



**DECISION ON REQUEST FOR REVISION
PURSUANT TO RULE 43 OF THE PANEL'S RULES OF PROCEDURE**

Date of adoption: 4 June 2020

Case no. 2016-28

S.H.

Against

EULEX

The Human Rights Review Panel, sitting on 4 June 2020 with the following members present:

Mr Guénaël METTRAUX, Presiding Member
Ms Anna BEDNAREK, Member
Ms Anna AUTIO, Member

Assisted by:
Mr Ronald HOOGHMSTRA, 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 11 December 2019,

Having deliberated through electronic means in accordance with Rule 13(3) of the Panel's Rules of Procedure, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint in this case was registered with the Panel on 22 September 2016.
2. By letter of 23 September 2016, the Panel informed the Mission about the registration of this case.

3. On 28 June 2017, 9 September 2017 and 17 October 2017, the Panel requested complainants in this and other cases to provide additional information regarding their complaints.
4. On 20 October 2017, the Panel received a response from the Representative of the complainants providing additional information in relation to two cases, including the present one.
5. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission (HoM), EULEX Kosovo, inviting her to submit her answers and written observations on the complaints no later than 26 January 2018.
6. The observations of the HoM were received on 16 October 2018 after which they were communicated to the complainants for additional observations.
7. On 28 March 2019, the Panel declared the case to be admissible (<http://hrrp.eu/docs/decisions/2019-03-28%20Admissibility%20Decision%202016-28-signed.pdf>).
8. On 14 May 2019, the complainant asked the Panel for an extension of time based on relevant personal considerations. The Panel granted that request and allowed the complainant to file any additional submissions no later than 20 June 2019 regarding the merit of the case and the Panel's questions (see, above, para 7). Additional submissions were received from the complainant on 20 June 2019.
9. On 17 May 2019, the HoM submitted her responses and submissions to the Panel.
10. On 11 September 2019, the Panel rendered its Decision and Findings on the merit of this case and found that the Mission had violated the fundamental rights of the complainant as guaranteed, *inter alia*, under Article 2 (procedural limb) and Article 3 of the European Convention of Human Rights (<https://hrrp.eu/docs/decisions/2019-09-11%20Decision%20and%20Findings%202016-28%20signed.pdf>). The Panel came to that view based on a dual sort of failure attributable to the Mission:
 - i. A failure to fully and diligently investigate the case; and
 - ii. A failure to sufficiently involve and inform victims.
11. On 21 November 2019, the Mission wrote to the Panel to inform it of the fact that it had located an additional document which it thought could have affected the decision on the merit of the Panel in this case. The Mission further invited the Panel to review the document in question and to consider reviewing its decision.
12. On 11 December 2019, sitting in Plenary, the Panel adopted an amendment of Rule 43 of its Rules to provide explicitly for the possibility for the Mission (and not just the complainant) to seek a revision of its findings. As amended, Rule 43 now reads as follows:

Rule 43. Requests for revision of findings

 1. In the event of the discovery of a new fact, which might by its nature have a decisive influence on the findings of the Panel and which, when the findings were delivered, was unknown to the Panel and could not reasonably have been known to a party, he/she may request the Panel, within a period of one month after becoming aware of the fact, to revise the findings.
 2. The request will specify the date and circumstances in which the new fact was discovered, why it could not reasonably have been known to the party

seeking a revision at the time of the original submissions and identify the specific findings of which revision is requested so as to establish that the conditions laid down in paragraph 1 are met. The request for revision must be accompanied by a copy of all supporting documentation.

