HRRP
Human Rights Review Panel

INADMISSIBILITY DECISION

Date of adoption: 10 April 2013

Case No. 2012-16

Kristian Kahrs

Against

EULEX

The Human Rights Review Panel sitting on 8 and 10 April 2013
with the following members present:

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 amended last on 15 January 2013,

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was submitted via e-mail to the Panel on 17 October 2012. On 20 October 2012, the complainant sent an e-mail to certain Kosovo authorities, copying the Panel, providing further documents therewith.

2. On 16 January 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 of the HoM were received on 1 March 2013. They were subsequently communicated to the complainant for his comments. On 10 March

2013, the complainant submitted additional observations which were forwarded to the HoM for information. No further observations were requested.

II. THE FACTS

3. The complaint is submitted as an "Official complaint about the Kosovo Police (KP) and the Pristina Municipal Court". The complainant works as a journalist, residing in Belgrade. It is alleged that on 3 August 2012 at 10 a.m. the complainant went to the Police Station #3 in Pristina in order to meet with an ethnic Serb KP Officer, as he wanted to discuss threats that had allegedly been made against him and the Serb KP officer after he had published an article about incidents at the Vidovdan celebrations in Gazimestan on 28 June 2012.

4. It is alleged that the complainant was arrested at Police Station #3. The complainant submits that he was charged under Article 171 of the Provisional Penal Code of Kosovo ("Unauthorized Photographing and other Recording"). The complainant states that he had already been convicted and fined 500 Euros on 29 June 2012 for taking pictures at the Vidovdan celebrations and that he was therefore charged "for the same thing twice".

5. As he was not able to reach his lawyer, KP provided him with a legal-aid lawyer who spoke Serbian. The complainant submits that the assistance provided by this lawyer was entirely unsatisfactory and that he was not even informed of the lawyer's name.

6. It is alleged that at 2:30 p.m., KP officers from the Cybercrime Division questioned the complainant and thereafter seized his computer, two mobile phones and a camera. The complainant alleges that the seizure of his property was conducted without a judicial order and that it was therefore unlawful. The seized items were eventually returned to him at the Norwegian Embassy on 16 October 2012.

7. The complainant further states that while he was at the Police Station #3, he encountered "one Swedish and one Greek EULEX officer". It is alleged that one of the EULEX officers "reminded the KP to confiscate [my] computer", and therefore violated the applicant's rights by "encouraging" the seizure of his property.

8. It is alleged that KP put handcuffs on the complainant and took him to the detention center at Police Station #1. The complainant states that he did not have access to the documents which laid down the charges against him. It is alleged that he was then provided with another legal-aid lawyer. His new lawyer allegedly gave no proper advice on the complainant's defense.

9. The complainant alleges that he spent over 48 hours in detention and was brought before a judge at the Pristina Municipal Court in hand-cuffs, at 10:25 on Sunday, 5 August 2012. It is alleged that he had no opportunity to defend himself and that he did not have access to a defence counsel beforehand. The complainant submits that the judge told him that he had "allegedly violated article 171", but did not receive a written document in a language which he understood.

10. It is alleged that the complainant's legal-aid lawyer arrived late at the court hearing and that both his lawyer and the judge ordered him to be silent and did not allow him "to challenge anything because everything [had been] decided beforehand".

11. It is further alleged that the complainant was forced to sign his confession in Albanian, as he would otherwise have been sent to a detention center for two to three days awaiting the translation of the confession. After signing the document, the complainant intended to contact his embassy in Kosovo or EULEX Kosovo, but was brought by KP to the crossing point at Merdare and released there.

III. COMPLAINTS

12. The complainant demands an explanation as to why EULEX failed to take steps to protect his property during the incident. In this regard, the complainant makes reference to Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights. He complains that he was unlawfully deprived of his possessions.

13. Further, the complainant asserts that he was arrested and sentenced twice for the same offence, that he was forced to sign a confession and that his basic fair trial rights were denied to him, in particular, his right to be given information in a language he understands of the nature and cause of the accusations leveled against him, to have adequate time and facilities for the preparation of his defence and his right to an effective legal representation.

