



DECISION ON ADMISSIBILITY

Date of adoption: 11 September 2019

Case Nos. 2016-11

Anđelija Brakus

Against

EULEX

The Human Rights Review Panel, sitting on 11 September 2019 with the following members present:

Mr Guénaél METTRAUX, Presiding Member

Mr Petko PETKOV, Substitute Member

Ms Anna AUTIO, Member

Assisted by:

Mr Ronald Hooghiemstra, 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 2019,

Having deliberated, decides as follows:

I. PROCEDURE

1. The complaint in this case was registered with the Panel on 30 June 2016.
2. On 27 June 2017, the Panel requested the complainant to provide further information.

3. On 20 October 2017, the Panel received additional information on the case in response to its request.
4. On 17 January 2019, the Panel transmitted Questions to the Head of Mission (HoM), EULEX Kosovo, inviting her to submit her answers and written observations on the complaints.
5. The observations of the HoM were received on 19 April 2019 and were communicated to the complainant for additional observations.
6. The complainant did not avail herself of the opportunity to submit additional observations.

II. STANDING OF THE COMPLAINANT

7. Considering the close family relationship between the primary victim –and the complainant – i.e. husband and wife – the Panel is satisfied that the complainant may be regarded as a secondary victim of the alleged violations and that, as such, a potential victim in accordance with Rule 25(1) of the Panel’s Rules of Procedure.

III. FACTS

8. The facts of the case, as appear from the complaint, may be summarized as follows.
9. On 17 or 18 June 1999, Dušan Brakus, the husband of the complainant, Anđelija Brakus, disappeared from the village of Nedakoc/Nedkovac, Vushtrri/Vučitrn Municipality, his last known whereabouts.
10. His disappearance was reported to a number of international and local institutions dealing with missing persons. In particular, his spouse reported his disappearance to UNMIK and KFOR in Pristina on the day that he disappeared. His family also immediately reported his disappearance to the Serbian authorities in Kraljevo, Republic of Serbia as well as to the International Committee of the Red Cross and also to KFOR HQ and to the French Gendarmerie in Mitrovica.
11. His son was asked to give blood samples on two occasions in 2002 for possible DNA identification, but was never informed of the results of the tests.

IV. COMPLAINTS

12. The complainant refers to Article 2 of the European Convention on Human Rights (hereafter, the Convention), which guarantees a person's fundamental right to life and provides for an obligation to investigate cases of suspicious deaths. She also submits in general terms that the following human rights instruments have been violated by the Mission:
 - The Universal Declaration of Human Rights (1948);
 - The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950);
 - The Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965) and
 - The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984).
13. The Panel has also considered, *proprio motu*, the relevance to this case of Articles 3, 8 and 13 of the Convention.
14. For reasons outlined below, the Panel has taken the view that this case is admissible in relation to alleged violations of complainant's rights under Articles 2, 3, 8 and 13 of the European Convention of Human Rights and other similar provisions.

V. SUBMISSIONS BY THE PARTIES

The complainant

15. As summarised above, the complainant alleges that, in the exercise of its executive mandate, EULEX Kosovo should have investigated the disappearance of her husband and culpably failed to do so in violation of her fundamental rights.

The Head of Mission

16. In her submissions, the HoM pointed out that at the moment of the hand-over from UNMIK of the case-file relating to Mr Dušan Brakus, the case had been inactive since 2005.
17. According to EULEX Kosovo records, the complainant has never made any inquiries with the Mission about the status of the investigation and in her complaint to the HRRP, the complainant has not argued that the disappearance

of his relative had been reported to EULEX Kosovo or that she had made any inquiries in this regard.

18. The HoM also underlines the fact that the complaint to the HRRP was filed in June 2016, that is 17 years after the disappearance occurred, eleven years since last investigative steps had been taken (by UNMIK), and more than seven years after the beginning of EULEX Kosovo mandate.
19. Thus, according to the Mission, the fact that the complainant has remained passive for a considerable lapse of time cannot be ignored. The HoM submits that the complainant should have filed her complaint before 2016 when given the absence of any communication from either UNMIK or EULEX authorities she should have suspected that the investigation had elapsed into inaction and that there was no realistic prospect of an investigation being provided in the future.
20. The HoM submits that this delay on the part of the complainant to make any enquiry must be thus characterized as both excessive and unexplained and therefore requests the Panel to declare the complaint inadmissible on that basis.
21. The Panel notes that similar submissions have been made by the Mission in other factually similar cases, in particular, case 2016-12 and 2016-13.

The complainant's response

22. The complainant did not respond to the HoM's submissions.

VI. THE PANEL'S ASSESSMENT

Mandate of the Panel (Rule 25 par. 1 of the Rules of Procedure) and inherent limitations placed on the Mission regarding the protection of human rights

23. As a matter of substantive law, 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 European Convention on the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, which set out minimum standards for the protection of human rights to be guaranteed by public authorities in all democratic legal systems.

