



ADMISSIBILITY DECISION

Date of adoption: 13 June 2017

Case No. 2011-27

F. and Others

Against

EULEX

The text of the decision adopted by the Panel on 13 June 2017 was redacted by the Head of Mission, using her powers under the Operation Plan (OPLAN) for the European Union Rule of Law Mission in Kosovo. The Head of Mission considered that the original text of the decision could affect the operational effectiveness of the Mission.



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The Human Rights Review Panel sitting on 13 June 2017 with the following members present:

Ms Magda MIERZEWSKA, Presiding Member
Mr Guénaël METTRAUX, Member
Ms Anna BEDNAREK, Substitute Member

Assisted by
Mr John J. RYAN, Senior Legal Officer
Ms Noora AARNIO, Legal Officer

Ms Elka Ermenkova recused herself from the case due to an appearance of conflict of interests and did not participate in the consideration of the case, in accordance with Rule 12(1) (1) of the Panel's Rules of Procedure. She was replaced by Ms Anna Bednarek.

Having considered the aforementioned complaints, 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. PROCEEDINGS BEFORE THE PANEL

1. A complaint on behalf of the wife and two members of the family of the late X.F. was lodged with the Panel on 14 November 2011.
2. The Panel acceded to the complainant's wish not to have their names disclosed. They will be referred to as "F. and Others".
3. On 15 and again on 30 November 2011, the Panel requested additional information from the complainant's legal representative. Relevant information was submitted on 15 March 2012.
4. The Panel communicated the complaint to the Head of Mission on 16 October 2012 and requested that EULEX Kosovo provide written observations on the admissibility and merits of the case.
5. On 17 January 2013, the Head of Mission (HoM) provided observations on the admissibility of the case.
6. On 9 April 2013, an officer designated by the Mission provided an oral presentation to the Panel concerning certain facts relevant to the resolution of the complaint.
7. On 15 July 2015, the Panel provided the complainants' lawyer with a copy of a redacted version of this presentation together with a request for his comments. In so doing, the Panel sought to ensure that the complainants were not deprived of any information relevant to their complaint and that the adversarial character of the process was maintained. The complainants' reply was subsequently submitted to the Panel on 27 July 2015.
8. On 30 October 2015, EULEX presented to the Panel a report of a review of the case which had in the meantime been carried out.
9. On 3 February and 20 June 2016, the HoM made further submissions on the case. He drew the Panel's attention to the fact that the Mission's submissions were considered EU-classified and/or could adversely affect the ongoing criminal proceedings.
10. These conditions were that the relevant content of the letters of 3 February 2016 and 20 June 2016 would not be shared with the public:
 - i. Before the appellate court decided on the appeal in the criminal case;
 - ii. As long as the document is not declassified; and
 - iii. Provided that the identity of none of the involved persons is ever revealed.
11. The Panel has therefore been presented with the Mission's submissions the full text of which the Panel was not able to forward to the complainant for his comments. Hence, the Panel needs to address the procedural issue arising in connection with non-disclosure to the complainant of the full submissions of the HoM.
12. The Panel first notes in this connection that its own character as a fact-finding human rights accountability body and the scope of its mandate is relevant in this context. Under the Accountability Concept Paper, the Panel's founding document, it has been created "to review complaints from any person, other than EULEX Kosovo personnel, claiming to be the victim of a violation of human rights by EULEX Kosovo in the conduct of EULEX Kosovo's executive mandate". The same document further specifies that the Panel's task is to "look into whether a violation of human rights has occurred or

not. It will assess the conduct of EULEX Kosovo in the performance of its executive mandate with a view to formulating non-binding recommendations for remedial action.”

