



ADMISSIBILITY DECISION

Date of adoption: 7 June 2013

Case No. 2012-14

Valbone Zahiti

Against

EULEX

The Human Rights Review Panel sitting on 7 June 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 registered with the Panel on 27 September 2012.
2. On 8 April 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 10 May 2013. They were subsequently communicated to the complainant for her comments. The complainant provided her comments to HoM's observations on 30 May 2013.

3. On 20 May 2013, the Panel invited the HoM to address further issues on admissibility that had not been addressed by his previous submission. The observations of the HoM were received on 3 June 2013.

II. THE FACTS

4. The fact as submitted by the parties may be summarized as follows.
5. The complainant submits that on 7 June 2011 at around 08:25 hours, while performing her official duties as a Kosovo police officer providing security for the premises of the Liaison Office of Romania, she was attacked and injured by an „EULEX official”, an international police officer. She claims that her attacker was a EULEX staff member who intentionally drove in her direction with his car, hit her with his vehicle and injured her leg.
6. The complainant states that the incident happened as a consequence of the illegal parking attempt by that EULEX staff member. According to the complainant, the EULEX staff member tried to park his vehicle in a place where it was forbidden to stop, namely, at a location reserved for the Liaison Office of Romania.
7. It is alleged that after the complainant warned the EULEX staff member not to park on this location, the latter started insulting her.
8. Further, it is alleged that the situation deteriorated in as much as the EULEX staff member drove his vehicle towards the Kosovo police officer and hit her on her right leg. The complainant allegedly ordered the EULEX officer to stop whilst holding her service weapon and threatening to use it in self-defence.
9. The complainant states that the incident caused „immediate injuries”, which resulted in negative long-term consequences to her health. The complainant was not able to return back to work for almost three months. Further, it is alleged that she still suffers from continuous health problems caused by this incident. Also, the nature of her employment requires physical fitness but her condition impedes her current professional performance. The complainant states that she had to take sick leave and other leaves which, she says, put her employment at risk.
10. The complainant provided medical documentation concerning her current condition. She states that Kosovo Police does not provide any health insurance so that she had to cover all related expenses by herself. Further, the complainant submitted a report drawn up by the Kosovo Police, which also includes an EULEX interim report, written by the EULEX staff member concerned, contradicting the version of the complainant. According to the version of the EULEX officer in this report, the complainant had behaved aggressively towards him. As a

consequence he drove away from the location of the incident. The alleged assault has not been mentioned in that report.

III. COMPLAINTS

11. The complainant requests information about the status of her case within EULEX and before the courts of the officer's home country. The complainant submits that due to the immunity of Mission personnel, she has no access to court competent to determine her rights in respect of damage which she suffered. Further she demands monetary compensation for the damage she claims was done to her health as a result of this incident.

12. The complainant alleges following violations of her human rights:

Right to a fair trial, based on:

- Article 6 of the European Convention of Human Rights and Fundamental Freedoms (ECHR), and
- Article 7 and 10 of the Universal Declaration for Human Rights (UDHR),

Right to effective legal remedy, based on:

- Article 13 ECHR, and
- Article 8 and 22 UDHR,

Prohibition of discrimination, based on:

- Article 14 ECHR,
- Article 1 and 2 UDHR,
- Article 1, paragraph 1 and 2, Article 2, paragraph 1, item a, b, c, Article 5, item a and b, and Article 6 of the Convention for Elimination of all forms of Racial Discrimination (CERD)
- Article 1, Article 2 item b and c and Article 3 of the Convention for Elimination of all forms of Discrimination against Women (CEDAW),

Prohibition of abuse of rights, based on:

- Article 17 ECHR,
- Article 28 UDHR,

Further, the complainant refers to Article 2, paragraph 1, 2 and 3, item a, b, and c, Article 16 and Article 26 of the International Covenant of Civil and Political Rights (ICCPR). Finally, the complainant makes reference to Article 2, paragraph 1 and 2 and Article 5, paragraph 1 and 2 of the International Covenant for Economic, Social and Cultural Rights (ICESCR).

