



DECISION ON THE IMPLEMENTATION OF THE RECOMMENDATIONS

Date of adoption: 26 November 2013

Case No. 2011-07

W

Against

EULEX

The Human Rights Review Panel, sitting on 25 and 26 November 2013, with the following members present:

Ms Magda MIERZEWSKA, Presiding Member
Mr Guénaél 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. DECISION OF THE PANEL OF 10 APRIL 2013

1. On 10 April 2013, the Panel adopted the following decision and made a number of recommendations in relation to the complaint of W:

“The Panel, unanimously:

1. *Holds* that there has been no violation of Article 3 of the Convention [the Convention for the Protection of Human Rights and Fundamental Freedoms];
2. *Holds* that there has been a violation of Article 8 to the Convention;
3. *Finds* it appropriate, in the light of its above findings of fact and law, to make recommendations to the HoM under Rule 34 of its Rules of Procedure; and
4. *Recommends* the following actions to be taken by the HoM:
 - A declaration should be made acknowledging that the circumstances of the case amounted to a breach of the complainant's rights attributable to the acts of EULEX in the performance of its executive mandate;
 - The HoM should order that the following measures be adopted without delay, i.e.:
 1. EULEX Prosecutors in charge of this case should be invited to request their Serbian counterparts to return copies of any documents provided to them which bears the name or refers to the complainant. This would include the two statements given by the complainant to EULEX.
 2. EULEX Prosecutors in charge of the case should be invited to request their Serbian counterparts –
 - i. To destroy any copy made of the above-mentioned documents and to redact the name and any information in other documents that could identify the complainant; and
 - ii. To give notice to EULEX Prosecutors that this has been done, and
 - iii. Not to disclose to any suspect or defendant any information provided by the complainant to EULEX
 - The HoM should order an evaluation of what legal instruments are available to EULEX Prosecutors to cooperate in matters of judicial and criminal cooperation and, should available legal basis be determined to be inadequate or insufficient, to undertake the necessary steps to try to bring all necessary legal instruments into force;
 - Pending this evaluation, the HoM should instruct EULEX Prosecutors not to communicate any information provided by witnesses to any authorities – Serbian or any other – without having received an assurance from the competent investigative and prosecutorial organs of EULEX that the requisite legal basis is in place for that purpose and that EULEX Prosecutors will comply with these legal requirements in all circumstances;
 - The HoM should order the competent organs of EULEX to conduct a thorough evaluation of the risk incurred by the complainant and/or his family as a result of his statement having been provided to Serbian authorities. Once this has been done and if a risk has been identified, the Panel recommends that EULEX should discuss with the complainant any step or measure which could be taken to limit and prevent the risk of harm.

- The HoM is invited to disseminate the present decision to relevant EULEX officials involved in the investigation and prosecution of crimes in Kosovo with a view to ensure that they are duly made aware of their duties and responsibilities vis-à-vis witnesses from whom they obtain information. “
2. The present decision constitutes a follow-up to the Panel’s decision of 10 April 2013 and recommendations made therein. The power and authority of the Panel to follow-up on its decisions and recommendations is provided for in Rule 45 bis of the Panel’s Rules of Procedure (see e.g. the decisions on the implementation of recommendations 2010-01, [Djeljaji Kazagic v. EULEX](#), 23 November 2011 and 2010-07, [Blerim Rudi v. EULEX](#), 23 November 2011)

II. INFORMATION FROM THE HOM EULEX

3. On 30 May 2013, the Head of Mission (HOM) informed the Panel about a number of measures which he intended to take with regard to the recommendations of the Panel. In particular, he indicated that he had addressed communications to the Head of EULEX Executive Division and to the Chief EULEX Prosecutor (CEP), informing them of the Panel’s decision and requesting them to take, to the extent possible, the appropriate actions in order to have the recommended measures implemented.
4. On 16 August 2013, the HOM informed the Panel of the further actions undertaken in pursuance of the Panel’s decision and recommendations.
5. As regards the recommendation that EULEX Prosecutors in charge of the case should be invited to request their Serbian counterparts to return, destroy or redact copies of any documents bearing information that could identify the complainant, the HoM proposed that such action would be detrimental to cooperation in criminal investigations between EULEX and Serbia. Moreover, the HoM maintained that a request to implement the above-mentioned measures would run counter to “the autonomous position” of the EULEX prosecutors.
6. The HoM further referred to the Panel’s recommendation to carry out an evaluation of legal instruments on cooperation in matters of judicial and criminal cooperation and, if necessary, to undertake steps to bring such instruments into force. The HoM took the view that the appropriate legal instruments were already in place and were being adequately implemented. He referred in particular to Art. 88 of the Law No. 04/L-031 on International Cooperation in Criminal Matters, which came into force after the events complained of in the present case. The relevant Article reads:

Article 88

Exchange of information

Without hindering the course of investigations or criminal proceedings, Kosovo judicial competent authority may, without a previous request, forward to the competent authority of a foreign country information collected during their investigations, if they consider that the disclosure of such information may assist receiving country to initiate or to take over investigations or criminal proceedings, or it may lead to a petition for mutual international legal assistance filed by receiving country.

7. With regard to the recommendation on evaluation of the risk incurred by the complainant and/or his family as a result of his statement having been provided to the Serbian authorities, the Panel reiterates that in its decision on the merits of the case it found that EULEX prosecuting authorities had not conducted the necessary risk assessment with a view to determine what measures might be warranted in the circumstances to protect the safety and security of the complainant and his family (see the admissibility decision, cited above, para. 52).
8. In this respect, HoM relied on an opinion provided by the Chief EULEX Prosecutor (CEP). He submitted that, according to the CEP, before providing the complainant's witness statement to the Serbian authorities the EULEX prosecutor had considered the location of the suspects (they were at the time in Serbia), the lack of any prospect of arresting and prosecuting them in Kosovo and the willingness of the Serbian authorities to take over the investigation. Moreover, there was no information or intelligence indicating any risk to the complainant. All this had led to the decision to hand over the complainant's statement to the Serbian authorities. The CEP had also assured the HoM that no further risk assessment was necessary. The HoM further pointed out that, after the Panel's decision was published, the complainant had appeared on TV, identified by his name, commenting on the EULEX actions.
9. The HoM made no mention of the Panel's recommendation to acknowledge a violation of the complainant's' rights and to disseminate the Panel's decision to the relevant staff in his reply.
10. On 30 August 2013, the Panel sent a letter to HoM, reiterating the importance of the dissemination of its decision. The Panel stressed that it was essential for a full and proper understanding of human rights issues affecting the work and performance of EULEX staff in the area of criminal law, including in the prosecution of alleged war crimes. It would also contribute to EULEX's broader effort to ensure human rights accountability and respect for the rule of law.
11. In his reply of 3 September 2013, the HoM informed the Panel that he had adopted the necessary measures to ensure the dissemination of

the decision to EULEX officials and units involved in the investigation and prosecution of crimes.

III. INFORMATION FROM THE COMPLAINANT

12. On 27 September 2013, the complainant visited the Panel's office and gave an oral statement, commenting on the HoM's actions.
13. He disagreed with the HoM's proposition that an assessment of the risk incurred by the complainant and/or his family was unnecessary. He also submitted that he had repeatedly asked EULEX for witness protection as he feared retaliation by persons in relation to whom he had provided information.
14. Regarding his appearance in the media, he maintained that he had been approached by them and asked general questions about justice in Kosovo. He had not discussed his case with them.
15. He further expressed his disappointment that EULEX did not apologise to him in this matter.

IV. EVALUATION BY THE PANEL

16. The Panel takes note of and commends the steps taken by the HoM to follow a significant number of its recommendations. It considers, however, that certain recommendations have not been implemented.
17. In particular, the HoM has opted not to make a declaration acknowledging that the circumstances of the case amounted to a breach of the complainant's rights attributable to the acts of EULEX. Considering the gravity of the interference with the complainant's rights and, in particular, the limited means of redress available in this case, such a decision is unfortunate. The Panel therefore invites the HoM to consider formally acknowledging the violation of the complainant's rights and informing the complainant of his position in that regard.
18. Further, it is noted that the recommendation that EULEX Prosecutors should request their Serbian counterparts to return or destroy copies of documents which bear the name of the complainant and to redact any information in other documents that could identify him has not been implemented. As justification for not implementing this recommendation, the HoM relies on a suggestion that such request would negatively affect cooperation in criminal investigations between EULEX and Serbia. The Panel notes that such cooperation is undoubtedly in the interest of an effective fight against war crimes.

