



DECISION ON ADMISSIBILITY AND MERITS OF THE CASE

Date of adoption: 16 September 2021

Case no. 2018-01

Y.B. 2

Against

EULEX

The Human Rights Review Panel, sitting on 16 September 2021 with the following members present:

Ms Anna AUTIO, Presiding Member
Mr Alexander FASSIHI, 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 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 on 20 February 2018.
2. By letter of 6 November 2018, the Panel informed the complainant's representative that the Head of Mission ("HoM") of the European Union Rule of Law Mission in Kosovo, EULEX Kosovo ("the Mission") had been notified that this case had been registered.
3. On 22 March 2019, the Panel communicated the complaint to the HoM, inviting the Mission to submit written observations on the issues raised in the complaint no later than 3 May 2019.

4. By email of 19 April 2019, the Mission requested an extension of the deadline to submit its observations on the admissibility and merits of the complaint. By email of 25 April 2019, the Panel extended the deadline to 3 June 2019.
5. By email of 30 May 2019, the Mission informed the Panel that it required specific additional information before it could finalize its observations. Specifically, the Mission requested the Panel to invite the complainant to provide the following documents:
 - a. The full transcript in English and Albanian of the broadcast "*Justice in Kosovo*" aired on 2 February 2018, stating that the transcript provided by the complainant did not include the questions asked by the journalist to the Special Prosecution Office of the Republic of Kosovo (SPRK) prosecutor and was only in English; and
 - b. The full article from the magazine "*Slobodna Bosna*", containing the interview given by the SPRK prosecutor on 7 February 2018, with the Mission stating that the article was quoted several times by the complainant, but it was not submitted in written format to the case file.
6. By letter of 13 June 2019, the complainant was requested to provide the additional information as requested by the HoM. The complainant was invited to provide these documents by 14 July 2019.
7. On 14 July 2019, the complainant requested a short extension of the deadline. The Panel extended the deadline to 15 August 2019.
8. On 30 July 2019, the complainant submitted the requested additional documents.
9. By letter of 5 August 2019, the Panel submitted the additional documents to the HoM, and invited the Mission to provide its comments on the admissibility and merits of the issues raised in the complaint by 16 September 2019.
10. By email of 3 March 2020, the Mission indicated that it had decided to prioritize the submission of its observations on the admissibility and/or merits in the backlog of cases dating from 2016, before proceeding with later cases.
11. By email of 12 March 2020, the Mission informed the Panel that the complaint number 2018-01 was "in the process of review" by the Human Rights and Legal Office of the Mission.
12. On 21 March 2021, the HoM submitted his observations on the admissibility and merits of the complaint.
13. On 31 March 2021, the HoM's observations were submitted to the complainant, who was given until 31 May 2021 to make any further submissions in response to that letter.
14. On 31 May 2021, the complainant's representative confirmed by telephone that they did not intend to provide any further response.

II. FACTS

15. The complainant is a resident of Bosnia and Herzegovina.
16. On 4 July 2014, a EULEX Prosecutor with the SPRK filed an indictment against a certain N.K. with the Basic Court of Pristina. He was charged with organized crime, aggravated

murder and various drug offences, which had all allegedly taken place in Bosnia and Herzegovina.

17. The complainant's name appeared in the indictment. In particular, it was stated that the indicted N.K. "in co-perpetration" with the complainant and several other persons,

"did organize, establish, supervise, manage and/or direct this Structured and Organized Criminal Group (OCG) or did actively participate in this OCG, knowing that his participation will contribute to the commission of the serious crime of Aggravated Murder against rival gangster boss [R.D.] (...)"

18. The indictment further submitted that N.K. had,

"attended a number of meetings with [the complainant and other persons], in Bosnia and Herzegovina. The participants of these meetings formed an Organized and Structured Criminal Group to plan, plot and murder [sic] rival gangster boss [R.D.] (...)"

19. On 1 February 2018, the Basic Court of Pristina issued its Judgment (PKR 375/14) against N.K. and found him guilty of one count of the indictment, but acquitted him of the counts relating to participation in an Organized Criminal Group together with other persons, including the complainant.
20. On 2 February 2018, the EULEX Prosecutor assigned to the case participated in a television programme called "Justice in Kosovo" (*Drejtësia në Kosovë*). In this programme, the EULEX Prosecutor was interviewed, along with a number of other persons who had been involved in the trial.

The EULEX Prosecutor's statements in the interview

21. In the course of his interview, the EULEX Prosecutor also made some references to the complainant. Here follows an excerpt:

[...]

Interviewer: *Mr. Prosecutor, one of the longest court processes in the history of trials in Kosovo has ended today, the trial against [N.K.]. He was convicted to six years in prison by the Court's Judgment. As a prosecutor, are you satisfied with this decision and what is your opinion of it?*

EULEX Prosecutor: *As the Prosecutor in the case I was pleased that this defendant was convicted of one count of drug trafficking, but I was also disappointed that he was not convicted of the organized crime and aggravated murder charges against the victim named [R.D.], who was considered a great war commander and a hero in Bosnia during the Bosnian war.*

Interviewer: *One of the issues the Court mentioned today is that witnesses failed the test when questioned by the Defense. What do you think the problem is? Was it because witnesses were challenged, or because they have problems with their past?*