IV. THE LAW

RELEVANT APPLICABLE LAW

Joint Action

13. Relevant extracts of Articles 2 and 3 of European Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (hereafter: Joint Action), read as follows:

Article 2 Mission Statement

EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

EULEX KOSOVO, in full cooperation with the European Commission Assistance Programs, shall fulfill its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities.

Article 3 Tasks

In order to fulfill the Mission Statement set out in Article 2, EULEX KOSOVO shall:

- (a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities;

Law on Jurisdiction

14. The Law on Jurisdiction, Case Selection and Case Allocation of EULEX judges and prosecutors in Kosovo (No. 03/L-053, hereafter: the Law on Jurisdiction), and more specifically its Article 17 regulate the executive powers of the EULEX Police:

Article 17

17.1 For the duration of the EULEX KOSOVO in Kosovo, the EULEX police will have the authority to exercise the powers as recognized by the applicable law to the Kosovo Police and according to the modalities as established by the Head of the EULEX KOSOVO.

15. The Panel also refers to Annexes G and J of the Operational Plan of EULEX, the Standard Operating Procedures “on Investigating Alleged Breaches of the Code of Conduct and Discipline”, the Code of Conduct and Discipline as well as Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo (in particular, Article 10).

Submissions by the parties

16. In its submissions, EULEX asserts that the complaint did not fall within the ambit of the Panel’s mandate since the events complained of did not concern acts committed in the exercise of EULEX executive

mandate and was logged outside the six-month timeframe. They argue that the complaint should be declared inadmissible.

EULEX submissions as to the executive mandate

17. EULEX submits that according to the OPLAN, Annex J under B.1 “[t]he HRRP will be established to review complaints from any person, other than EULEX staff members, claiming to be a victim of a violation of human rights by EULEX Kosovo in the conduct of EULEX Kosovo executive mandate”. Under B. 6 is reiterated “[t]hat the Panel will only assess the conduct of EULEX Kosovo in the performance of its executive mandate. Accordingly, the findings of the Panel are not meant to form the basis for disciplinary or judicial proceedings involving EULEX Kosovo staff members”. Further, EULEX points to Rule 25 par. 1 of the Panel’s Rules of Procedure, stating that “[a] complaint may be filed by any person other than EULEX Kosovo personnel who claims to be a victim of a human rights violation by EULEX Kosovo in the conduct of its executive mandate”.
18. EULEX submits that the EULEX staff member who injured the complainant was an Advisor to the Kosovo Police Department of Training, and therefore was not vested with any executive powers. At the time of the incident he had not been carrying out any official (EULEX) duties. Thus, he had at that time been acting in a private capacity. Insofar as deemed relevant, the vehicle had been a private one with EU plates, not an official EULEX vehicle.
19. Therefore, EULEX submits that the alleged incident was not in any manner connected to the EULEX Kosovo Mission mandate and the tasks to be carried out in the fulfilment of that mandate as set out on Articles 2 and 3 of the Joint Action.
20. EULEX submits that the acts committed by the officer in question could not be equated with acts *ultra vires* or contrary to instruction.
21. Also, EULEX argues that it was not alleged that EULEX staff members (police officers) had been present at the scene or that there had been any other involvement of EULEX staff members in the incident (other than the EULEX staff member who injured the complainant).
22. EULEX submit that in the case of *Al-Jedda v. The United Kingdom* [Application no 27021/08, 7 July 2011] the European Court of Human Rights (hereinafter, “the Court”) examined the issue of its own jurisdiction and held that “[j]urisdiction under Article 1 is a threshold criterion. The Exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which gives rise to an allegation of the infringement of rights and freedoms set forth in the Convention”. The test to be applied in order to determine whether or not the organization exercises effective control or ultimate authority and control over the acts and omissions of a third party. Given this narrow interpretation and

in the light of the circumstances of the current case, it could not be said that EULEX had had “effective control” or “ultimate authority and control” over any activities of the EULEX staff member in question and therefore could not be held liable for acts or omissions imputable to it.