IV. THE LAW

Submissions by the parties

14. In its submissions, EULEX asserted that the complaint did not fall within the ambit of exercise of the EULEX executive mandate and should therefore be declared inadmissible. EULEX argued that the complainant had been detained and his property seized by KP in compliance with an order of the public prosecutor in connection with an on-going investigation into threats via facebook against a KP officer.

15. EULEX conceded that EULEX police officers had been present at the relevant time at the police station in question. It is submitted by EULEX, however, that they had been present there in an advisory capacity exercising Monitoring, Mentoring and Advising (MMA) responsibilities to assist the KP. It is further stated that the EULEX police officers present at the police station at the material time were not part of the executive chain of command. The executive power had remained with the KP who had the responsibility to put the prosecutor's order into effect pursuant to article 6 of the Law on Police. In this regard, it is submitted that EULEX had not exercised executive functions in respect of the operations of the Kosovo public prosecutor who had issued the order in the case based on his/her responsibility.

16. Furthermore, EULEX averred that there had been no need for the EULEX police officers to intervene by exercising any form of limited executive functions, essentially since the seizure had been effected under Kosovo law – in pursuance of the prosecutor's order which had not been manifestly unlawful. Further, it was open to the complainant to seek redress within the Kosovo legal system by having recourse to applicable legal remedies.

17. Regarding EULEX MMA responsibilities, even if there were grounds to believe that the actions of KP taken against the complainant were unlawful, EULEX would not be mandated to prevent compliance by the KP with the prosecutor's order, as any such intervention would amount to substituting the authority of the Kosovo rule of law institutions.

18. It was further submitted that a reasonable interpretation in line with the Mission's mandate of assistance to the Kosovo rule of law institutions was to allow the remedies and mechanisms available within its legal framework to operate and, on the Mission's part, to intervene only if those remedies and mechanisms were not functioning well or there was a failure in the system that rendered them ineffective.

19. Further, it is stated that the only exception exempting EULEX from its obligation to wait for the reaction of the Kosovo legal system through recourse to available remedies would apply to situations, where it could be accepted that a positive obligation to intervene arose. However, these cases should be limited, with respect to EULEX MMA activities, to situations where immediate intervention was needed in view of the importance of the right concerned (i.e. the rights protected by Articles 2 and 3 of the European Convention on Human Rights and Fundamental Freedoms) because an intervention by Kosovo institutions would be belated and thereby incapable of ensuring a proper protection of the right that ran the risk of being irreversibly violated.

20. EULEX concluded that the subject of the present case was not within the Panel's mandate and that for that reason the case had to be declared inadmissible.

21. In his response, the complainant reiterated that the KP had unlawfully seized his property. The complainant submitted that the OSCE's Police Guidelines for Dealing with the Media provided in point 4 that the "police cannot confiscate professional equipment or materials from journalists unless a court order or warrant authorizes it. Materials which are to be confiscated under the Criminal Code or which might serve as evidence in criminal proceedings may be temporarily confiscated and turned over to the Court for safe keeping".

22. The complainant maintained that his equipment had been confiscated by the KP without a "court order" and that the case should be admissible "because of the active role played by EULEX in this case".

The Panel's Assessment

23. 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.

24. According to Rule 25, paragraph 1 of the Rules of Procedure the Panel can examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate in the justice, police and customs sectors.

25. The circumstances of the current case relate to actions taken by EULEX police officers working within the Mission's Strengthening department. In this regard, it is noted that the HoM conceded that EULEX staff had been present at the time and place of the incident.

Corrective Powers

26. As already submitted by EULEX in *Bahadur and others against EULEX*, 2011-02, 14 September 2011 par. 39, "*EULEX police retain a corrective capacity, which is a special form of the executive powers. Such powers can be used in relation to any violations of human rights and inappropriate operational or administrative decisions made by the Kosovo Police*".