EULEX Prosecutor: *I think it is important to note that before the trial and throughout the trial many of our witnesses were threatened with death. We also had evidence that some of them were bribed, or were offered bribes. And to penetrate a well-organized criminal network – often you have to – and about the only way you can penetrate is to somehow get a member, or members, of the organization to be willing to come forward. And the profile of these people is generally poor education, no employment, criminal*

history, and easily bribed, or easily persuaded by threats. It's like the classic organized crime in Italy called "Omerta". It's called the code of silence. If you break the code of silence, we will kill you, or we will kill your family, we will destroy your property, we will ruin your reputation. And this was a case where there was a history of people being killed, their car being bombed, grenades thrown, the media destroying them, so that they couldn't get a job. So you have witnesses that can definitely be tempted to change their story, and so. [...] But when you have a serious charge like murder or organized crime it's a prosecution's burden. We have to meet the burden, and it should be a high burden, because of such a serious crime. And the Judge felt that we didn't meet this burden. And, I disagree. But, of course, I respect the Court's decision. And that's why we have an appeal process, and I will do the appeal.

Interviewer: Attempts to bribe witnesses, threats and intimidation have been mentioned. If you have any evidence, should you investigate these cases?

EULEX Prosecutor: Not only is there enough proof, there is actually a current trial going on in Bosnia against three defendants who are charged with intimidating and threatening one of our most important witnesses in our trial. One of the defendant's names is [complainant], and he is being prosecuted in Bosnia right now, along with two of his close friends for actually threatening and intimidating one of our witnesses. So, yes, the answer to your question is yes, there is enough evidence, and there has been an ongoing trial regarding these defendants for over a year now.

Interviewer: You say that crime in the Balkans is similar to that in Italy. Who is the boss and does he work from the criminal network in the Balkans?

EULEX Prosecutor: Well, in our indictment we allege that [complainant] ordered the murder of [R.D.], and that the defendant [N.K.] is a loyal soldier and a high-ranking person in this organized criminal group, found the assassins, and they carried out a very well-executed assassination, a brutal assassination of this victim. As to whether the organized criminal group is still going on, I don't know. But it certainly is a possibility.

[...]

Interviewer: The case was investigated mainly in Bosnia. Was it investigated properly and were the records submitted? And was the evidence sufficient or could it have been investigated further?

EULEX Prosecutor: It was a very big challenge that we were given this case when all the evidence, basically all the evidence and all the witnesses were in Bosnia and Serbia, or elsewhere. [...] And so we had a tremendous challenge because all your evidence and all your witnesses are in Bosnia. They are subject to being threatened there, bribed. They have no money, they have no future. They are afraid for their families. [The complainant] had his media empire, and one by one, he would destroy our witnesses' reputation in his media. So, who wants to testify? Who's willing to? And we even had trouble getting the complete case file. I made five trips to Sarajevo to get the evidence. And, over time, we developed cooperation with Bosnia, but it was very, very difficult.

Interviewer: You mentioned that [N.K.] came to Kosovo in order to avoid trial in Bosnia. What do you think, what was his objective? To avoid the process and to come and be tried by the Court and a Judge and a Prosecutor financed by the European Union?

EULEX Prosecutor: Well, you know, to some degree you're asking me to speculate, but, perhaps he never thought he would be arrested in Kosovo. And for eight months he wasn't. And if he wasn't arrested, I think, he still would be hiding in Kosovo. So, I don't

know. I cannot tell you what goes on in his mind, but we stand by our indictment and believe that he was involved in this brutal murder.

[...]

The complainant's initial action

22. On 8 February 2018, the complainant wrote to the Chief EULEX Prosecutor to complain about the statements given by the EULEX Prosecutor in the interview.
23. The complainant specifically referenced a Ruling by the Presiding Judge of the Basic Court of Pristina (PPKR 86/13) of 4 December 2014, ordering, *inter alia*, that,

"The presentation and publication of the counts against defendant [N.K.] shall hereinafter not include the names of persons who are alleged by the Prosecution to be un-indicted co-perpetrators in indictment PPS 42/13. This includes both oral and written forms."

24. The complainant also referenced the Decision and Findings of 19 October 2016 of the Human Rights Review Panel in case number 2014-37, which had found a violation of the complainant's rights under Article 8 of the European Convention on Human Rights (ECHR) and had made the following recommendations to the HoM of EULEX:

a. *The HoM should make a declaration acknowledging that the circumstances of the case amounted to a breach of the complainant's rights attributable to the acts attributable to EULEX in the performance of its executive mandate;*

b. *The HoM should provide copy of the present Decision to the EULEX Prosecutors through the relevant channels. This should serve to inform the EULEX Prosecutors of the general nature of an obligation to make it their priority to protect rights and freedoms of not only suspects and the accused but other persons involved in cases they investigate.*

(See: <https://hrrp.eu/docs/decisions/Decision%20and%20findings%202014-37.pdf>)

25. The complainant in his complaint on 8 February 2018 requested that the following measures be adopted by the Chief EULEX Prosecutor:

- *Firstly, to issue a public apology to [complainant], which explains clearly that:*
 - *[Complainant] is not a suspect or defendant in the [N.K.] case; and*
 - *There has been no judicial determination that [complainant] was involved in the alleged murder of [R.D.], and the Basic Court of Pristina acquitted [N.K.] of the alleged murder of [R.D.].*
- *Secondly, to request BIRN (Balkan Investigative Reporting Network) to retract its article concerning [N.K.], or delete any references to [complainant], and withdraw authorization for any videos which are available on other sites; and*
- *Thirdly, in light of [the EULEX Prosecutor's] blatant infringement of a Court protective order and the directives set out by the [Human Rights Review] Panel, withdraw [the EULEX Prosecutor] from the [N.K.] case and appoint a Prosecutor who is duly instructed in the importance of respecting the presumption of innocence and rights of third persons concerned by the [N.K.] case.*

26. By letter of 12 February 2018, the Chief EULEX Prosecutor rejected the complaints. Specifically, the Chief EULEX Prosecutor contended, *inter alia*, that,

"[...] nothing of what was said by [the EULEX Prosecutor] during the interview is unknown to the public or different from what [was] propounded by the prosecutor of the case throughout the criminal proceedings.

During the interview [the EULEX Prosecutor] described in general terms the threats and the offers of bribes that a number of witnesses in the case allegedly received before and throughout the trial, explained the sociological phenomenon behind the refusal to testify and the recantation of previous statements by some witnesses in certain contexts and answered the journalist's question as to the evidence of witness intimidation.

It is in relation to the latter that the existence of a trial ongoing in Bosnia over a year against three defendants and pertaining to accusations of intimidation of one of the prosecution witnesses in the case PPKR 86/13 was mentioned during the interview.

And yet, in no part of the interview I could find a statement by [the EULEX Prosecutor] that the defendants in that trial are guilty or that they will be found guilty. [...]

Based on the foregoing, I don't find in the interview given by [the EULEX Prosecutor] any intent to defame the defendants in the case ongoing in Bosnia and/or to put into question the right to the presumption of innocence they enjoy. [...]

[...] in relation to your request to adopt measures to preserve the presumption of innocence and the reputation of [complainant], I consider that the statements made by [the EULEX Prosecutor] during the interview (1) as to the existence in Bosnia of criminal proceedings against three defendants for alleged intimidation of a prosecution witness and (2) as to the alleged role played by [complainant] in the alleged murder of [R.D.] by [N.K.] were given without any intent to make prejudice to the presumption of innocence (the first) and the reputation (the second) of [complainant]. [...]

However, it seems to me that the way the indictment was drafted, the subsequent issuance of the Order by the presiding judge and the legitimate concern raised with your letter require that any doubt is dispelled as to the procedural position of [complainant] in the case PPKR 86/13 (PPS 42/13)."

27. On 14 February 2018, in consequence of the considerations expressed in his letter, the Chief EULEX Prosecutor issued the following press release:

"Pristina, 14 February 2018 – *In relation to the interview broadcasted on 2nd February 2018 to the television program "Justice in Kosovo", and pertaining to the recent court decision in the case against [N.K.], the EULEX Prosecution Office wishes to clarify that at no time during the criminal proceedings before the Basic Court of Pristina [complainant] was a defendant, and that there has been no judicial determination that [complainant] was involved in any way in the alleged murder of [R.D.]."*

III. COMPLAINT

28. The complainant alleges that the actions of the EULEX Prosecutor violated his rights in providing public statements which created the appearance that:
- a. The complainant was indicted for murder in the case against N.K.;

- b. It has been factually proven that the complainant was found to be responsible for severe acts of witness intimidation, including death threats.
- 29. The complainant alleges that these actions:
 - a. Violated his presumption of innocence as protected by Article 6(2) of the ECHR; and
 - b. Violated his right to a private life by damaging his reputation under Article 8 of the ECHR.
- 30. The complainant alleges that the gravity and harm occasioned by these violations are further aggravated by:
 - a. The fact that the EULEX Prosecutor had been previously instructed by the Judge of the Basic Court of Pristina, and the Human Rights Review Panel that such statements would undermine the complainant's protection and security, and violate his rights under Article 8 of the ECHR; and
 - b. The Mission's failure to comply fully with the directives of the Human Rights Review Panel to take specific steps to ensure that EULEX prosecutors did not commit further violations of the complainant's rights, and to issue a declaration that would have helped restore the complainant's reputation.
- 31. The complainant requests that the HoM be invited to:
 - a. To instruct the Head of the SPRK to withdraw the particular prosecutor, who is responsible for cumulative violations of the complainant's rights, from the ongoing case against N.K.; and
 - b. Issue a public apology to the complainant for the violation of his rights as set out above.

IV. REQUEST FOR AN INTERIM MEASURE

- 32. The complainant contends that interim measures are necessary in order to ensure that his right to a fair trial in the proceedings in Sarajevo are not prejudiced further through the actions of EULEX.
- 33. To this end, the complainant requests that the Panel order the EULEX Prosecution authorities to:
 - a. Issue an internal instruction to the effect that no EULEX prosecutors are to refer in their public statements to the complainant, or the ongoing proceedings in Sarajevo concerning the complainant;
 - b. Request BIRN (Balkan Investigative Reporting Network) to retract its article concerning N.K. that refers to the EULEX Prosecutor's statements or delete any references to the complainant and withdraw authorization for any videos which are available on other sites; and
 - c. Issue a declaration, which can be communicated by the complainant to the relevant authorities in Sarajevo, to the effect that the statements of the EULEX Prosecutor are not to be considered as an accurate reflection of the evidential findings of the Basic Court in the case against N.K.

