



DECISION ON THE IMPLEMENTATION OF THE PANEL'S RECOMMENDATIONS

Date of adoption: 11 November 2015

Case no. 2011-20

X and 115 other complainants

Against

EULEX

The Human Rights Review Panel, sitting on 11 November 2015, with the following members present:

Ms Magda MIERZEWSKA, Presiding Member
Mr Guénaël METTRAUX, Member
Ms Katja DOMINIK, Member

Assisted by
Ms Joanna MARSZALIK, Legal Officer
Mr Paul LANDERS, 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 22 APRIL 2015

1. On 22 April 2015, the Panel rendered its decision in relation to the complaint filed by X and 115 other complainants against EULEX and made a number of recommendations to the Head of Mission (HoM) in accordance with Rule 34 of the Rules of Procedure. The decision read:

"THE PANEL, UNANIMOUSLY,

1. *Holds* that there has been a violation of Article 13 of the Convention [of Human Rights and Fundamental Freedoms];
2. *Holds* that that it is not necessary to consider the complaint under Article 6 of the Convention.
3. *Finds* it appropriate, in the light of its above findings of fact and law, to make the following recommendations to the Head of Mission under Rule 34 of its Rules of Procedure:
 - i. The HoM should instruct competent EULEX officials to make enquiries with Kosovo authorities whether an investigation in this matter is ongoing and, if so, at what stage of the process the matter stands. The HoM should inform the Panel of the result of this enquiry.
 - ii. Having received that information, the HoM should instruct EULEX Prosecutors to consider whether to take over the responsibility of this case pursuant to Article 7(A) of the Law No. 04/L-273 taking into account all relevant circumstances, as highlighted above, in particular the need for the Mission to guarantee the effective protection of the complainants' rights. The HoM should inform the Panel of the Prosecutor's decision in that regard.

The Panel respectfully asks the HoM to provide the Panel with the requested information no later than 15 June 2015."

2. The Panel recalls that the Basic Prosecution Office in Mitrovica registered a complaint about a criminal offence having been committed, lodged by the complainants' representative, on 21 November 2013. Initially, EULEX assigned a prosecutor to deal with it; subsequently a mixed team of EULEX and Kosovo Prosecutors was assigned to the case. On 30 May 2014, the Law on amending and supplementing the laws related to the mandate of the European Union Rule of Law Mission in the Republic in Kosovo came into force with retroactive effect from 15 April 2014. Pursuant to its Article 1. A (1) the EULEX prosecutors have the authority to conduct criminal investigations in principle only in cases for which the decision to initiate investigation has been filed before 15 April 2014. In the present case an investigation was initiated on 15 April 2014 precisely. The case therefore could not be regarded as an ongoing case within the meaning of this provision and the investigation could not be conducted by the EULEX Prosecutors. Consequently, the investigation was taken over by the Kosovo prosecutors of the Basic Prosecutors Office in Mitrovica.
3. The present decision constitutes a follow-up to the Panel's decision of 22 April 2015 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).

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

4. On 31 August 2015, the HoM informed the Panel about a number of measures which he had taken with regard to the recommendations of the Panel.
5. In particular, he wrote to the Acting Head of EULEX Executive Division and the Acting Chief EULEX Prosecutor requesting them to consider the decision of the Panel and to assess whether there would be a possibility to apply Article 7A of the Law no. 04/L-273 on Jurisdiction and Competencies of EULEX Judges and Prosecutors as amended (Law on Jurisdiction) to the criminal case subject to the Panel's decision and assign the case to a EULEX Prosecutor due to "extraordinary circumstances" within the meaning of this provision.
6. On 19 August 2015, the Acting Head and the Acting Chief Prosecutor informed the HoM that, as required by Article 7A, the case and the possibility of taking it over by EULEX Prosecutors had been assessed jointly by the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor. They concluded, nevertheless, that the "extraordinary circumstances" required by Article 7A had not been met and jurisdiction of the EULEX Prosecutors could not be triggered. However, the Acting Chief EULEX Prosecutor assured the HoM that, should such circumstances emerge in the future, the case and the applicability of Article 7A might be reconsidered.
7. Further, the Acting Chief EULEX Prosecutor submitted that in its decision on the merits of the present case the Panel had criticised EULEX for initiating the investigation one day after the so called "cut-off date" of 14 April 2014. He argued that there had not been so far any ruling to initiate investigation, but the case currently remained in the preliminary investigative phase with a view to determine whether a criminal offence has been committed and if so, who would be the suspect of that offence.
8. The Acting Chief EULEX Prosecutor also submitted that the complainants' representative had not responded to the inquiries sent by the local prosecutor and the information provided by the complainants' appeared to have very limited evidential value.
9. Despite the above, the local Prosecutor assigned to the case sent the criminal report to the Special Prosecution Office of Kosovo for assessment whether it would fall under their competence. The reply was negative; according to the Deputy Chief Prosecutor of the Special Prosecution Office, there was no indication of organised crime involvement in the case and thus it fell outside of its jurisdiction. Consequently, the case currently remains with the Kosovo prosecuting authorities.