EULEX submissions as to the six months period

23. EULEX submits that only those complaints submitted within six months from the time of the alleged violation were to be considered admissible. In the present case, the incident had occurred on 7 June 2011. The complaint, alleging a violation of human rights in light of the continuous health problems resulting from the events of that day was submitted on 27 September 2012. The complaint should therefore be declared inadmissible in light of the expiry of the six-month period pursuant to Rule 25 para. 3 of the Panel’s Rules of Procedure.

The complainant’s comments on HoM’s observations

24. In her additional observations of 30 May 2013, the complainant submits, in essence, that the internal division of powers within EULEX did not have relevance in relation to third parties. It is submitted that an EULEX staff member “*wearing a uniform falls under the jurisdiction of the Mission [...]. For a third party, the uniformed appearance suffices to attribute the person’s actions to the mission*”. There was no obligation for a third party to have knowledge whether an individual EULEX staff member personally exercised executive powers or not. In this regard, the complainant submitted that according to article 17 of the Law on Jurisdiction “*a police officer in uniform operating within a mission has the same executive powers as Kosovo police*”.
25. The complainant further submits that the EULEX officer had been wearing a police uniform and that every EULEX staff member is permanently under the jurisdiction of the mission.
26. In relation to the six-month time limit to lodge a complaint with the Panel, the complainant submits that, first, after the accident she had been on sick leave for a three months period. Second, she indicates that she believed that EULEX investigators would contact her in regard to this case; however, no EULEX personnel had ever done so. Thirdly, the complainant says she was also under the impression that the case was examined within the sending state of the EULEX staff member. In essence, the complainant expected to be informed about the results of these proceedings. As this did not happen, the complainant contacted the local Prosecution Office on an unspecified date and was informed that local courts lacked jurisdiction to proceed in cases against EULEX. Thereafter, the complainant lodged her case with the Panel. Due to the fact the EULEX staff was immune to local prosecution, the complainant submits that she addressed the Panel as a last resort.

Further submissions by the HoM

27. On 3 June 2013, following additional queries from the Panel, the HoM informed the Panel that EULEX Internal Investigation Unit (IIU) had launched an internal investigation into the incident on 7 June 2011. On 30 June 2011, as a result of its internal investigation EULEX concluded that the staff had breached EULEX Code of Conduct. As a consequence, the staff member's sending State finalized his mission and repatriated him to his home country. The case was closed on 13 July 2011. The Panel did not receive information as to whether disciplinary measures were actually imposed upon the staff member. On 22 November 2011, the Municipal Public Prosecutor of Pristina was informed by EULEX of the staff member's repatriation and that the Mission had closed its internal investigation on the case.
28. Further, EULEX submits that the incident amounts to a breach of the code of conduct but not to a human rights violation.

The Panel's Assessment

29. 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.
30. It further falls to the Panel to determine the legal characterisation of the complaint. It is of the view that the complaint should be examined under Article 8 of the European Convention for the Protection of Human Rights taken together with Article 13 of that same Convention.
31. According to Rule 25, paragraph 1 of the Rules of Procedure, the Panel can examine complaints relating to human rights violations by EULEX Kosovo in the conduct of its executive mandate.

EULEX police and the executive mandate

32. The circumstances of the current case relate to the acts and conduct of a EULEX Advisor to the Kosovo Police Department of Training. In this regard, it is noted that the HoM conceded that the EULEX staff member had been present at the time and place of the incident. It is further noted that the results of the internal inquiry showed that he had ran his car into the complainant and caused what EULEX characterises as "slight body injuries".
33. The Panel adopts the approach developed by the Court, that "[a] *State may also be held responsible even where its agents are acting ultra vires or contrary to instructions* (see *Ilascu and others v. Russia and Moldova*, application no. 48787/99, judgment of 8 July 2004, at par. 319, page 79).
34. EULEX submitted that its staff member was not vested with any executive powers and that, at the time of the incident, he was not

carrying out any official (EULEX) duties. Therefore, EULEX submitted that the incident was not in any manner connected to the EULEX Kosovo Mission mandate.