V. THE PANEL'S ASSESSMENT OF THE REQUEST FOR AN INTERIM MEASURE

34. The Panel recalls *Rule 22. Interim Measures, paragraph 1*, of its Rules of Procedure:

"The Panel, or where appropriate, its Chairperson may, at the request of a complainant, or at its own discretion, propose to the HoM that an interim measure it considers necessary be adopted in the interests of the proper conduct of proceedings before it. The HoM will take a decision."

35. The Panel notes that Rule 22(1) provides that the Panel may "propose an interim measure" to the HoM, and cannot issue "orders" to EULEX or its staff members.
36. The Panel notes further that the executive mandate of EULEX in the Kosovo justice system was terminated on 14 June 2018.
37. In the interim, as outlined in the HoM's submissions on admissibility below, the judicial proceedings against complainant in Bosnia and Herzegovina relating to the accusation of witness intimidation, were finally concluded with a Judgment of the Appeals Panel on 25 October 2018.
38. In consequence, the Panel finds that the complainant's request for the proposal of an interim measure has become without object.
39. Therefore, the Panel rejects the complainant's request for the proposal of an interim measure.

VI. SUBMISSIONS OF THE PARTIES REGARDING ADMISSIBILITY

The complainant

40. As summarised above, the complainant alleges that the EULEX Prosecutor assigned to the criminal proceedings against N.K. had made public statements in a television interview that violated the complainant's rights to the presumption of innocence in respect of criminal proceedings against him in Bosnia and Herzegovina, as protected by Article 6(2) of the ECHR. In addition, the complainant alleges that his right for the respect for his private life as protected by Article 8 of the ECHR has been violated because of the damage to his reputation caused by the EULEX Prosecutor's statements.
41. Regarding Article 6(2) ECHR, the complainant submits that this article would be violated if a public official uses language which would encourage the public to believe that a suspect is guilty, or to otherwise prejudge the assessment of the facts by the competent Court (see: ECtHR Judgment of 24 April 2008, *Ismoilov and Others v. Russia*, No. 2947/06, para. 61; ECtHR Judgment of 26 March 2002, *Butkevičius v. Lithuania*, No. 48297/99, para. 53.)
42. The complainant submits further that the duty to respect the presumption of innocence also applies to statements which have a close connection to criminal proceedings taking place in another jurisdiction. Although the proceedings against the complainant for obstruction of justice are taking place in Bosnia, these proceedings are closely connected with the case against N.K. taking place in Kosovo. (See: ECtHR Judgment of 24 April 2008, *Ismoilov and Others v. Russia*, No. 2947/06, para. 163).
43. The complainant alleges that by his statements, the EULEX Prosecutor went beyond merely alleging a suspicion that the complainant was involved in witness intimidation, but

also claimed that the complainant was part of a criminal organization, and described it in terms that suggested it was an established fact.

44. Regarding Article 8 ECHR, the complainant submits that the case-law of the European Court of Human Rights has determined that this right encompasses the protection of a person's reputation, so long as the "*publication constitutes a direct attack on a person's private life of such a gravity as to compromise his personal integrity*" (See ECtHR Judgment of 21 September 2010, *Polanco Torres and Movilla Polanco v. Spain*, No. 34147/06, para. 40).
45. The complainant submits that the statements of the EULEX Prosecutor concerning the complainant amount to a grave attack on his reputation. The EULEX Prosecutor's statement that the indictment alleged that the complainant had ordered N.K. to murder R.D. created the impression that the complainant was officially charged with murder, and contradicted the findings of the Basic Court of Pristina, which had acquitted N.K. of the murder of R.D.
46. Furthermore, with his statements, the EULEX Prosecutor contravened the Ruling of the President of the Basic Court of Pristina of 4 December 2014 to refrain from mentioning the complainant's name in connection with the indictment.
47. The complainant also recalled the Decision of the Panel in case number 2014-37, where the Panel had found that statements such as those made by the EULEX Prosecutor, "*[were] capable of stigmatizing him and of having a major impact on his personal life and reputation*". (See: *Y.B. against EULEX*, Decision and Findings of 19 October 2016, para.53).
48. The complainant further submits that the failure of the HoM to "*make a declaration acknowledging that the circumstances of the case amounted to a breach of the complainant's rights*", as recommended by the Panel in its abovementioned decision, has meant that the harm to the complainant's reputation has accumulated.

Head of Mission ("HoM")

49. In his observations on the complaint, the HoM submitted that,

"[...] there are sufficient grounds for the complaint to be struck out in line with Rule 29 *bis* of the Panel's Rules of Procedure, because the grievances contained therein relating in particular to Article 6(2) and Article 8 of the European Convention on Human Rights, have been completely resolved since the complaint was filed in February 2018."

Application of Rule 22 bis of the Panel's Rules of Procedure

50. The Mission noted that the complaint is dated 13 February 2018 and that the complaint was communicated to the HoM for his observations on 22 March 2019. The Mission submits that in the period between when the case was first filed and its communication to HoM a number of significant developments occurred.
 - a. Firstly, on 14 June 2018, the EULEX executive mandate in the Kosovo justice system came to an end, and all the Mission's prosecutorial and jurisdictional functions were terminated on that date, leading to the departure of all International Judges and Prosecutors from the Mission. In light of this development the request of the complainant, "*To instruct the Head of the SPRK*

to withdraw the particular prosecutor, who is responsible for cumulative violations of complainant's rights, from the ongoing case against N.K.," has become irrelevant.