24. Before considering the complaint on its merits, the Panel has to decide whether to proceed with the complaints, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
25. According to Rule 25, paragraph 1, the Panel can only examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate.
26. The Panel has already established that the actions of the EULEX prosecutors and police form part in principle of the executive mandate of EULEX Kosovo and therefore fall within the ambit of the mandate of the Panel (see, for instance, K to T against EULEX, 2013-05 to 2013-14, 21 April 2015, para. 43; Krlić against EULEX, 2012-21, 26 August 2014, para. 23; Y against EULEX, 2011-28, 15 November 2012, para. 35).
27. The Panel is satisfied that the case comes *prima facie* within its competence *ratione materiae* and notes that the Mission has not taken issue with that part of the enquiry.

Sufficient temporal connection with the underlying conduct and 6-month deadline to file a complaint – The Panel’s competence ratione temporis.

28. As noted above, the HoM submits that the Panel lacks jurisdiction *ratione temporis* over the case and/or that the complainant failed to comply with the 6-month deadline within which to file his complaint in accordance with Rule 25, paragraph 3, of Panel’s Rules of Procedure.
29. Pursuant to Rule 25, paragraph 3, of the Panel’s Rules of Procedure, a complainant is required to file a complaint within six months from the act, decision or conduct which is said to amount to or involve a violation of his/her rights (see, e.g., Gashi v EULEX, 2013-22, 7 April 2014, para. 10; Thaqi v EULEX, cited above, para. 51).
30. As a preliminary matter, the Panel notes that the Mission was seemingly put on notice of the existence of this case when it received notice of it from UNMIK. Without prejudice to the merit of the case, from that point on, it was under an obligation to investigate the case. That obligation was, *prima facie*, ongoing. It was not dependent on the complainant asking them to act or otherwise soliciting the Mission.
31. The Panel agrees with the Mission that a degree of proactivity is expected of alleged victims of human rights violations when it comes to seeking to remedy those. How proactive and how this should be assessed depends, however, on the particular circumstances of the case.

32. The Panel also notes that the violations complained of are regarded as ongoing or continuing violations of the victim's fundamental rights. See *Miladinović against EULEX*, Decision on Admissibility, 2017-02, 27 March 2019, para. 47; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, Decision on Admissibility, 30 September 2015, para. 78; *Sadiku-Syla against EULEX*, 2014-34, Decision on Admissibility, 29 September 2015, paras. 35 and 42. See also, in the context of Article 3, ECtHR, *Kurt v. Turkey*, Judgment of 25 May 1998, Reports of Judgments and Decisions 1998- III, paras. 130-34; *Varnava and others v. Turkey*, Application nos.16064/90, Judgment of 18.September 2009, para 148 and 162-163; *Khadzhaliyev and Others v. Russia*, Application no. 3013/04, Judgment of 6 November 2008, paras. 120-121; *Timurtas v Turkey*, Application no. 23531/94, Judgment of 13 June 2000, para. 95; and Resolution No. 828 of 1984, paragraph 3 (Parliamentary Assembly of the Council of Europe).
33. The Panel will also reiterate here its findings from the *Miladinović* case, which are applicable to the present matter. See *Miladinović against EULEX*, Decision on Admissibility, 2017-02, 27 March 2019, paras. 50 et seq, in particular, para. 55. Complaints filed beyond the 6-month timeframe set by the Rules will in principle be declared inadmissible in accordance with Rule 29(c) of Rules of Procedure. See *Mikic against EULEX*, 15 June 2015, pars 8-9; *K.P. against EULEX*, 21 April 2015, par 15; *Martinovic against EULEX*, 23 November 2011, pars 17-18. In some instances, however, the Panel has exercised its discretion to declare admissible complaints that were filed belatedly but where particular circumstances pertaining to the case justified that the matter not be declared inadmissible on such grounds. The particular gravity of the alleged violation or the belief on the part of the complainant that the matter was still under the Mission's consideration have been regarded as particularly relevant in that regard by the Panel. See, e.g., *Sadiku-Syla against EULEX*, 29 September 2015, pars 44 et seq.; *D.W. and others against EULEX*, 30 September 2015, pars 91 et seq.
34. Furthermore, the Panel has held that if the violation of fundamental rights is ongoing, the 6-month deadline has not lapsed in principle until the violation ceases. See, e.g., *Zahiti against EULEX*, 7 June 2013, par 42. In such a case, the deadline starts to run on the date after the impugned action said to have caused or resulted in a right violation. See, e.g., *Y against EULEX*, 15 November 2012, pars 30-31.
35. It should also be remembered in this context that EULEX Kosovo is a rule of law mission, not a state, and that compliance with human rights obligations forms a core and essential element of its mission (see *Miladinović against EULEX*, Decision on Admissibility, 2017-02, 27 March 2019, para. 55).

