



DECISION ON THE IMPLEMENTATION OF THE PANEL'S RECOMMENDATIONS

Date of adoption: 11 November 2014

Case no. 2012-14

Zahiti

Against

EULEX

The Human Rights Review Panel, sitting on 11 November 2014, 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 4 February 2014

1. On 4 February 2014, the Panel rendered its decision in relation to the complaint filed by Valbone Zahiti against EULEX regarding a dispute she had with an EULEX staff member that resulted in the complainant being injured.
2. The Panel found that EULEX violated the right of the complainant to an effective remedy, as guaranteed *inter alia* under Article 13 of the ECHR,

enabling her to seek reparation for the harm done to her by an EULEX staff member.

3. In its Decision, the Panel made a number of recommendations to the Head of Mission (HoM) in accordance with Rule 34 of the Rules of Procedure to the following effect:

- i. The HoM should acknowledge that the complainants' rights have been breached by EULEX. The Panel invites the HoM to inform the complainant of his position on that point;
- ii. The HoM should consider lifting the former staff's immunity and informing the local Kosovo prosecutor accordingly;
- iii. If necessary through the EEAS, the HoM should inform the national authorities of the sending state of the Panel's findings;
- iv. Considering the HoM's submissions regarding the availability of third party claims to the complainant and should the HoM consider that this case might warrant having recourse to that scheme, the Panel recommends that the HoM should invite the complainant to submit an application under that scheme.

4. The present decision constitutes a follow-up to the Panel's decision of 4 February 2014 and the 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 *W against EULEX*, 2011-07, 26 August 2014; *H&G against EULEX*, 2012-19&20, 27 May 2014; *A,B,C&D against EULEX*, 2012-09, 2012-10, 2012-11 & 2012-12, 5 February 2014; *W. against EULEX*, 2011-07, 25 November 2013; *Djeljaji Kazagic v. EULEX*, 2010-01, 23 November 2011 and *Blerim Rudi v. EULEX*, 2010-07, 23 November 2011).

II. INFORMATION RECEIVED FROM EULEX'S HEAD OF MISSION REGARDING THE IMPLEMENTATION OF THE PANEL'S RECOMMENDATIONS

5. On 2 April 2014, the HoM informed the Panel about a number of measures which he had taken with regard to the recommendations of the Panel.

6. In particular, the HoM submitted that he intended to inform the authorities of the sending state of the concerned EULEX staff member about the findings of the Panel.

7. Further, the HoM informed the Panel that it was too late to refer the complainant's case to the Mission's third party claims insurance. However, the HoM indicated that the Mission would contact the complainant directly in order to further pursue the matter with the complainant in order to seek to reach a mutual agreement.

8. On 6 June 2014, the HoM informed the Panel on the exact steps taken regarding each of the recommendations of the Panel. In regard to the recommendation that the HoM should acknowledge that the complainant's rights had been breached by EULEX and to inform the complainant of his position on that point, the HoM informed that relevant Units and the Civilian Operations Commander have been engaged in discussions regarding the possible implications of the Panel's findings. In that regard, it is submitted that insurance schemes have been studied and that a comparative research to other international organization's systems have been made. In addition, an information memorandum was drafted to the Internal Investigation Unit to establish best practices in case there is an external victim to an incident investigated by the Internal Investigation Unit in the future. It is apparent from the HoM's submissions on that point that the Mission has not adopted this recommendation of the Panel.
9. In relation to the recommendation to lift the staff member's immunity and inform the local Kosovo prosecutor accordingly, the HoM indicated that the previous HoM of EULEX had requested in June 2012 the local Kosovo prosecutor to first contact the national authorities of the concerned EULEX staff member about the possible investigation and proceedings in the sending state and subsequently inform the Mission on the status of the case to consider whether to lift the immunity of the said staff member. As EULEX never received any further information or contact from the Kosovo prosecutor, the HoM decided not to lift the immunity of the staff member.
10. In relation to the recommendation to inform the national authorities of the concerned EULEX staff member of the Panel's decision and findings, the HoM informed that, on 23 April 2014, he had shared this information with those authorities.
11. In relation to the recommendation to invite the complainant to submit an application to the third liability insurance, the HoM stated noted the following: the incident took place in 2011 and the time-limit to submit an insurance claim is set for two years; the insurance at the time of the incident was in the name of the previous HoM and it appears that the complainant has not suffered any pecuniary damage which could be compensated from the insurance. On that basis, the HoM found it impossible to implement the Panel's recommendation.
12. On 30 September 2014, the HoM informed the Panel that discussions with the complainant to find alternative solutions to her case did not yield any positive results.