- b. Secondly, on 25 October 2018 the Appeal Panel of the Court of Bosnia and Herzegovina (BiH) delivered an appeals judgment in the case of the complainant and others, dismissing as ill-founded the appeal filed by the BiH Prosecutor's Office, and upholding the trial judgment delivered by the Court of BiH on 16 May 2018 which acquitted the complainant of the charges. Therefore, the Mission submits that it is evident that no interference with the complainant's right to a fair trial ever occurred. Three months after the airing of the television programme, the complainant was acquitted by a first instance court and then five months later by a final court judgment.
- c. [...]
- d. Fourthly, in response to the letter from the complainant of 8 February 2018, on 14 February 2018 the Mission, through the Office of the Kosovo Chief State Prosecutor, issued a clarification to the press emphasizing that, "[...] *at no time during the criminal proceedings before the Basic Court of Pristina [complainant] was a defendant, and that there has been no judicial determination that [complainant] was involved in any way in the alleged murder of [R.D.]*."

51. In light of this information, the Mission submits that all matters alleged in the complaint have been resolved, and that, therefore, the complaint should be struck out by the Panel pursuant to Rule 29 *bis*, paragraph 1(b), of the Rules of Procedure.

Complaint manifestly ill-founded

- 52. Alternatively, should the Panel decide not to strike out the complaint, either in part or in full, the Mission submits that the complaint should be declared inadmissible as manifestly ill-founded.
- 53. The Mission submits that the statements given by the EULEX Prosecutor during the television programme "*Justice in Kosovo*" on 2 February 2018 cannot be considered a threat to the presumption of innocence in relation to judicial proceedings in Bosnia and Herzegovina, nor a serious attack on the complainant's reputation amounting to a violation of his right to respect for his private life as protected by Article 8 ECHR.
- 54. Regarding the allegations of a violation of Article 6(2) ECHR, the Mission submits that the remarks made in the interview cannot be considered as prejudicial statements within the meaning of the ECHR. The Mission concedes that the EULEX Prosecutor could have been more circumspect during the interview, and at the time it promptly issued a clarifying statement which was disseminated on 14 February 2018 to a wide range of media outlets.
- 55. The Mission contends that, even if one accepts that the public statements by the EULEX Prosecutor were theoretically prejudicial to the complainant's case in Bosnia, the final acquittal of the complainant in October of the same year categorically proves and demonstrates beyond any doubt that the complainant's fears that the presumption of innocence had been or would be prejudiced were not objectively justified in the event, and thus there is no concrete evidence of any interference in his right to be presumed innocent of the charges laid against him in the proceedings in Bosnia.
- 56. Regarding the allegations of a violation of Article 8 ECHR, the Mission notes that, according to the jurisprudence of the European Court of Human Rights, in order for an

interference with someone's reputation to come within the scope of the protection of private life, an attack on a person's reputation must attain a certain level of seriousness and must cause prejudice to the personal enjoyment of the right to private life (See: ECtHR Judgment of 7 February 2012, *Axel Springer AG v. Germany*, No. 39954/08, para. 83; ECtHR Judgment of 29 March 2016, *Bédat v. Switzerland*, No. 56925/08, para. 72; ECtHR Judgment of 27 June 2017, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, No. 17224/11, para.76).

57. While the Mission acknowledges that the EULEX Prosecutor could have been more circumspect during his interview, the Mission considers that it had clarified any misunderstandings with its media statement of 14 February 2018.
58. Furthermore, the Mission submits that it is not proven that the interview was substantially circulated in Bosnia and Herzegovina. The Mission claims that it was only able to identify a handful of articles that referred to the interview.
59. More specifically, the Mission submits that the complainant has not provided any concrete evidence that his private life has been compromised in any way by the statements made by the EULEX Prosecutor in the interview, which was only broadcast in Kosovo. In that sense, the Mission noted that the complainant continued to be a member of the Parliament of Bosnia and Herzegovina until 23 December 2019, and between 23 December 2019 and 2 June 2020, he served as the Minister of Security in the Government of Bosnia and Herzegovina.
60. In light of these considerations, both regarding Article 6(2) and Article 8 ECHR, the Mission requests that the Panel declare the complaint inadmissible as manifestly ill-founded.

VII. THE PANEL'S ASSESSEMENT REGARDING THE ADMISSIBILITY OF THE CASE

61. Before considering the complaint on its merits, the Panel must decide whether to accept the complaints, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
62. The Panel reiterates that according to Rule 25, paragraph 1, of its Rules, the Panel can only examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate.
63. The Panel reiterates that the actions or omissions attributable to the prosecutors during the investigative phase of criminal proceedings may not be considered as being made in the context of "judicial proceedings". Actions of an EULEX prosecutor taken while examining a case are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel's mandate until at least the time when an indictment has been filed with a court competent to examine the merits of a case (see, *Thaqi against EULEX*, no. 2010-02, 14 September 2011, paras. 63-64).
64. The Panel considers, *mutatis mutandis*, that statements made in public by a EULEX Prosecutor after the conclusion of a criminal trial may also not be considered as being made in the context of "judicial proceedings", but remain within the definition of the executive mandate of EULEX.