13. The Panel does not possess the full range of powers that a judicial body would enjoy. In particular, the Panel is not empowered to render binding decisions. While the Accountability Concept Paper provides that the Panel “is independent in the exercise of its functions which it will perform with impartiality and integrity,” the procedure before it is not attended by the entire range of safeguards that would normally be applicable in judicial proceedings.
14. It is further noted that under Rule 36 of its Rules of Procedure “the Panel will base its decisions and findings only on evidence that it considers to be relevant to the complaint, including evidence it has collected on its own initiative.” The Panel normally adheres to the principle of adversarial proceedings to the extent necessary to guarantee the fairness of proceedings although it is not thereby prevented from collecting information *ex officio*.
15. The Panel’s usual practice so far has been to make it possible for the parties to the proceedings before it to have access to and comment on submissions of the other party. This is intended to ensure the fairness and, as noted above, the adversarial character of proceedings. This is also an important element of the Panel ensuring that it has received all relevant information from the parties so that it is able to arrive at the correct conclusion in dealing with the complaint.
16. Despite the particular nature of proceedings before the Panel, as described above, the Panel has had regard to the fair hearing standards guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as developed by the European Court of Human Rights (ECtHR) regarding acceptable restrictions on the right to a fully adversarial procedure. The Court has held that certain restrictions are permissible in the context of situations where there are strong countervailing public interest grounds, such as national security, for the need to keep secret certain police methods of investigation or the protection of the fundamental rights of persons other than the accused, even in the context of proceedings for the determination of guilt on criminal charges, which proceedings are normally attended by full guarantees of the right to a fair hearing within the meaning of Article 6 of the Convention. The Court has also held that a fair trial issue will arise if difficulties caused to the defendant by a limitation on his or her rights are not sufficiently counterbalanced by the procedures followed by the judicial authorities (see, for example, ECtHR, *Doorson v. the Netherlands*, 26 March 1996, § 70, Reports 1996-II; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 58, Reports 1997-III; *Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 51-53, 16 February 2000; *S.N. v. Sweden*, no. 34209/96, § 47, ECtHR 2002-V; and *Botmeh and Alami v. the United Kingdom*, no. 15187/03, § 37, 7 June 2007).
17. Thus, while the right to a fair criminal trial under Article 6 includes in principle a right to full disclosure of all material evidence in the possession of the prosecution, both for and against the accused, the Court has held that it might sometimes be necessary to withhold certain evidence from the defence on public-interest grounds. In *Jasper* (cited above, §§ 51-53), the Court found that the limitation on the rights of the defence had been sufficiently counterbalanced where evidence which was relevant to the issues at trial, but on which the prosecution did not intend to rely, was examined *ex parte* by the trial judge, who decided that it should not be disclosed because the public interest in keeping it secret outweighed the utility to the defence of disclosure. In finding that there had been no violation of Article 6, the Court considered it significant that it was the trial judge, with full knowledge of the issues in the trial, who carried out the balancing

exercise and that steps had been taken to ensure that the defence were kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without disclosing the material which the prosecution sought to keep secret (ibid., §§ 55-56; see also, for a summary of relevant principles, ECtHR, *A. v. UK*, 3455/05, 19 February 2009, paras. 206-211).

18. The Panel is well aware, firstly, that these principles were developed for the purposes of the effective protection of defendants' rights in criminal proceedings. It cannot therefore be assumed that all of them would be applicable to proceedings before the Panel, or to the same extent, if only because the fair hearing standards applicable in criminal proceedings are normally more stringent than in any other kinds of proceedings. These differences between criminal proceedings and proceedings before the Panel do not mean, however, that such fundamental guarantees become irrelevant to the work of the Panel (see, for example, *Hasani* against EULEX, 2010-05, 14 September 2011, para. 61; *Fanaj* against EULEX, 2010-06, 14 September 2011, paras. 61 and 61). Moreover, the Panel is aware of the jurisprudence pointing to the weight of the evidence not disclosed to the party to the proceedings, namely that it cannot be of decisive character to the outcome of the case (ECtHR, *Schatschaschwili v. Germany* [GC], no. 9154/10, 15 December 2015, *mutatis mutandis*).
19. Secondly, as regards the counterbalancing guarantees, the Panel stresses that in the present case it has had recourse to the procedure by which the Panel itself was given full access to the information provided by the Mission, including information which was considered too sensitive from the point of view of operational safety to be disclosed to the complainant and to the public. While the Panel is not at liberty to disclose them to the complainant or to make them public, this fact did not prevent the Panel from a thorough examination of the issues involved in the case. Furthermore, the Panel has satisfied itself that its inability to disclose all of that information to the complainant would not prejudice its ability to seek an effective remedy before the Panel.
20. Hence, subject to all relevant safeguards the Panel is authorised under the standards referred to above not to disclose to the complainant the full submissions of the Mission and to perform its functions on that basis.
21. Having regard to the above considerations, the Panel is satisfied that the procedure followed has maintained the necessary balance between the complainants' procedural right to argue their case effectively and the need to safeguard confidentiality of certain aspects of the Mission's operation in sensitive area.

II. SUMMARY OF FACTS

22. X.F. was a witness for the prosecution in a major criminal case, concerning serious charges brought against 10 individuals which were being examined by the Basic Court of Pristina.
23. X.F. was attacked and injured by unidentified persons in the yard of his house in 2009. There were altogether six attempts on his life by perpetrators who remain unknown. F. (X.F.'s wife, who is the first complainant in the present case) and their children were admitted into the EULEX witness protection programme in December 2009. The complainants submit that their conditions while in the program were very difficult.
24. The HoM denied these allegations.