10. The Acting Chief EULEX Prosecutor assured that the EULEX Prosecutor previously assigned to the case would be available to the local prosecutor in their mentoring and advising capacity. Moreover, a detailed petition by any party can be addressed at any time to the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor if they consider that the circumstances have changed and the conditions set out in Article 7 A of the Law on Jurisdiction are met.

III. INFORMATION FROM THE COMPLAINANTS

11. On 13 September 2015, the complainants submitted their reply to the information provided by HoM.
12. They disagreed with the HoM's submission that the case is outside the jurisdiction of EULEX.
13. They also maintained that, contrary to the HoM's assertions, their representatives had never been contacted by EULEX.
14. In their opinion, the investigation failed the European standards of due diligence while investigating the case.

IV. EVALUATION BY THE PANEL

15. The Panel takes note of the steps taken by the HoM to implement the Panel's recommendations.
16. The Panel is satisfied that the HoM implemented its recommendation to enquire with the local authorities whether the investigation in the case was ongoing. It is noted in this context that the case was first brought to the attention of the Kosovo prosecuting authorities almost two years ago, in November 2013. No information has been provided to the Panel by the Head of Mission as to whether there was any evidence taken during the investigation conducted by the Kosovo prosecuting authorities, including questioning of witnesses. Likewise, no information has been provided as to the possible timeframe within which the case may be finalised. Nor has it been established that victims were involved meaningfully in the ongoing process of investigation. It has not therefore been shown to the Panel's satisfaction that there has been real progress in the investigation. In those circumstances, the complainant's right to an effective remedy pursuant to Article 13 of the Convention still appears to be affected by the absence of a demonstrable effort to promptly and effectively investigate this case.

17. Furthermore, the Panel notes the decision of the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor not to assign the case to a EULEX Prosecutor. The Panel considers that the effectiveness of the investigation would have been greatly increased if it could have drawn upon EULEX's expertise and resources.
18. In view of the above, the Panel considers that the steps taken so far by the Mission have not been such as to ensure that the right of the complainants to an effective remedy is being effectively protected. Whilst the Panel needs not decide the matter at this point, it notes that the apparent failure of the Kosovo authorities to diligently and effectively investigate the matter might be regarded, for the purpose of Article 13 of the Convention, as "extraordinary circumstances" (Article 7A) justifying the Mission taking over the responsibility over that case.
19. The Panel therefore invites the Mission to continue liaising with the competent Kosovo authorities with a view to following up on the progress of this case.
20. The Panel further invites the Head of the Mission to provide information on the manner in which the notion of "extraordinary circumstances" within the meaning of the said Article 7 A as a decisive criterion for cases being taken over by EULEX prosecuting authorities is interpreted in practice.
21. Having examined the information provided by the HoM with regard to the implementation of the recommendations of the Panel,

THE PANEL UNANIMOUSLY

Declares that the HoM has implemented in part the Panel's recommendations.

Declares that the right of the complainants to an effective remedy remains affected by the absence of a demonstrable effective investigation of that case.

Invites the HoM to provide the clarification sought regarding the Mission's interpretation of "extraordinary circumstances" pursuant to Article 7A of the Law on Jurisdiction.

Invites the Mission – through the HoM – to seek regular updates from the Kosovo authorities on the progress of their investigation.

Invites the HoM to update the Panel of the progress of the investigation no later than 28 February 2016.

Decides that it remains seized of the matter.

For the Panel,

Joanna MARSZALIK
Legal Officer

Magda MIERZEWSKA
Presiding Member