65. Therefore, the Panel finds that the statements made by the EULEX Prosecutor in the television programme "Justice in Kosovo" of 2 February 2018 come within the scope of the jurisdiction of the Panel.

Regarding the request to strike out

66. In its submissions, the Mission argues that the issues raised in the complaint have been completely resolved, due to (a) the conclusion of the executive mandate of EULEX on 14 June 2018; (b) the acquittal of the complainant in a final decision by the Appeal Panel of the Court of Bosnia and Herzegovina on 25 October 2018; and (c) the public clarification of 14 February 2018 issued by the Chief EULEX Prosecutor regarding the status of complainant in the criminal proceedings in Kosovo.

67. For these reasons, the Mission submits that it is no longer justified for the Panel to continue the examination of the complaint and it should be struck out in accordance with Rule 29 *bis*, paragraph 1(b), of the Rules of Procedure.

68. The Panel cannot agree with this line of reasoning. The alleged interferences with the complainant's rights took place at a particular moment in time, and the Mission should not be permitted to escape accountability for these alleged interferences by the mere passing of time. The Panel considers that the alleged interferences with the complainant's rights merit further examination, irrespective of subsequent events.

69. Therefore, the Panel rejects the Mission's request to strike out the complaint.

70. The complaint refers to alleged interferences with two rights as protected by the ECHR, namely the right to the presumption of innocence as protected by Article 6(2), and the right to respect for his private life as protected by Article 8. The Panel will examine the admissibility of each complaint in turn.

Regarding the presumption of innocence

71. The complainant maintains that, by his statements, the EULEX Prosecutor exercised undue influence over the criminal proceedings on a charge of obstruction of justice being conducted against the complainant in the courts of Bosnia and Herzegovina. The complainant alleges that, because the proceedings in Bosnia concerned intimidation of a witness in the proceedings in Kosovo, there is a "close link" between both sets of proceedings. In support of his argument, the complainant relied on the ECtHR Judgment in the case of *Ismoilov and Others v. Russia* (op.cit. para. 41).

72. In addition, the complainant submits that the television interview of the EULEX Prosecutor was available in Bosnia and Herzegovina, and that his statements regarding complainant had been widely reported in Bosnia.

73. The Mission contends that the statements made by the EULEX Prosecutor in the television programme cannot be considered prejudicial to the presumption of innocence, within the meaning of the Article 6(2) ECHR. The Mission submits that there is no concrete evidence to support this allegation, all the more so because the complainant was acquitted in final instance by the Appeal Panel of the Court in Bosnia and Herzegovina. Furthermore, the Mission submits that it is not proven that the EULEX Prosecutor's interview was "substantially circulated" in Bosnia and Herzegovina.

74. The Mission considers that this complaint should be declared inadmissible as manifestly ill-founded.

75. The Panel recalls the ECtHR Judgment in *Ismoilov and Others v. Russia*, which concerned statements made by officials in Russia in the context of extradition proceedings to Uzbekistan. The ECtHR set out the general principles regarding the presumption of innocence as follows:
- “161. The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, § 35). It prohibits the premature expression by the tribunal itself of the opinion that the person “charged with a criminal offence” is guilty before he has been so proved according to law [...] It also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority [...]”
76. With respect to statements by public officials in one country making statements regarding guilt or innocence with respect to criminal proceedings taking place in another country, this ECtHR Judgment states that,
- “163. [...] In the present case, the Court must also ascertain whether there was any close link, in legislation, practice or fact, between the impugned statements made in the context of the extradition proceedings and the criminal proceedings pending against the applicants in Uzbekistan which might be regarded as sufficient to render the applicants “charged with a criminal offence” within the meaning of Article 6 § 2 of the Convention [...].
164. The Court observes that the applicants' extradition was ordered for the purpose of their criminal prosecution. The extradition proceedings were therefore a direct consequence, and the concomitant, of the criminal investigation pending against the applicants in Uzbekistan. The Court therefore considers that there was a close link between the criminal proceedings in Uzbekistan and the extradition proceedings justifying the extension of the scope of the application of Article 6 § 2 to the latter. [...].
77. The Panel notes that the criminal proceedings against the complainant in Bosnia and Herzegovina were linked to the criminal proceedings conducted in Kosovo only to the extent that the proceedings in Bosnia and Herzegovina concerned, *inter alia*, intimidation of a witness relevant to the proceedings in Kosovo. No evidence has been presented to show that the proceedings in Bosnia and Herzegovina were either initiated as a consequence of the proceedings in Kosovo, or that the judicial authorities in Bosnia and Herzegovina were in any way connected to the judicial authorities in Kosovo. Indeed, there is no extradition treaty between Kosovo and Bosnia and Herzegovina.
78. In these circumstances, the Panel is not convinced that any statements made by a public official in Kosovo can in any objective way impinge upon the fairness of a criminal proceeding taking place in Bosnia and Herzegovina. The Panel considers that the complainant has not substantiated his claim that the statements made by the EULEX Prosecutor in the television programme “Justice in Kosovo” had a sufficiently close connection to the proceedings in Bosnia and Herzegovina such that they violated the complainant's right to the presumption of innocence in the criminal proceedings against him in Bosnia and Herzegovina within the meaning of Article 6(2) ECHR.
79. The Panel further accepts that the EULEX Prosecutor's statements regarding the existence of evidence of witness intimidation may be interpreted as a mere assertion by the EULEX Prosecutor that there was sufficient evidence to support the bringing of a criminal charge against complainant (See also: ECtHR Judgment of 26 March 2002, *Butkevičius v. Lithuania*, No. 48297/99, para. 52).