3. The Panel may refuse the request if no reason exists that warrants its reconsideration.
 4. If the Panel decides to entertain a request for revision on its merit, it will communicate its decision to that effect to the parties and will invite them to submit written comments within a time limit established by the Panel.
 5. When it has decided to entertain a request for revision on its merit under paragraph 4, the Panel shall render a decision regarding the merit of the request for revision consistent with Rules 29 and following.
13. On 11 December 2019, the Rapporteur in this case visited the Mission with a view to review the document in question. Insofar as may be disclosed, it is apparent from that document that it constitutes a statement/record of interview of a relative of the complainant. It dates back almost a decade and is related to a war crimes case which was at that point being investigated. In that statement, the interviewee provides information, *inter alia*, about the circumstances of the disappearance of his father. The statement was taken by staff of the Mission and it appears that the statement was later produced as evidence and admitted in proceedings. It appears that the interviewee did not give live evidence in court.
 14. Having reviewed the document in question and in light of its confidential character, the Panel is satisfied that the fact that the complainant did not have access to it would not prejudice his position in these proceedings.
 15. On 12 December 2019, the Panel responded to the Mission's letter of 21 November. In its letter, the Panel informed the Mission that it had amended Rule 43 of its Rules of Procedure to formally authorize the Mission (and not just a complainant) to seek a revision of its findings. The Panel also informed the Mission that if the Mission intended to do so in this case, it was expected to make a formal request to that effect and demonstrate that the requirements of Rule 43 were met. In particular, the Panel asked the Mission to provide 'detailed information regarding the date and circumstances in which the new information was identified and specify the findings which you suggest are being affected by this information and the reason why, in your view, they affect those findings.'
 16. On 20 January 2020, the Mission through the Acting Head of Mission wrote again to the Panel in regards to this matter to formally seek the revision of the Panel's findings in Case 2016-28 based on the newly discovered document.
 17. On 22 January 2020, the Panel forwarded to the complainant the Mission's letter of 20 January and asked him to make any additional submissions regarding the newly discovered document no later than 20 February 2020. The complainant did not avail himself of this possibility.

RELEVANT FINDINGS ON THE MERIT

18. On 11 September 2019, the Panel found as follows in the relevant sections of its Decision:

Failure to inform relatives of the victim

76. It has been noted above that there is no indication on the record of the Mission having fulfilled its obligation to inform the complainant of the existence, course, and tenor of the investigation (see, para. 38 above).
77. Such a requirement is a necessary element of the protection of the rights of the victims in the investigation of such a case. See, e.g., *Desanka and Zoran Stanisic against EULEX*, 2012-22, 11 November 2015, para. 66, referring to *L.O. against EULEX*, 2014-32, 11 November 2015, paras. 60-61, 72-74; *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 86; see also *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, ECtHR Judgment of 6 April 2004, paras. 311-314, *Isayeva v. Russia*, Application no. 57950/00, ECtHR Judgment of 24 February 2005 paras. 211-214; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, ECtHR Judgment of 7 July 2011, para. 167.
78. This obligation is particularly important in the context of incidents of enforced disappearance where victims suffer emotionally from the absence of information regarding the fate of their loved one. See *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 87. Highlighting the victims' right to truth in this context, the *General Comment* of the Working Group on Enforced Disappearance says the following about this matter:

“Article 13 of the Declaration recognizes the obligation of the State to investigate cases of enforced disappearances. Paragraph 4 of Article 13 specifies that “the findings of such an investigation shall be made available upon request to all interested persons, unless doing so would jeopardize an ongoing criminal investigation.” In light of the developments that happened since 1992, the Working Group deems that the restriction in the last part of this paragraph should be interpreted narrowly. Indeed, the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth. Such a limitation must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an ongoing criminal investigation. A refusal to provide any information, or to communicate with the relatives at all, in other words a blanket refusal, is a violation of the right to the truth. Providing general information on procedural matters, such as the fact that the matter has been given to a judge for examination, is insufficient and should be considered a violation of the right to the truth. The State has the obligation to let any interested person know the concrete steps taken to clarify the fate and the whereabouts of the person. Such information must include the steps taken on the basis of the evidence provided by the relatives or other witnesses. While the necessities of a criminal investigation may justify restricting the transmission of certain information, there must be recourse in the national legislation to review such a refusal to provide the information to all interested persons. This review should be available at the time of the initial refusal to provide information, and then on a regular basis to ensure that the reason for the necessity that was invoked by the public authority to refuse to communicate, remains present.”

See *General Comment on the Right to the Truth in Relation to Enforced Disappearance*, Report of the Working Group on Enforced or Involuntary Disappearances (2010), Document A/HRC/16/48, para 3; *Zufe Miladinović*

against EULEX, 2017-02, 19 June 2019, para. 87; and, also, *I. case of the Rio Negro Massacres v. Guatemala*, IACtHR Judgment of 4.09.2012, Preliminary objection, merits, repair and costs, para. 265.

79. The Mission did not provide an explanation for its failure to keep the complainant (or any other close relative of the primary victim) informed about this case. The fact that its records are silent on that point speaks for itself.
 80. This failure contributed to the violation of the complainant's rights insofar as it added to the state of uncertainty in which he found himself all through the relevant period.
19. The Panel later found that this failure – as well as the Mission's failure to properly and fully investigate this case – had violated the rights of the complainant under Article 2 (procedural limb) and Article 3 of the European Convention of Human Rights.

