



INADMISSIBILITY DECISION

Date of adoption: 10 January 2017

Case No. 2015-04

Nazmi Maluku

Against

EULEX

The Human Rights Review Panel, sitting on 10 January 2017,
with the following members present:

Ms Magda MIERZEWSKA, Presiding Member
Mr Guénaél METTRAUX, Member
Ms Elka ERMENKOVA, Member

Assisted by
Mr John RYAN, Senior Legal Officer
Ms Noora AARNIO, 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. PROCEEDINGS BEFORE THE PANEL

1. The complaint was registered on 7 May 2015. In submitting his complaint, the complainant indicated that he had no objection to his identity being made public.

2. On 18 May 2015 and 27 September 2015, the complainant sent additional information to the Panel.
3. On 29 September 2015 and, again, on 1 October 2015, the complainant met with members of the Secretariat of the Panel.
4. The complaint and additional information were communicated to the Head of Mission ("HoM") on 14 October 2015 and 12 November 2015 respectively.
5. On 14 December 2015, the Head of Mission ("HoM") submitted its observations to the Panel. The HoM requested that some of the information provided to the Panel should remain confidential. The HoM provided the Panel with a shortened, redacted, version of his submissions for the purpose of informing the complainant and the general public of the tenor of his submissions. The Panel has satisfied itself that the complainant has not been prejudiced by the fact that he only received a summarized version of the HoM's submissions. The Panel is also satisfied that, on balance, it is justified in the circumstances to keep some of this information from the public at large. On that basis, the redacted version of the HoM's submission was communicated to the complainant on 18 December 2015.

II. THE FACTS

6. The following facts appear from the information which the complainant has provided:
 - In or around 2010-2011, the complainant went to EULEX Special Prosecutors to complain about a case involving his wife which referred to a medical negligence case wanting to file a complaint against the State Prosecutor. He was informed by the Prosecutor that he should prepare all documents and that they would contact him. Approximately three months later, he returned to SPRK and made a statement to EULEX on the exclusive issue, he said, of his wife's medical issue. The statement was produced in English. He said that he was not provided with an Albanian copy of his statement.
 - A couple of months later, on at least three occasions, he was contacted by EULEX officials and went to SPRK to meet with them. He claimed that he was asked about events in Drenica during the war but supposedly informed them that he had no information about this.
 - On one of these occasions, it would appear in January 2012, he said that he was asked to sign an Albanian version of his original statement. Because it allegedly contained un-truths, he said he refused to sign it and asked them not to contact him again.

- Despite this, he said that he was contacted again. Upon EULEX's invitation, he said that he and his wife went to meet with EULEX officials. He claims that his wife was told that she would only get medical help for her condition if she convinced the complainant to give evidence against the KLA Commanders in the Drenica case. His wife declined and they were asked by EULEX to leave.
- He claims to have been further threatened by EULEX officials if he did not sign his statement.
- Subsequently, two days after members of the Drenica group had been arrested, the complainant said that he was contacted by local people saying he was a State witness and that his name was in the public domain as such. As a result, he said he was in fear for his life.
- In 2012, the complainant says that he went to the Ombudsman to discuss the matter and was told to make a complaint to EULEX. The complainant said that the Ombudsman refused to take his complaint.
- In June 2014, EULEX called the complainant again and allegedly told him that, as a victim, he had to testify in the Drenica case. He said that he then informed an EULEX official that he would not testify but was told by a privately-retained lawyer to do so or risk imprisonment.
- On 5 and 11 December 2014, the complainant testified in court. He was declared a hostile witness by the Mitrovica court as he refused to confirm what was in a statement, which he claimed was a fabrication.
- The complainant stated that he was told by EULEX that he was a protected witness and brought to the court to testify. He said he was placed in the courtroom beside the defendants and in full view of the public gallery. He said that no efforts were made to protect his identity from either the public or the defendants. He was referred to as witness C.
- The complainant said that he received no advice and was offered no protection from EULEX despite his requests to that effect.
- The complainant claims he was attacked in his home by unknown assailants on 6 July 2015. The KP and EULEX were contacted to report the matter. Another EULEX investigator called him to ask for a description of the attackers. The complainant said he also had contact with another EULEX police officer about this matter.
- The complainant said that EULEX failed to do anything more about the attack and that he fears for his life and that of his wife.