80. Therefore, the Panel finds that the complaint regarding the violation of the presumption of innocence as protected by Article 6(2) ECHR is inadmissible as manifestly ill-founded, within the meaning of Rule 29, paragraph 1(e) of the Panel's Rules of Procedure.

Regarding the right to respect for private life

81. The complainant alleges that the statements by the EULEX Prosecutor made in the television programme "Justice in Kosovo" constitute a grave attack on his reputation, and thereby violated his right to respect for his private life as protected by Article 8 ECHR.
82. The Mission submitted that there was no evidence that the EULEX Prosecutor's interview had been substantially circulated in Bosnia and Herzegovina, and that the complainant had not demonstrated how his private life had been concretely damaged by the EULEX Prosecutor's statements. In addition, the Mission argued that the continuation through 2019 and 2020 of the complainant's political career as a Member of Parliament and as a government minister in Bosnia and Herzegovina illustrated how his reputation had not been damaged. For these reasons, the Mission submitted that this complaint should be declared inadmissible as manifestly-ill-founded.
83. The Panel notes that the applicability of Article 8 to alleged attacks on a person's reputation is the topic of substantial case-law of the European Court.
84. In these circumstances, the Panel considers that the complaint in relation to a violation of Article 8 of the Convention raises serious issues of fact and law, the determination of which requires an examination of the merits of the complaint.

VIII. SUBMISSIONS OF THE PARTIES REGARDING THE MERITS OF THE CASE

The complainant

85. The Panel recalls the complainant's submissions outlined above regarding the admissibility of the alleged violation of his right to respect for his private life as protected under Article 8 ECHR (See paras. 44-48).

Head of Mission ("HoM")

86. Aside from its submissions on the admissibility of the complaint in relation to Article 8 ECHR, the Mission did not make any additional submissions on the merits of this complaint.
87. The Mission stated that it acknowledges that the EULEX Prosecutor could have been more circumspect during his interview, but the Mission considers that it had clarified any misunderstandings regarding the status of the complainant with the media statement of the Chief EULEX Prosecutor of 14 February 2018. Specifically, the media statement indicates that the complainant has not been prosecuted in Kosovo for any crime, and that there has been no judicial determination that he was in any way involved in the alleged murder of [R.D.].

IX. THE PANEL'S ASSESSMENT REGARDING THE MERITS OF THIS CASE

Regarding the right to respect for private life

88. The Panel recalls Article 8 of the European Convention, which provides

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
89. The Panel recalls that the European Court of Human Rights has set out a number of general principles regarding the protection of a person's reputation within the meaning of the protection of the right to private life under Article 8 (see e.g.: ECtHR Judgment of 7 November 2017, *Einarsson v. Iceland*, No. 24703/15, paras. 32-34).
- "32. The notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which extends to a number of aspects relating to personal identity, such as a person's name or image, and furthermore includes a person's physical and psychological integrity (see *Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004 VI, with further references).
33. Furthermore, it has been accepted by the Court that a person's right to protection of his or her reputation is encompassed by Article 8 as part of the right to respect for private life. The Court has also concluded that a person's reputation is part of their personal identity and moral integrity, which are a matter of private life even if the person is criticised in a public debate (see *Pfeifer v. Austria*, no. 12556/03, § 35, ECHR 2007 XII, and *Petrie v. Italy*, no. 25322/12, § 39, 18 May 2017). The same considerations apply to a person's honour (*A. v. Norway*, no. 28070/06, § 64, 9 April 2009, and *Sanchez Cardenas v. Norway*, no. 12148/03, § 38, 4 October 2007).
34. However, in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life (see, *inter alia*, *Axel Springer AG v. Germany [GC]*, no. 39954/08, § 83, 7 February 2012, *Delfi AS v. Estonia [GC]*, no. 64569/09, § 137, ECHR 2015, and *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina [GC]*, no. 17224/11, § 76, 27 June 2017)."
90. The Panel recalls that in its Decision and Findings of 16 October 2016 on the complaint *Y.B. against EULEX*, (no. 2014-37) brought by the same complainant and concerning the indictment against N.K. brought by the same EULEX Prosecutor, and public references to that indictment made at the beginning of the criminal trial against N.K., the Panel had found that these statements had violated the complainant's right to respect for his private life.
91. In that Decision (para. 46), the Panel considered that
- "[...] it was implied in the indictment that the complainant participated in an organised crime group in order to murder a "rival crime boss" which constitutes a serious criminal offence [...]. A statement couched in such terms made in an official indictment seems to amount to an affirmation that the complainant did commit the crimes concerned, although he is not indicted in the criminal proceedings in question [...]"
92. The Panel recalls that, in that Decision, it had recommended that,

“The HoM should provide a copy of the present Decision to the EULEX Prosecutors through the relevant channels. This should serve to inform the EULEX Prosecutors of the general nature of an obligation to make it their priority to protect rights and freedoms of not only suspects and the accused but other persons involved in cases they investigate.”

93. The Panel recalls that in its Decision on the Implementation of the Panel's Recommendations of 10 January 2017, the HoM had reported that a copy of the Panel's Decision had been provided to the EULEX Prosecutors.