36. Regarding the application of the above principles and considerations in the present case, the Panel notes the following. Up until that point, the complainant had received no information from the Mission that it was or was not investigating this case. Nor, it would seem, had the complainant contacted the Mission to inquire about the matter.
37. The Mission does not challenge the suggestion that it would have been competent to investigate this case had it been in possession of additional information. Absent such information, the case remained dormant. At no point does the case appear to have been formally closed by the Mission. Nor was the complainant informed of that fact. On that basis, the complainant might have been under the impression and might have assumed that EULEX would be dealing with this case.
38. Its failure to enquire with the Mission suggests, however, that he could have been more proactive in seeking clarification from the Mission. Had he done so, she could perhaps have seized the Panel at an earlier stage.
39. In evaluating what consequence to attach to that failure, the Panel has taken notice of the Mission's own apparent failure to inform the complainant of the fact that it was in possession of some information regarding this case and that the case lay dormant in its records. Absent such information, it is not clear why the complainant should have been expected to inquire with the Mission about its efforts.
40. In that assessment, the Panel also notes that under the revised OPLAN, as reflected in Rule 25(4) of the Panel's Rules of Procedure, complaints relating to cases transferred from EULEX to Kosovo institutions shall be filed within six months from the end of the EULEX Executive Mandate in the criminal justice system as defined in Kosovo law or within six months from the transfer of the casefile. Under that regime, the deadline for filing of a complaint had not yet expired at the when the present complaint was filed.
41. Furthermore, the Panel notes that the time which the complainant took before filing her complaint did not seemingly cause it any prejudice as far as proceedings before the Panel is concerned. The interest that the Mission might have in the strict enforcement of the 6-month deadline must also be interpreted in that light.
42. Therefore, applying the standard outlined by the European Court of Human Rights in the *Varnava* Judgment, the delay imputed to the complainant cannot be said to be either excessive or unexplained as the complainant continued to prompt and contact those authorities which she thought could help move this investigation forward. *Varnava and others v. Turkey*, Case Nos. 16064/09 et al,

Judgment of 18 September 2009 (as discussed in *Miladinović against EULEX*, Decision on Admissibility, 2017-02, 27 March 2019).

43. In those circumstances, the Panel is satisfied that the complainant acted diligently and that the 6-month deadline set by the Rules has been complied with in this case.
44. Because the complainant's inaction might be relevant to the relief that the Panel may be prepared to grant in this case should it find that the complainant's rights were violated by the Mission, it is asking the complainant to explain its failure to act when addressing the merit of this case (see question below in the disposition).
45. The Panel notes that, *ratione temporis*, it is competent to consider the actions of the Mission until 14 June 2018. After that date, the Mission ceased to have any executive responsibilities in relation to that case. Activities carried out after that date could be relevant, however, to evaluate the extent to which the Mission might be said to have fulfilled its human rights obligations. The Panel therefore invites the Mission to make reference in its submissions to any effort undertaken by the Mission to ensure that this case was or is being investigated (if any), including after that date.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

DECLARES ADMISSIBLE, without prejudging the merit of the matter, the complaints with regard to alleged violations of Articles 2, 3, 8 and 13 of the European Convention of Human Rights;

ASKS the parties to address the following questions in relation to the merit of this case,

1. For the Mission:
 - i. Was a decision formally taken not to investigate this case? If so when and by whom?
 - ii. What steps, if any, did the Mission take to investigate this case?
 - iii. What contacts, if any, did the Mission have with the relatives of the disappeared, and the complainant in particular?

- iv. What information, if any, regarding its investigative efforts, when and by what means did the Mission provide the relatives of the disappeared?
- v. If the Mission did not provide any information, why not?
- vi. Was the case-file pertaining to this case transmitted to local authorities? If so, when?

2. For the complainant:

- i. What contact, if any, did you have with the EULEX Mission or its representatives? If so, when? If not, why?
- ii. Are you aware of any efforts by local authorities to investigate this case?
- iii. Has the Mission violated or contributed to the violation of the complainant's rights under Articles 2, 3, 8 and 13 of the Convention? If so, in what manner?
- iv. What are the consequences – personal, financial, legal and emotional – associated with the disappearance of your relative?

AND ASKS the parties to respond to the above and make any other submissions regarding the merit of this case no later than 11 November 2019.

For the Panel:

Guénaël METTRAUX
Presiding Member

Petko PETKOV
Substitute Member

Anna AUTIO
Member