7. In response to the suggestion that it failed to take the threats made against the complainant seriously enough and that the Mission failed to address them, the HoM points to the following:
 - i. The complainant's protected identity was disclosed by the complainant himself when he refused to be addressed as "Witness C" in the case, revealed his identity and insisted to give his statement in open court.
 - ii. A risk-assessment was conducted in relation to his case, which led to EULEX Prosecutors seeking protective measures for him from the Court and an order to that effect. These were duly granted by the Court before being partly withdrawn after the complainant revealed his identity and asked to testify in open court.
 - iii. A confidential investigation into the public disclosure of protected witnesses was initiated and an indictment has now been filed with the Mitrovica Basic Court on 23 April 2014 against a number of individuals. These criminal proceedings were ongoing at the time of the HoM's submissions.
 - iv. EULEX has also been conducting certain pre-investigative actions in relation to the revealing of identities of other protected witnesses in the "Drenica" case.
 - v. There is also a criminal investigation ongoing by EULEX Prosecutors in relation to the threatening and intimidating of witnesses in the "Drenica" case – with "around seven suspects" concerned.
 - vi. The HoM also notes that it was he, the complainant, who made his (protected) identity known to the public in the context of the proceedings before the Mitrovica court.

III. COMPLAINT

8. The tenor of the complaint may be summarized as pertaining to three distinct categories of allegations:
 - i. It is alleged that EULEX prosecutors and/or investigators falsified a statement attributed to the complainant but which, he says, was falsely attributed to him.
 - ii. It is further alleged that his protected identity as a witness in the "Drenica" case was leaked to the public.
 - iii. It is also alleged that he was subject on a number of occasions to threats and, in one instance, to serious physical violence.

IV. THE LAW

Submissions by the complainant

9. It is not entirely clear from complainant's submissions what aspects of the complaint are attributed by him to the Mission. Accordingly, the Panel has considered each of the three principal allegations made by the complainant (see para. 6 above) as having been attributed by him, in whole or in part, to the Mission.
10. The HoM's submissions may be summarized as follows. First, the HoM generally questions the reliability and credibility of the allegations made by the complainant. The HoM points in that regard to a number of inconsistencies and contradictions. It further points to the findings of the Mitrovica Basic Court concerning the reliability and credibility of the complainant as a witness in the "Drenica" case.
11. As further detailed below, regarding those allegations which the HoM considers to have some merit, it is submitted that these are either not attributable to the Mission and/or have been the subject of all necessary and reasonable steps on the part of the Mission. The HoM rejects any suggestion that the fundamental rights of the complainant were violated by the Mission.
12. The HoM disputed the suggestion that the Mission had violated any of the complainant's rights. The HoM submitted that the complaint should be rejected on the basis of "incompatibility with the material requirements [of Rule 25 of the Panel's Rules of Procedure], as the complaint does not concern any human rights violation by EULEX". The HoM submitted further that the EULEX investigators and prosecutors had acted diligently and in line with their human rights obligation so that the complaint should be rejected as manifestly ill-founded.

The Panel's assessment

General requirements of admissibility

13. As a matter of substantive law, the Panel is empowered to apply human rights instruments as reflected in the EULEX Accountability Concept 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 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.

14. Before considering the complaint on its merits, the Panel has to decide whether to accept the complaints, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
15. According to Rule 25, paragraph 1, the Panel can only examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate.
16. Pursuant to Rule 25, paragraph 3, of the Panel's Rules of Procedure, a complainant is required to file a complaint within six months from the act, decision or conduct which is said to amount to or involve a violation of his/her rights (see, e.g., *Gashi against EULEX*, no. 2013-22, 7 April 2014, para. 10; *Thaqi against EULEX*, cited above, para. 51; *Sadiku-Syla against EULEX*, 2014-34, 29 September 2014, para. 40 *et seq.*).