However, in such a case where the fundamental rights of a witness or the accused might be affected, the competent authorities are required to ensure that a fair balance is struck between those rights and the legitimate public interest in pursuing such crimes.

19. The Panel cannot agree, in the present case, that its recommendation would have the detrimental effect alleged on cooperation. Nor has it been established to the Panel's satisfaction that a fair balance was struck between the interests of the prosecutors and those of the complainant so that the rights of the latter may not be said to have been restricted only to the extent necessary and proportionate under the circumstances (see its decision *W against EULEX* of 10 April 2013, par. 45). Instead, the step recommended by the Panel would underline the importance for the cooperating partners to respond to reasonable requests of witnesses fearing for their safety. Its gist is limited to ensuring that during criminal investigations proper consideration is given to safeguarding the safety and security of witnesses where the circumstances of the cases under investigation suggest that issues may arise in this respect.
20. The HoM also relies on the suggestion by the CEP that compliance with such a request might interfere with the "autonomous position" of the prosecutor. This is considered to be of no merit. The autonomy given to prosecuting authorities to perform their functions cannot be interpreted as an allowance to act without due consideration to procedural safeguards and relevant human rights standards of those concerned by the legal or judicial process (see, International Commission of Jurists' *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners Guide No. 1*). EULEX Prosecutors are part of the mission and, as such, subject to relevant human rights standards and safeguards which have been put in place to guarantee the effective protection of these rights. In that sense, no claim of "autonomy" could warrant actions by the Prosecution taken in violation of those standards. See e.g. UN Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, par 12 ("Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.").
21. Having regard to the above, the Panel recommends that the HoM should consider anew implementing recommendation No. 2 of the Panel's original Decision. In particular, if the Serbian authorities have decided not to ask the complainant to testify, there seems to be little justification in their retaining information which, if disclosed, could possibly result in significant prejudice to the complainant.

22. The Panel notes that a new Law on International Cooperation in Criminal Matters has come into force since the events complained of. The Panel notes further that, in the application of that law, EULEX should ensure that the law is being interpreted and implemented by its agents in a manner that is consistent with the fundamental rights of those concerned.
23. The Panel notes with concern that the risk assessment recommended by the Panel has not been carried out. To justify the Mission's inaction, the HoM has relied on the CEP's assurance that "no further risk assessment is necessary". The Panel has not been provided with evidence that an effective risk assessment was conducted in the first place. Indeed, this finding was at the core of its decision that the complainant's rights guaranteed under Article 8 of the Convention had been breached. The Panel fails to see how the conclusion that no risk exists and that no "further" risk assessment is necessary can be justified.
24. In those circumstances, the Panel remains concerned that EULEX has failed to conduct a sufficient evaluation of the risk posed to the complainant and his family, despite the Panel's recommendation to this effect. The Panel, therefore, invites the HoM to consider instructing the competent authorities to carry a thorough assessment of this matter. The Panel further recommends that the HoM should seek necessary guidance from EULEX's organs specifically tasked with the responsibility of protecting witnesses in sensitive criminal cases.
25. As regards the Panel's recommendation to disseminate its decision to relevant EULEX officials involved in the investigation and prosecution of crimes in Kosovo, the Panel records its satisfaction with the HoM's assurance that this recommendation has been duly implemented.
26. Having examined the information provided by the parties with regard to the implementation of the recommendations of the Panel,

THE PANEL UNANIMOUSLY

Declares that HoM has implemented its recommendations in this case in part only,

Decides to invite HoM to once again consider implementing the recommendations of the Panel in light of the present decision by issuing the necessary instructions and to inform the Panel accordingly by 30 December 2013.

Recommends that the HoM should ensure full dissemination of the present decision to relevant EULEX officials involved in the investigation and prosecution of crimes in Kosovo.

For the Panel,

John J. RYAN
Senior Legal Officer

Magda MIERZEWSKA
Presiding Member