



ADMISSIBILITY DECISION

Date of adoption: 1 July 2014

Case No. 2013-03

Goran Becic

Against

EULEX

The Human Rights Review Panel by way of electronic means in line with Rule 13 of its Rules of Procedure, on 1 July 2014, with the following members taking part:

Ms Magda MIERZEWSKA, Presiding 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 with the Panel on 27 May 2013.

2. On 7 June 2013 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. The observations were received on 15 August 2013. They were subsequently communicated to the complainant for comments. The complainant provided his comments on 8 September 2013 and sent additional comments on 12 September 2013. Those comments have been sent to the HoM for information on 10 October 2013.
3. On 27 November 2013 the Panel decided to communicate to the HoM an expanded statement of facts, inviting him to submit additional written observations. On 9 December 2013 the complainant informed the Panel about further developments in his case. On 26 December 2013 the HoM submitted his additional observations. The complainant submitted further comments on 9 February 2014 and on 27 May 2014.

II. THE FACTS

4. The complainant owns an apartment located in Pristina. He submits that since 1999 he has not been able to gain possession of his apartment. In 2004 a certain S.H. who unlawfully resided in the apartment was forced out of it pursuant to a "*Decision from Habitat [Housing Property Claims Commission] (HPCC/D/87/2003/C as of 29.08.2003) by which it is confirmed that [the complainant is the] legal owner of the apartment*".
5. Despite this decision, the complainant did not succeed in regaining possession of his apartment. On several occasions different usurpers occupied the apartment and thereafter abandoned it.
6. In 2009, during a short period of time while the apartment remained vacant, the complainant managed to renovate it.
7. On 26 August 2009 the complainant's wife went to the apartment and discovered that it was being unlawfully occupied again. On that occasion, the door of the apartment was allegedly opened by the daughter of a certain R.Q. who said that this apartment had been "allocated" to R.Q. by officers of the police station No. 4, "Dardanija" in Pristina. The complainant alleges that the police officers from this police station rent the apartment to R.Q.
8. The complainant submits that R.Q., is a member of the Kosovo police and he took possession of the apartment with the approval of the Chief of the police station No. 4.
9. On 14 September 2009, represented by a lawyer from the "Danish Refugee Council", the complainant filed criminal charges against R.Q. and members of the KP from police station No. 4 with the Municipal Public Prosecution Office in Pristina. Subsequently, the complainant was represented by lawyers of the NGO „Further support to refugees and internally displaced persons in Serbia“. The complainant submits

that on 6 November 2009 the Public Prosecutor requested the police to collect information in order to identify the perpetrator of the alleged criminal act.

10. The complainant submits that he contacted EULEX via email on 29 November 2009 and informed them about his case. He was referred to an EULEX staff member (M.M.) and was informed that his complaint was forwarded to a number of units within the EULEX Mission. On 13 December 2009 the complainant informed M.M. about his case and in particular about his four attempts to report the matter to the Kosovo police (on 4 June 2008, 14 October 2008, 26 August 2009 and 10 October 2009), which had not yielded any results. On 5 January 2010, the complainant received a reply from M.M. who provided him with the details of a contact person, namely the Head of the Court Liaison Office in Mitrovica with a suggestion to contact her.
11. The complainant has submitted the email from M.M. which read, *inter alia*: „EULEX is interested in cases of eventual malpractice in a court's system and it is within our mandate to improve protection of the citizens and their rights before courts". The complainant was advised to contact the Head of the Court Liaison Office in Mitrovica as „her assessment on the need of EULEX to intervene can be crucial".
12. Further attempts by the complainant to address the official suggested, as well as the original contact within EULEX, did not yield any response.
13. Ultimately, on 6 May 2010 the complainant was able to submit a complaint at the Police Station No. 4 with the assistance of a lawyer.
14. It is alleged that on 30 August 2010 the complainant submitted a letter to the Municipal Public Prosecution Office requesting that the authorities should take measures in regard to his case and should respond to him in writing. The complainant states that he did not receive a reply.
15. Thereafter, the complainant contacted EULEX again via email at the beginning of January 2012. He has submitted to the Panel a letter in reply from the EULEX Property Rights Coordinator dated 14 February 2012, advising him on available remedies and indicating that this response was shared with the appropriate EULEX authority responsible for providing support to the Municipal Prosecution Office in Pristina, with the Head of the Municipal Public Prosecution Office of Pristina and with the Acting Director of the Office of the Disciplinary Council in the Kosovo Judicial Council.
16. On 7 March 2012 the complainant received a letter from the Office of Disciplinary Council informing him that the first prosecutor assigned to the case had been replaced in 2010 and that on 28 February 2012 the case had been allocated to another prosecutor. The complainant submits that there was no progress in his case.