(See: <https://hrrp.eu/docs/decisions/2014-37%20Y.B..pdf>)

94. The Panel notes that despite having been provided with a copy of the Panel's earlier Decision, the EULEX Prosecutor in the present case persisted in making public statements which called into question the behaviour of the complainant.

95. The Panel recalls the references to complainant made by the EULEX Prosecutor in his interview:

Regarding intimidation of witnesses: “Not only is there enough proof, there is actually a current trial going on in Bosnia against three defendants who are charged with intimidating and threatening one of our most important witnesses in our trial. One of the defendant's names is [complainant], and he is being prosecuted in Bosnia right now, along with two of his close friends for actually threatening and intimidating one of our witnesses.”

Regarding the Organized Crime Group: “[...] in our indictment we allege that [complainant] ordered the murder of [R.D.], and that the defendant [N.K.] is a loyal soldier and a high-ranking person in this organized criminal group, found the assassins, and they carried out a very well-executed assassination, a brutal assassination of this victim. As to whether the organized criminal group is still going on, I don't know. But it certainly is a possibility.”

Regarding influencing witnesses: “[...] we had a tremendous challenge because all your evidence and all your witnesses are in Bosnia. They are subject to being threatened there, bribed. They have no money, they have no future. They are afraid for their families. [The complainant] had his media empire, and one by one, he would destroy our witnesses' reputation in his media.”

96. The Panel finds that the EULEX Prosecutor's statements amount to serious attacks on the complainant's reputation, sufficient to cause prejudice to the right to private life within the meaning of Article 8. The complainant was described as having ordered a murder and as having intimidated, threatened and influenced witnesses. These are serious and prejudicial allegations that meet the threshold of Article 8.
97. The Mission's claim that there cannot have been any serious interference with the complainant's reputation, because he continued to enjoy a successful political career following the publication of the EULEX Prosecutor's interview, does not convince the Panel. In the Panel's view, the fact that the complainant subsequently held positions of importance does not exclude that prejudice of a degree of seriousness could have been caused by the Prosecutor's statements. On the contrary, the Panel views the EULEX Prosecutor's statements as stigmatizing and capable of causing serious harm to the complainant's reputation.

98. The Panel also finds that the subsequent press release, while a valuable step, was not capable of rectifying the damage caused, particularly in the light of the history of this case and the prior case brought by the same complainant.
99. The Mission has not argued that the statements by the EULEX Prosecutor were in accordance with the law and necessary in a democratic society. The Panel sees no reason to determine otherwise.
100. The Panel also recalls that the European Court of Human Rights has stated as follows in respect of balancing the right to freedom of expression under Article 10 of the ECHR with the right to respect for private life (see ECtHR judgment of 20 September 2018, *Jishkariani v. Georgia*, para 62):
 - “62. The Court reiterates in this connection that the Convention cannot be interpreted to require individuals to tolerate, in the context of their rights under Article 8 of the Convention, being publicly accused of criminal acts by Government officials who are expected by the public to possess verified information concerning those accusations, without such statements being supported by facts (see, *mutatis mutandis*, *Egill Einarsson*, cited above, § 52).”
101. In these circumstances, the Panel finds that there has been an interference with the complainant’s right to respect for his private life, and that this interference has not been justified as necessary in a democratic society for a legitimate aim.
102. Consequently, the Panel finds that there has been a violation of the complainant’s right to respect for his private life as guaranteed by Article 8 ECHR.

Conclusions and findings

103. Based on the above, the Panel finds that the complainant’s request for the proposal of an interim measure is without object, and therefore the Panel rejects the request.
104. The Panel finds that the issues raised in the complaint merit further examination despite subsequent events, and therefore the Panel rejects the HoM’s request to strike out the complaint.
105. The Panel considers that the complainant has not substantiated his claim that the statements made by the EULEX Prosecutor in the television programme “Justice in Kosovo” had a sufficiently close connection to the proceedings in Bosnia and Herzegovina such that they violated the complainant’s right to the presumption of innocence in the criminal proceedings against him in Bosnia and Herzegovina. For this reason, the Panel finds that the complaint of a violation of the right to the presumption of innocence as guaranteed by Article 6(2) ECHR is inadmissible as manifestly ill-founded.
106. The Panel finds that the public statements made by the EULEX Prosecutor in the television programme “Justice in Kosovo” on 2 February 2018 amount to an interference with the complainant’s right to respect for his reputation, and that this interference was not justified. Therefore, the Panel finds that there has been a violation of the complainant’s right to respect for his private life under Article 8 of the European Convention on Human Rights.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

REJECTS the request for an interim measure;

REJECTS the request to strike out the complaint;

FINDS that the complaint pursuant to Article 6(2) of the European Convention on Human Rights is inadmissible as manifestly ill-founded;

FINDS that the complaint pursuant to Article 8 of the European Convention on Human Rights is admissible;

FINDS that the Mission has violated the rights of the complainant as protected under Article 8 of the European Convention on Human Rights;

INVITES THE HEAD OF MISSION to make a public declaration acknowledging that the circumstances of the case amounted to a breach of the complainant's rights as a result of acts attributable to EULEX in the performance of its executive mandate;

INVITES the Mission to report to the Panel regarding the above recommendations at its earliest convenience and no later than 15 December 2021.

For the Panel,


Anna AUTO
Presiding Member




Alexander FASSIHI
Member