PARTIES' SUBMISSIONS REGARDING THE REQUIREMENTS OF RULE 43

20. The Panel now turns to consider the new document in light of Rule 43 of its Rules of Procedure.
21. In its letter of 20 January 2020, the Mission explained that its request for revision arose from the discovery on 28 October 2019 of a new fact which was brought to the attention of the Panel, which it said was unknown to the Mission at the time of presenting its observations on the admissibility and merits of the complaint. The Mission further argued that the fact in question, if known at the time, might have impacted the findings of the Panel.
22. According to the Mission, the 'new fact' in question is that a relative of the complainant gave a statement (as "Witness R") that was tendered in criminal proceedings initiated by EULEX in relation to, *inter alia*, the disappearance of the complainant's father. It appears that the individual in question did not give live evidence in the case but his statement was read into the minutes of the case and thus formed part of the record of those proceedings.
23. Regarding the circumstances that led to the discovery of this document, the Mission explains that, having received the Panel's Decision of 11 September 2019, on 7 October 2019, the Human Rights and Legal Office of the Mission (HRLO) conducted a 'further search into the former EULEX SPRK and WCIU electronic records on the case, so as to ensure that nothing had been overlooked'. These records have been available to the HRLO since January 2019. They consist of around 60 folders containing PDF documents which cannot be electronically searched.
24. The document was discovered in those records on 28 October 2019. As already indicated, it consists of a statement taken from a relative of the complainant by EULEX WCIU on 22 December 2010. In that statement, the individual mentions having been interviewed by UNMIK years before and that he was related to the family of the disappeared. The UNMIK statement is not available to the Panel.
25. On 25 July 2011, as part of the said criminal proceedings, acting upon a motion of the EULEX Prosecutor, the District Court of Pristina issued an order for protective measures in relation to several witnesses in the case, including the one who gave the statement that is the subject of the present application. As a result, his name was anonymized and his contact details subject to confidentiality.

26. Addressing the question of why the alleged new fact and associated statement could not have been reasonably known to EULEX at an earlier time, the Mission notes that prior to January 2019, the HRLO did have the possibility to search the SPRK or WCIU files as these units and their records were embedded in the Kosovo institutions. The Mission adds that

‘It would appear that in October 2018, when providing information [regarding admissibility of the case] on case 2016-28 to HRLO for the purpose of preparing the EULEX initial observations on the case, these units did not search the part of the relevant case-files containing personal data on the protected witnesses, and therefore did not become aware that the relative of the complainant and of the complainant’s father was one of them. This might have been due to the extraordinary circumstances and pressure in which the mentioned units were operating in the imminence of the deadline for the completion of the hand-over process to Kosovo institutions. Furthermore, since the case had been decided at the Supreme Court level in May 2017, the respective SPRK file had already been archived and was not reviewed prior to the hand-over by EULEX [...]. The fact that the complainant did not mention the involvement of Witness ‘R’ in the criminal proceedings did not contribute to EULEX becoming aware of it in the fall of 2018.’

27. In that light, the Mission seeks a revision of the Panel’s findings in paragraphs 75-80 of its Decision and summarized under the sub-heading ‘failure to inform relatives of the victim’ (see, *supra*, para 18). The Mission submits that it can be inferred that from 11 November 2011 onwards (when the trial in this case opened), the complainant was formally made aware of the criminal proceedings. The Mission adds:

‘It is apparent that he was also aware of the final outcome of such proceedings, since he indirectly points this out in the complaint form registered by the HRRP on 22 September 2016.’

The Mission further seeks to submit that because “Witness R” was interviewed, he must have been speaking on behalf of the entire family and that his family (including, it is implicit, the complainant) must have been informed of the investigation of this case.

28. On that basis, the Mission concludes that the Panel’s finding that EULEX failed to inform the relatives of the complainant’s father of the existence, course and tenor of the investigation must be revised. “On the contrary”, the Mission submits, “despite the challenging circumstances it is apparent that the Mission did its best ‘to balance the rights and interests of victims to be kept informed of the progress of the investigation with the necessary degree of confidentiality that an investigation may legitimately require’.”
29. The Mission does not submit that the alternative and independent basis on which the Mission was found to have violated the rights of the complainant (i.e., through an inadequate investigation of the case) is in any way affected by the discovery of the new fact.

DELIBERATIONS

Does the basis of the application constitute a ‘new fact’?

30. Rule 43 provides that an application for revision of a Panel Decision may be made upon the discovery of ‘a new fact’. A ‘new fact’ in this context means an event, a circumstance or a factor that bears substantively on issues relevant to the case or which is materially connected to factual considerations relevant to the case. It must be ‘new’ in the sense

that it was unknown to the Panel and could not reasonably have been known to a party at the time of the main proceedings. This also implies that the fact in question must not merely constitute a reiteration in a different form of a fact already considered by the Panel.