III. EVALUATION BY THE PANEL

13. The Panel takes note of the steps taken by the HoM to implement some of the Panel's recommendations.

Acknowledgement of human rights violations

14. As in previous decisions, the Panel notes that the HoM did not formally acknowledge the violation of the complainants' human rights and did not formally inform the complainant of his position on that point despite the Panel's recommendation to that effect.
15. The Panel notes once again (see *H&G against EULEX*, 2012-19&20, 27 May 2014, at pars. 11-13) that the acknowledgment of human rights violations by authorities responsible for the violation is a well-established practice in the case law of, *inter alia*, the European Court of Human Rights (see therefore Rule 62 A of the *Rules of the Court*). A similar practice of acknowledgment of human rights violations is regularly applied by the Human Rights Advisory Panel (HRAP) of UNMIK (see for instance, in the HRAPs latest decision to date, *MITIĆ against UNMIK*, case no. 064/09 of 14 March 2014 at p. 43).
16. Given the fact that the Panel cannot recommend that monetary compensation be paid to the victim, it has invited the HoM to make use of the remedies available to him. In some cases, the formal acknowledgement of a violation of rights is capable of providing some redress to the victim. Considering the limitations placed upon the ability of the Panel to recommend financial compensation as stipulated by the in the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel, the formal acknowledgment of a violation by the competent authority becomes all the more important as a form of redress.
17. The Panel notes with regret the decision of the HoM not to make use of the possibility to provide some degree of redress to the complainant by acknowledging the violation of rights that she suffered.

Lifting the former staff member's immunity

18. Regarding the recommendation that the HoM should consider lifting the former staff member's immunity and inform the local Kosovo prosecutor accordingly, the HoM submitted that the local Kosovo prosecutor had first to contact the national authorities of the concerned former staff member and subsequently inform the Mission on the status of the case in order to consider lifting the immunity of concerned staff member. As EULEX did not receive any further information in this regard, the HoM did not consider it necessary to lift the immunity.
19. The HoM has provided no cogent explanation and no legal basis for the position as to why the lifting of this immunity first required or was dependent upon the existence of an investigation of that case by the national authorities of the concerned former staff member. This line of argument is not coherent as any potential investigations of the national authorities of the concerned staff member would likely require the lifting of the immunity of the former EULEX staff member.

20. The lifting of the immunity *in the first place* by the Mission might provide just the incentive for local authorities to decide to open such an investigation. In contrast, the HoM's suggestion that any decision on the lifting of the immunity should await a formal request from the national authorities is not coherent and unlikely to contribute to the effective remedying of the harm done to the complainant. In such a scenario, the national authorities would have to first seek the lifting of that immunity from the HoM before being able to commence their investigation, which could delay it further, and the HoM would not be better placed than he is today to decide to lift that immunity.
21. Furthermore, a decision to lift this immunity would send a clear and unmistakable message that the Mission does not condone such acts and will not let the Mission's immunities contribute to creating unaccountability for serious violations of rights.
22. The Panel, therefore, notes with regret the decision of the HoM not to lift the immunity of the former employee and notes, furthermore, the failure of the HoM to implement this recommendation of the Panel.

Informing authorities of the sending State

23. The Panel is satisfied that the HoM implemented its recommendation to inform the national authorities of the sending state of the Panel's findings.

Availability of a third party claims insurance

24. The Panel notes the HoM's submissions regarding the unavailability of a third party claims insurance in regard to the current case.
25. The Panel accepts that, at this point in time, the HoM, is not any longer in a position to invite the complainant to submit an application to a third party liability insurance. The Panel notes, however, that in the course of its submissions, EULEX had referred to the third party claims insurance as a possible avenue for the complainant to seek relief for the harm done to her. Considering that this remedy was not in fact available to her, the Panel would have preferred that the Mission not refer to that mechanism as it was not in fact applicable to the present case.
26. Finally, the Panel commends the HoM's efforts to further engage with the complainant in order to seek to address her grievances although these efforts turned out to be unsuccessful in this particular case.

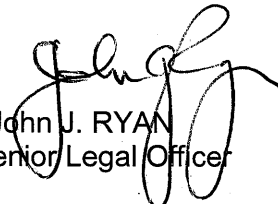
THE PANEL UNANIMOUSLY

Declares that the HoM has implemented some of the Panel's recommendations and failed to implement others.

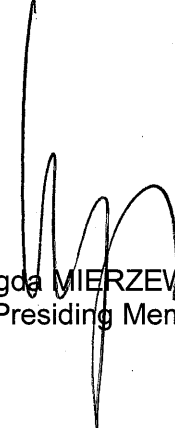
Regarding those recommendations that have not been implemented, the Panel *invites* the Head of Mission once again to reconsider his position as regard the possibility of acknowledging the violation of the complainants' rights by the Mission and consider lifting the EULEX staff member's immunity.

Decides to close the examination of this case.

For the Panel,


John J. RYAN
Senior Legal Officer




Magda MIERZEWSKA
Presiding Member