27. The Panel notes the explanation by EULEX that its police officers present at the scene of the alleged incident were acting in an advisory capacity and exercising MMA responsibilities.

28. The Panel further notes, as stated by EULEX, that MMA activities can carry a positive obligation to take action where immediate intervention is needed in view of the protected right.

29. In this regard the Panel finds relevant the approach developed by the Court which implies that under the ECHR in certain well-defined circumstances a positive obligation arises on the part of the authorities to take preventive operational measures to protect an individual. In this regard the Court noted in the context of cases concerning the right to

life that "bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention" (see, among other authorities *Osman v the UK*, judgment of 28 October 1998, par. 115 et seq.).

30. The Panel accepts that given the limited mandate of EULEX it cannot be held responsible for failing to guarantee an effective protection of human rights as such in Kosovo and that an impossible or disproportionate burden as regards policing cannot be imposed on the Mission. It is noted, however, that it is the obligation of EULEX under the Council Joint Action to ensure that its activities should be carried out in compliance with international standards concerning human rights (see Article 3 (i), Council Joint Action 2008/124/CFSP). Hence, limiting the Mission's obligations arising in the context of MMA only to situations of imminent and serious threats to violations of Articles 2 and 3 would not only be incompatible with EULEX's character as a rule of law mission, but would also undermine the general effectiveness of human rights protection in Kosovo. Besides, it is noted that the respondent did not provide any legal basis for this argument, either derived from the Council Joint Action or the Operational Plan of the Mission or any other legal authority.

31. The Panel therefore concludes that within the context of MMA the obligation for EULEX officers to act in order to prevent human rights violations can be said to arise when they are faced with a threat of any imminent and serious violation of individual rights, regardless of the subject matter of the right concerned. The nature of the response should be appropriate to the circumstances and, in turn, depend on what right or rights were at stake and on the seriousness of the threats to those rights.

32. Referring to the circumstances of the instant case, the Panel observes that the EULEX police officers present during the material incident were acting in the MMA capacity. The Panel is of the view that in the present case the circumstances complained of were not such as to trigger the obligation of the EULEX officers to intervene and act in their corrective capacity. It is noted in this connection that it has not been argued, let alone shown, that the complainant had not at his disposal legal remedies to address the issue of the allegedly unlawful seizure of his property. Nor was it argued that in the circumstances of the case

the available remedy would not, for some case-specific reasons, be effective. It is further noted that the complainant was not under threat to life or limb. Nor was he exposed to a threat to his personal integrity. No threat of use of physical force was proffered against him. He was not verbally abused. The right at stake concerned the peaceful enjoyment of his possessions. The Panel is sensitive to the fact that the confiscated material, namely his camera and computer were used by the complainant for professional purposes. However, it was not argued that their pecuniary value was very high or that any serious prejudice was caused for which he could not otherwise seek redress. In the last analysis, they were ultimately returned to him.

33. Having regard to the circumstances of the case seen as a whole the Panel is of the opinion that the situation complained of did not create a situation that would have obliged EULEX police officers to intervene with local authorities, in order to stop or prevent a violation of the complainant's human rights.

34. It therefore declares this part of the complaint inadmissible.

35. The remaining issues raised by the complainant pertain to his allegations that he was arrested by the KP and sentenced twice for the same alleged offence, that he was forced to sign a confession and that basic fair trial rights were denied to him. The Panel observes that it has not been shown or even argued that EULEX Kosovo has been involved in any capacity in those circumstances of the case (see *Mustafa against EULEX*, 2011-03, 8 April 2011, at par. 22).

36. As a result, the issues concerned in this part of the present complaint do not fall within the ambit of the executive mandate of EULEX Kosovo.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

finds the complaint falls outside of the Panel's jurisdiction within the meaning of Article 29 (d) of its Rules of Procedure, and

DECLARES THE COMPLAINT INADMISSIBLE.

For the Panel,

John J. RYAN
Senior Legal Officer

Human Rights Review Panel HRRP Kosovo

Magda MIERZEWSKA
Presiding Member