17. On 30 August 2012 the complainant again enquired with the EULEX Property Rights Coordinator asking for help. The complainant received a reply from the EULEX Property Rights Coordinator on 20 September 2012, providing some advice on possible remedies and informing him that the case had been referred to responsible EULEX authority for information purposes.
18. On 12 September 2012 the Municipal Prosecution of Pristina Kosovo conducted an interview with R.Q., who allegedly admitted that he was using the apartment which he had unlawfully entered by breaking the door.
19. On 28 January 2013 the complainant addressed EULEX once again, as he was allegedly asked by R.Q. to pay him 5,000 Euros as a precondition for him to vacate the apartment. The complainant did not receive a response from EULEX.
20. On 1 April 2013 the complainant's legal representative wrote to the Basic Public Prosecution Office and requested it to initiate criminal proceedings on the basis of collected evidence and admissions made by R.Q. He did not receive a reply.
21. On 11 May 2013 the complainant addressed the Office of Disciplinary Council of Pristina. He received a reply from the Office of Disciplinary Council on 16 August 2013, which stated that the case against R.Q. (proposal for indictment) had been submitted by the Municipal Prosecution Office to the Municipal Court in Pristina on 5 July 2011 and it was pending before that court. Further, the Office of the Disciplinary Council did not determine any grounds for the initiation of disciplinary investigations against unprofessional prosecutorial behaviour of the prosecutor in the case of R.Q.
22. On 15 August 2013 the complainant received a letter from the Basic Prosecution Office of Pristina. He was requested to supplement his case with further documents, including evidence of ownership of the apartment. He was further requested to submit the decision of the Housing Property Claims Commission (see par. 4 above). The complainant provided the relevant documents and further stated that he had filed those documents already when submitting the criminal charge in this case.
23. On an unspecified date during the autumn of 2013 the Mobile Team in Justice Matters from the EULEX Strengthening Division took over the monitoring of the criminal proceedings pending before the Basic Court in Pristina that had been initiated on an unspecified date, presumably in autumn of 2013.
24. On 16 December 2013 the judge of the Basic Court found the accused guilty and imposed on him a conditional sentence of three

months of imprisonment, while also ordering to release the property within 30 days from the date of the judgment.

Complaints

25. The complainant submits that EULEX failed to react appropriately to his case and therefore violated his human rights. It can be inferred that the complainant complains under Article 1 of Protocol 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) in conjunction with Article 14 of the Convention and under Article 13 of the Convention.

IV. THE LAW

26. The Panel is empowered to apply human rights instruments as reflected in the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel. Of particular importance to the work of the Panel are the ECHR and the International Covenant on Civil and Political Rights (ICCPR) which set out minimum standards for the protection of human rights to be guaranteed by public authorities in all democratic legal systems

RELEVANT APPLICABLE LAW

Joint Action

27. Relevant extracts of Articles 2 and 3 of European 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), 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 fulfil the Mission Statement set out in Article 2, EULEX KOSOVO shall:

(d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by

measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;

Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors 2008/03-L053, applicable until 31 May 2014 (hereafter: Law on Jurisdiction)

Article 11

Authority of EULEX prosecutors for Hate-Motivated crimes

11.1. At any time during the proceeding and upon agreement with the Chief EULEX Prosecutor, the EULEX prosecutors can take the responsibility over any investigation or prosecution of any criminal offence, including offences against persons or property, where the victim, premises, or target of the offence appear to be selected because of their real or perceived connection, attachment, affiliation, support, or membership of a real or perceived group identified according to its race, national or ethnic or social origin, association with a national minority or with a political group, language, color, religion, sex, age, mental or physical disability, sexual orientation, or other similar factor.