31. The Panel is satisfied that the fact put forth by the Mission – i.e., the existence of an interview taken by EULEX Staff of a close relative of the complainant touching, *inter alia*, upon the disappearance of their relative – constitutes a new fact for the purpose of Rule 43 of the Panel’s Rules of Procedure.

One-month deadline to apply for revision – Rule 43, paragraph 1

32. Rule 43, paragraph 1, of the Rules of the Panel provide that where a new fact has been discovered, the party concerned may request the Panel, *within a period of one month after becoming aware of the fact*, to revise the findings.

33. In this case, the following timeline is relevant:

- i. On **11 September 2019**, the Panel renders its Decision and Findings;
- ii. On **28 October 2019**, the Mission discovers the ‘new fact’ in the form of a witness statement;
- iii. On **21 November 2019**, the Mission wrote to the Panel to inform it of the fact that it had identified said statement;
- iv. On **11 December 2019**, the Panel amends Rule 43 of its Rules of Procedure;
- v. On **12 December 2019**, the Panel responded to the Mission’s letter of 21 November and invites the Mission to make an application pursuant to Rule 43 if it so wishes;
- vi. On **20 January 2020**, the Mission formally applies for a revision pursuant to Rule 43.

34. The Panel notes that more than one month elapsed between the amendment of Rule 43 (11 December 2019) and the Mission’s formal application filed pursuant to that Rule (20 January 2020).

35. Considering the particular circumstances of this case and the fact that the Mission had notified the Panel less than a month after it had discovered the new fact, the Panel will not dismiss the present application on this ground.

Requirements of diligence and timeliness by the applicant

36. Rule 43 implies that the party concerned must have exercised reasonable diligence in procuring documents and information relevant to the proceedings. As expressed in Rule 43, the applicant must demonstrate to the Panel that the fact and information relevant to its application could not reasonably have been known to a party.

37. Regarding the question of whether the Mission has fulfilled this requirement, the Panel wishes to underline the following.

- i. *First*, by the Mission's own account, its search for additional documents was triggered by the Panel's decision of 11 September 2019.
 - ii. *Second*, the institutional and procedural regime applicable before the Panel does not provide for an appeal or a system of multiple instances. There is therefore an inbuilt assumption that all facts and considerations relevant to the Panel's Decision must be placed before it at the relevant time, i.e., before it is due to render a decision on the merit of the case. This, in turn, imparts upon a party an obligation of diligence to ensure that they have conducted a full review of their records to ensure that all relevant information is placed before the Panel at that one time.
 - iii. *Third*, and in light of the previous point, a Decision of the Panel on the merit of a case does not trigger a new process by which an aggrieved party can seek to *overturn* that Decision based on material it has sought to obtain after that Decision. This is important to ensure expeditiousness, fairness, effectiveness and finality of the proceedings. It is also essential to ensure that diligence is exercised by all at every stages of proceedings before the Panel. In other words, the revision process provided under Rule 43 cannot be used as a means to effectively 'appeal' a decision of the Panel. It is, and must remain, an exceptional procedure dealing with situations where a party has discovered in good faith new facts that could not have been known at an earlier time despite the exercise of the expected due diligence.
38. Applying the above principles and considerations to the present case, the Panel notes the following.
39. Firstly, the Panel observes that the statement in question was in possession of the Mission at all times relevant to these proceedings. While HRLO might not have had access to that information, other parts of the Mission (in particular WCIU) did have it. It is part of the Mission's responsibility in relation to proceedings before the Panel to ensure that relevant information is sought and obtained from all relevant organs of the Mission.
40. Secondly, while the Mission says that it could not search those records until January 2019, the Panel notes that the Mission's submissions on the merit of this case were filed on 17 May 2019, i.e., more than four months after it became searchable.
41. Thirdly, whilst the Panel accounts for the challenges that might have been involved in that process, such challenge should not be exaggerated. It took the Mission slightly over a month to locate that statement once it started looking. In those circumstances, the Mission has failed to explain why this document could not, in the reasonable exercise of its diligence, have been found prior to its submission of 17 May 2019.
42. Fourthly, as noted, the Mission's decision to go back to its records was triggered by the Panel's Decision of 11 September 2019. Consistent with what has been said above about the Panel's procedure, a decision of the panel regarding the merit of a case does not trigger a second round of proceedings.
43. Based on the above, the Panel find that it cannot be said that, in accordance with Rule 43, the new fact subject to the present application could not reasonably have been known to the Mission. The Mission's application for a revision can be rejected on these grounds. However, and so as to ensure that the Panels' recommendations are still fully consistent with the record of this case, the Panel will consider what effect, if any, that this new fact would have had on its Findings and recommendations.