25. In December 2010, the family left the programme voluntarily, apparently because of the pressure exerted on X.F. by his wife who was unhappy about the life the family was leading while protected by the officers of the protection program. Despite leaving the protection program, X.F. still wished to give testimony in the case.
26. On an unspecified date in 2011, a risk assessment was carried out by EULEX. It was found that the risk of attack against X.F. and his family remained high.
27. In the early months of 2011, a number of arrests were affected in connection with the criminal case referred to above.
28. It was arranged for X.F. to travel to an EU Member State on short notice. A EULEX Prosecutor informed the authorities of the EU Member State thereof at a point in time when X.F. was on his way there. A certain amount of money was assigned from the Mission's funds to finance X.F.'s stay in the EU Member State where he had family ties.
29. On an unspecified date, the authorities of the EU Member State were informed of X.F.'s stay in the EU Member State.
30. In July 2011, X.F. returned to Kosovo where he gave statements at the pre-trial hearing in the case. He was subsequently re-admitted to the EULEX witness protection program in order for him to receive financial and other assistance from that program.
31. Shortly afterwards, accompanied by EULEX Kosovo, he returned to the EU Member State, having left the witness protection programme once again.
32. On 28 September 2011, X.F. died in the EU Member State.
33. An investigation carried out by the authorities of the EU Member State determined that he had committed suicide.
34. The criminal proceedings against the defendants were subsequently conducted before the Kosovo courts. In 2013, the Basic Court of Pristina rendered its judgment. All defendants were acquitted.
35. The EULEX Prosecutor appealed. In 2016, the Court of Appeal dismissed the appeal.
36. Subsequently, the EULEX Prosecutor of the Office of the State Prosecutor filed a request for Protection of Legality against this judgment. In 2017, the Supreme Court of Kosovo dismissed the Prosecutor's challenge of that judgment.

III. COMPLAINTS

37. The complainants submit that X.F. and his family experienced very poor living conditions and isolation while they were in the witness protection programme. They maintain that after the family left the programme X.F. was kept in isolation, separated from his family and that he had no contact with them.
38. The complainants further submit that the psychological pressure X.F. was subjected to, as well as his general treatment by EULEX and his isolation from the family while in the witness protection programme and, later on, in the EU Member State, led him to commit suicide. It is alleged that EULEX was aware of his mental state but failed to

take adequate steps to prevent his death. They request that the persons responsible for the alleged violations of the F. family rights and X.F.'s death be brought to justice.

IV. THE LAW

39. The complainants submit that X.F. and his family experienced very poor living conditions and isolation while they were in the witness protection programme.
40. As a matter of substantive law, the Panel is empowered to apply human rights instruments as reflected in the EULEX Accountability Concept Paper of 29 October 2009 on the establishment of the Human Rights Review Panel. Of particular importance to the work of the Panel are the European Convention on the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the International Covenant on Civil and Political Rights which set out minimum standards for the protection of human rights to be guaranteed by public authorities in all democratic legal systems.
41. Before considering the complaint on its merits, the Panel must decide whether to accept the complaint, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
42. According to Rule 25, paragraph 1, of the Rules the Panel can examine complaints relating to alleged violations of human rights by EULEX in the conduct of its executive mandate. In accordance with Rule 25, paragraph 3, of the Rules, complaints must be submitted to the Panel within six months from the date of the alleged violation.
43. The Panel examined the complaints made by the complainants under Articles 2 and 3 of the Convention which, in so far as relevant, provide that:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. [...]"

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

44. The Panel notes that in the present case the family left the witness protection programme on 29 December 2010. The complaint was lodged with the Panel on 14 November 2011, therefore outside the six-month time-limit provided for by Rule 25 para. 3 of the Rules of Procedure.
45. It follows that this part of the complaint must be declared inadmissible.
46. The facts concerning the F. family participation in the EULEX witness protection programme may be taken into consideration by the Panel only as background to the case. The Panel reserves the right to take those into consideration, in particular, in the context of the other aspect of the complaints, namely, the suggestion that their participation in this program and the circumstances in which they came to be admitted and treated was a contributing factor to X.F.'s death.

47. The complainants further complain that the Mission has failed to take adequate measures to protect X.F.'s life and failed to investigate the circumstances that led to his death. The HoM disagreed with that suggestion.
48. The Panel first notes that this part of the complaint relates primarily to the actions of EULEX prosecuting and police authorities. The Panel has already held on numerous occasions that actions of the EULEX prosecutors and police are part of the executive mandate of EULEX Kosovo and therefore fall within the ambit of the Panel's jurisdiction (see, for instance, *K. to T. against EULEX*, cases nos. 2013-05 to 2013-14; 21 April 2015; *Krlić against EULEX*, no. 2012-21, 26 August 2014; *Y against EULEX*, no. 2011-28, 15 November 2012, para. 35). The Panel accordingly holds that it has jurisdiction *ratione personae* to examine the complaint.
49. Having regard to the above considerations, the Panel finds that it has jurisdiction to examine the remainder of the complaint.
50. The Panel considers that, in the light of the parties' submissions, the complaint raises serious issues of facts and law under Articles 2 and 3 of the Convention, the determination of which require an examination of the merits of the case. The Panel concludes therefore that the complaint is not manifestly ill-founded. No other ground for declaring it inadmissible has been established.

FOR THESE REASONS, THE PANEL, UNANIMOUSLY,

DECLARES admissible, without prejudging the merits, the complaint made under Article 2 and Article 3 of the Convention;

DECLARES THE REMAINDER OF THE COMPLAINT INADMISSIBLE,

RESERVES the determination of the future procedure before the Panel.

For the Panel,

John J. RYAN
Senior Legal Officer

Magda MIERZEWSKA
Presiding Member