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.

Submissions by the Parties

EULEX submissions

Ambit of the executive mandate of EULEX

- 28. The Panel requested the Parties to submit their comments as to whether the facts fell within the ambit of the executive mandate of EULEX, in particular in relation to Article 3 par. (d) of the Joint Action (see par. 27 above).
- 29. EULEX submits that the complainant's claim did not substantiate that an inter-ethnic or hate motivated crime had been committed in his case that could trigger the mechanism envisaged by article 11 of the Law on Jurisdiction which provided for the possibility of EULEX prosecutors to take the case over (see par. 27 above).
- 30. EULEX submits that in order to qualify as a hate-motivated crime the act/conduct must amount to a crime under criminal law and must have been committed with a motive based on inter-ethnic bias.

31. EULEX acknowledges that unlawful occupation of real property is a criminal offence under Chapter XXII of the Criminal Code of Kosovo of 2004 that was applicable at the time of the alleged act.
32. Further, EULEX submits that according to the description of facts provided in the "Officer's report", R.Q. occupied the apartment because it was vacant and no arguments were offered by the complainant to substantiate an allegation that R.Q. committed the criminal offence of unlawful occupation of real property with an ethnic-hatred bias against the complainant. Hence, the criminal offence of unlawful occupation of property did not trigger the executive mandate of EULEX Prosecutors.

EULEX awareness of the case

33. As to the question whether EULEX was aware of the case and whether a relevant preliminary investigation was conducted, EULEX submits that EULEX Prosecutors were not aware of it. EULEX Prosecutors were not informed until August 2012 of any complaint or report filed by the complainant. No document bearing this case number has been communicated to EULEX Prosecutors.
34. EULEX submits that the file of the Office of the Chief EULEX Prosecutor on complaints lodged with that Office contains a memorandum from the President of the Assembly of EULEX Judges to the Head of Justice on "*property related proceedings initiated*" by the complainant. This memorandum was first communicated to the Office of the Chief EULEX Prosecutor on 24 February 2012 by the Office of the Head of Justice, but not the complaint itself.

Alleged violation of the complainant's rights

35. EULEX submits that a reasonable interpretation in line with EULEX's mandate of assistance to Kosovo Rule of Law Institutions is that redress shall be sought first within the Kosovo legal system allowing the remedies and mechanisms available within its legal framework to operate.
36. EULEX submits that the complainant has failed to provide elements that would allow to establish existence of discrimination consistent with the approach of the European Court of Human Rights. Not only the conduct of EULEX could not be considered to amount to a violation of the applicable provisions of the ECHR, but its conduct was also in compliance with its mandate of assistance to Kosovo Rule of Law Institutions and with the Law on Jurisdiction.

Handling of complaints brought by the complainant by EULEX

37. The Panel requested EULEX to comment on how EULEX guarantees that relevant complaints sent to EULEX are shared with EULEX

Prosecutorial authorities in a timely manner. EULEX submitted in reply that all communications to EULEX are channelled through the Office of the Chief of Staff to relevant units, with the exception of communications received directly by EULEX judges or prosecutors, which fall under the sole responsibility of the Executive Division.

38. The Office of the Chief of Staff assesses which EULEX offices are best placed to draft a reply to the correspondent and requests the designated person to prepare a reply. Relevant offices, such as the Office of the Head of the Executive Division, receive the correspondence in copy, depending on the nature of the complaint. Offices copied frequently provide input or feedback of the case in subject. All steps in this procedure are logged in the office of the Chief of Staff registry. Finally, the reply is sent by the relevant office either directly to the correspondent – for example, in case of a request for takeover – or via the Office of the Chief of Staff.