35. The Panel notes the view expressed by the International Law Commission that it is *“a particular problem [...] to determine whether a person who is a State organ acts in this capacity. It is irrelevant for that purpose if the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.”* Further, state responsibility is excluded if *“the act had no connection with the official function and was in fact merely the act of a private individual. The case of purely private conduct should not be confused with that of an organ functioning as such but acting ultra vires or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State* (see *“The International Law Commissions Articles on State Responsibility: Introduction, Text and Commentaries”*, James Crawford, Cambridge University Press (2002) at page 99).
36. In so far as EULEX argued that the officer concerned could not be regarded as being vested with executive powers because he had been working as a training advisor, the Panel is of the view that it is irrelevant whether he worked for one particular department of within EULEX or another. This is a matter of internal organization that cannot affect third party claimants.
37. The Panel notes in this connection that, pursuant to Article 17 of the Law on jurisdiction, *“[f]or the duration of the EULEX Kosovo in Kosovo, the EULEX police will have the authority to exercise the powers as recognized by the applicable law to the Kosovo Police and according to the modalities as established by the Head of the EULEX Kosovo”*. Therefore, EULEX police as such is in principle vested with the same executive powers as Kosovo police unless otherwise qualified by the modalities set out by the HoM. The Panel is unaware of any such modalities which would have the effect of restricting EULEX’s responsibility for the actions of its police officers merely on the strength of the fact that there were charged with training activities.
38. The Panel therefore rejects EULEX’s submissions that it cannot be said that EULEX had “effective control” or “ultimate authority and control” over the activities of the EULEX staff member in question and therefore cannot be held liable to acts or omissions imputable to it.
39. The Panel further notes that EULEX does not contest the fact that the impugned EULEX officer acted improperly. Nor it is in dispute that the complainant had suffered physical injury as a result of his misconduct. The complainant further submits that she had no legal avenue at her disposal to try to obtain some form of redress for the breach of her bodily integrity.

40. The Panel will consider whether the circumstances of the case are such as to be covered by the notion of EULEX's executive mandate. The Panel emphasizes that its task in this case is not to consider whether the officer's misconduct may be imputed to EULEX. Rather, it is called upon to determine whether, in the circumstances of the case and for the purposes of the effective exercise of its executive mandate, EULEX was obliged to provide adequate legal avenues with a view to ensuring adequate redress for the complainant and thus to comply with its human rights obligations under Articles 8 and 13 of the ECHR.
41. The Panel has taken the view that, based on the material before it, the manner in which EULEX has dealt with the disciplinary process concerning one of its police officer might raise an issue regarding the right of the complainant to obtain an adequate remedy pursuant to Article 13 of the ECHR and in relation to the rights guaranteed under Article 8 of the Convention. The Panel notes, in particular, that the information disclosed so far to the Panel does not provide clear indications of what steps, if any, were taken by EULEX to ensure that its actions did not result in a denial of complainant's right to seek and obtain an adequate remedy. The complaint therefore raises serious issues pertaining to Articles 8 and 13 of the ECHR and is not manifestly ill-founded. No other grounds to declare it inadmissible has been established.
42. Finally, the Panel does not accept EULEX's submissions that the claim is inadmissible under the six-month rule. The prejudicial effect caused by the absence of an effective remedy is ongoing. Furthermore, based on the material before the Panel, the complainant was not formally notified of EULEX's decision to dismiss the officer and/or of his repatriation. In that sense, she was denied an opportunity to challenge those decisions at the time when they were taken.
43. The Panel considers that the question whether the complainant's case falls within EULEX's executive mandate is closely linked to the merits of the complaint. It therefore joins this preliminary question to the merits.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

DECLARES ADMISSIBLE, without prejudging the merits, the complaint with regard to alleged violations of Article 8 in conjunction with Article 13 of the European Convention of Human Rights.

For the Panel,

John J. RYAN
Senior Legal Officer

Magda MIERZEWSKA
Presiding Member