Effect of the new fact upon the Panel's findings

44. The Panel reiterates that, consistent with Article 2 and 3 of the European Convention on Human Rights, the Mission had an obligation to inform the complainant of the existence, course, and tenor of its investigation in this matter. The Panel also recalls that such an obligation is a necessary and important element of the protection of the rights of the victims in the investigation of such a case. See, e.g., *Desanka and Zoran Stanisic against EULEX*, 2012-22, 11 November 2015, para. 66, referring to *L.O. against EULEX*, 2014-32, 11 November 2015, paras. 60-61, 72-74; *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 86; see also *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, ECtHR Judgment of 6 April 2004, paras. 311-314, *Isayeva v. Russia*, Application no. 57950/00, ECtHR Judgment of 24 February 2005 paras. 211-214; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, ECtHR Judgment of 7 July 2011, para. 167.
45. This obligation is particularly significant in the context of incidents of enforced disappearance where victims suffer emotionally from the absence of information regarding the fate of their loved one. See *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 87. Their right to truth is critical in such a context and the authorities must ensure that they take appropriate steps to uphold that right. See *General Comment on the Right to the Truth in Relation to Enforced Disappearance*, Report of the Working Group on Enforced or Involuntary Disappearances (2010), Document A/HRC/16/48, para 3; *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 87; and, also, *I. case of the Rio Negro Massacres v. Guatemala*, IACtHR Judgment of 4.09.2012, Preliminary objection, merits, repair and costs, para. 265.
46. In its Decision of 11 September 2019 (para. 79), the Panel said that

‘[t]he Mission did not provide an explanation for its failure to keep the complainant (or any other close relative of the primary victim) informed about this case. The fact that its records are silent on that point speaks for itself.’
47. According to the Mission, the new fact (i.e, the giving of a statement by a close relative of the complainant) undermines the Panel’s findings. For reasons given below, the Panel disagrees.
48. First, the violation of rights for which the Mission was found responsible were those of the complainant – not those of any other member of his family. Assuming that the Mission fulfilled its obligations under Articles 2 and 3 of the European Convention of Human Rights in relation to “Witness R”, this would not have relieved it of its obligations towards the complainant.
49. Second, there is in fact no evidence that the Mission provided information to “Witness R” that would meet the requirements and expectations of Articles 2 and 3. It cannot therefore be assumed that the information relevant to those provisions was given to him. Additionally, the obligation of the Mission to inform the next of kin of the disappeared person about the fate of the victim remains valid even though a member of the wider family of the victim is or might be aware about an ongoing investigation or trial.

50. Thirdly, even if that was the case, there is no indication that this information was in turn shared by “Witness R” with the complainant. Nor was it his obligation. Instead, it was and remained at all times the Mission’s responsibility, which it cannot delegate to third parties. Furthermore, the confidentiality of “Witness R” testimony might have made it impossible for him to disclose his involvement in the proceedings.
51. Finally, the Panel notes that the Mission’s application for revision only pertains to its findings regarding the Mission’s failure to keep the complainant adequately informed of the course of its investigation. It did not raise any issues regarding the other part of the Panel’s findings regarding its failure to properly investigate the case. These findings and associated recommendations do not, therefore, need to be reconsidered in light of the new fact.
52. Based on the above, and for the reason given, the Panel finds that the Mission’s application for revision must fail.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

FINDS Mission’s application does not fulfil the requirements of diligence and timeliness of Rule 43;

FINDS that the information submitted by the Mission constitutes a ‘new fact’ in accordance with Rule 43;

FINDS that the new fact in question does not materially impact the Decision of the Panel of 11 September 2019;

THEREFORE CONFIRMS its Decision and Findings of 11 September 2019;

REITERATES that, based on the record available to the Panel, the violation of the complainant’s rights might be ongoing;

INVITES THE MISSION to carefully consider the Panel’s Recommendations of 11 September 2019; and

FURTHER INVITES THE MISSION to inform the Panel of the steps taken to implement those recommendations no later than two month from the receipt of this Decision.

For the Panel

Guénaël METTRAUX
Presiding Member

Anna BEDNAREK
Member

Anna AUTIO
Member