Complainant's reply to HoM's observations

39. In essence, it is stated that R.Q. who occupies his apartment unlawfully is protected by the members of Kosovo police. The complainant criticises in particular the inaction of the Kosovo police as well as the failure of the Kosovo Public Prosecutor to act decisively.
40. Further, the complainant submits that contrary to EULEX argument, namely that until August 2012 the EULEX Prosecutors were not aware of any complaint of criminal charge filed by him, he contacted EULEX via email already on 29 November 2009 but received no reply. His further contacts with EULEX did not yield any result.
41. It is submitted that EULEX only started acting after the Panel had communicated the case to the HoM for his comments.
42. Further, the complainant submits that whilst the court sentenced R.Q. to three months imprisonment on probation, his apartment is seriously damaged and the complainant does not expect to get compensated for damages he suffered.
43. While in his submission of 9 February 2014, the complainant stated that *"I am asking you not to take measures against EULEX"*, it was clarified on 27 May 2014 that *"I do not wish to withdraw the complaint. On the contrary, I would like the Panel to review the case and give recommendations to EULEX, in order not to have this kind of cases repeated."*

The Law

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.

45. 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, Z against EULEX, 2012-06, 10 April 2013, at par. 32; W against EULEX, 2011-07, 5 October 2012 at par. 21; Hoxha against EULEX, 2011-18, 23 November 2011 at par. 22; Slobodan Martinović against EULEX, 2011-11, 23 November 2011 at par. 16)
46. The Panel has further held that actions or omissions by the prosecutors during the investigative phase of criminal proceedings cannot 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 *Z against EULEX*, 2012-06, 10 April 2013, at par.33; *Thaqi v. EULEX*, 2010-02, 14 September 2011, par. 93).
47. The current case relates to alleged actions and inactions of EULEX Prosecutors at the pre-investigative stage. In this regard, no arguments have been brought forward that the case would not fall in principle under the Panel's jurisdiction.
48. EULEX submits that the usurpation of the complainant's flat by R.Q. did not constitute a hate motivated crime in any case and therefore did not fall under EULEX mandate.
49. The Panel notes in this respect that EULEX has not commented on the complainant's allegation that the facts of the case amounted to discrimination against him by the Kosovo police and Kosovo prosecutors and that their alleged refusal to pursue his claim had barred him from accessing an effective remedy.
50. The Panel stresses that it is not its task to evaluate the merits of a prosecutorial decision as such, related to the initiation of an investigation or the taking over of cases by EULEX prosecutors from Kosovo prosecutors. However, it appears that a formal decision in relation to the initiation of an investigation has never been taken.
51. The Panel notes that it was submitted by EULEX that EULEX Prosecutors "*were not and still are not in possession of the necessary information concerning this case*" (compare par. 33 above). The Panel cannot therefore accept the conclusion "*that in accordance to the assessment made by the Office of the Chief EULEX Prosecutor in its response to the issues raised by the Panel referred to that office by the EULEX Human Rights and Legal office, the alleged offences could not be categorized as a hate motivated crime*" (see pars. 29 to 32 above).

52. The Panel considers that, in the light of the parties' submissions, the complaint raises serious issues of fact and law pertaining to alleged violations of human rights in relation to Articles 13 and 14 ECHR as well as Article 1 of Protocol 1 of the ECHR, the determination of which requires an examination of the merits of the complaint.
53. The Panel concludes therefore that the complaint is not manifestly ill-founded and falls under the jurisdiction of the Panel. No other ground for declaring it inadmissible has been established.

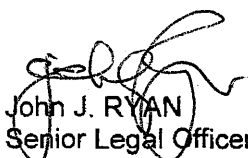
FOR THESE REASONS,

The Panel, unanimously,

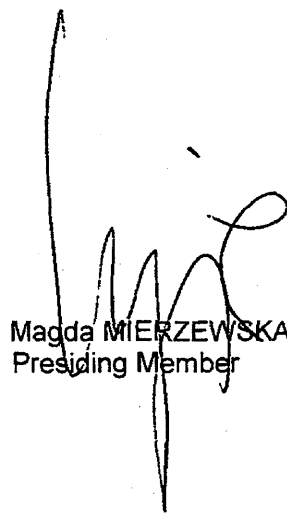
DECLARES ADMISSIBLE, without prejudging the merits, the complaints with regard to alleged violations in relation to Articles 13 and 14 ECHR as well as Article 1 of Protocol 1 of the ECHR; and

INVITES the HoM and the Complainant to address, in their submissions, should they choose to do so, the issues identified in the present Decision and any other matter which parties consider relevant to the merits of this case which have not already been addressed in their submissions.

For the Panel,


John J. RYAN
Senior Legal Officer




Magda MIERZEWSKA
Presiding Member