Alleged falsification of statement of the complainant

17. It is alleged by the complainant that he met and was interviewed by EULEX prosecutors and investigators as a result of which a statement was taken from him. It is apparent from the record that this statement was taken on 24 January 2012. The resulting statement contains information pertaining to (war) crimes allegedly committed by members of the so-called "Drenica" group. The statement suggests that the complainant was a witness to several of these alleged crimes.
18. The complainant claims, however, that this statement is a fabrication and that he never gave a statement in relation to these matters. Instead, he claims to have given a statement about an entirely unrelated matter. He claims also that his signature that appears on the document might be a falsification or a genuine signature apposed to an English statement that he did not understand.
19. As noted above, after he appeared before the Mitrovica Basic Court as a witness in the "Drenica" case, he was declared a "hostile witness" by the Court. The Court proceeded in its 27 May 2015 Judgment to find that he was "completely unreliable" as a witness and "tended to sabotage" when confronted with his earlier statement. According to the Court, his "story of falsification of the records of his pre-trial interview was naïve and unconvincing".
20. As a preliminary matter, the Panel notes that the impugned statement-taking process occurred in January 2012 and that an Albanian translation was provided to the complainant about four months later which should have made him aware of any discrepancy between his account and what was being recorded. As such, any violation of rights arising from that process would fall outside the Panel's 6-month requirement.

21. Even assuming that the complainant only became aware later in time of the alleged alteration or falsification of his statement, there appears to be little substance in his claim that EULEX prosecutors would have fabricated an entire statement about matters he now claims to know nothing about and that they would have falsified his signature. Considering the doubts raised by the Mitrovica Basic Court about the reliability and credibility of his account, and considering also that the Basic Court has had the benefit of hearing the Panel has treated his account with caution.
22. Accordingly, this part of the complaint is inadmissible as being ill-founded.

Public disclosure of the complainant's identity as a protected witness

23. As noted above, the complainant also refers in his complaint (and subsequent communications) to the fact that his identity as a protected witness (Witness C) in the Drenica case was made public. It is not clear from his submissions whether he attributes that fact to EULEX or what prejudice, he says, this would have caused him.
24. In this respect, the Panel would first reiterate the critical importance of witnesses to the functioning of the criminal justice system (see, generally, Council of Europe, Committee of Ministers, Recommendation Rec(2005)9 of the Committee of Ministers to members states on the protection of witnesses and collaborators of justice, 20 April 2005).
25. In order for witnesses and other "collaborators of justice" to contribute to that system, their fundamental rights need to be adequately safeguarded so that their involvement in the process does not expose them to any risk of harm. The Panel would therefore underline how important it is for the competent investigative and prosecutorial authorities to ensure that witnesses in criminal cases and collaborators of justice are protected from harm and from other negative consequences arising from their involvement in criminal proceedings. In *W*, the Panel noted that the responsibility of the authorities to protect witnesses may imply in some cases a positive obligation on their part to take measures to ensure the safety and security of witnesses although this obligation must not impose an impossible or disproportionate burden onto them (*W against EULEX*, 2011-07, 10 April 2013, para. 48).
26. A particularly important aspect of this protection pertains to the protection of the identity of sensitive witnesses who are subject to protective measures and who might be at risk of harm should their

identity be disclosed to the public (ibid, para. 49, 52-53; see also *L.O. against EULEX*, 2014-32, 11 November 2015, para. 72).

27. In this particular instance, there is no indication that it was EULEX that made the identity of the complainant public. Instead, it is apparent from the record of proceedings before the Mitrovica court that it was he who made his identity public and he who asked to testify without protective measures (see, above, para. 7). In those circumstances, the suggestion that EULEX violated his rights – to security and/or privacy – by making his identity public is without merit and manifestly ill-founded.

Threats made against the complainant or his family

28. The third and last aspect of the complaint pertains to threats and acts of violence which the complainant says were directed against him or his relatives.
29. In accordance with the 6-month rule stated above (see, para. 16 above), the Panel will only consider those allegations that are no older than six months prior to the filing of the complaint. Also, the Panel has decided, proprio motu, to consider allegations of threats and violence that occurred after the complaint was filed with the Panel. It regards those allegations as effectively amending the complaint filed on 7 May 2015.
30. The Panel would first note that the complainant does not allege that any of these threats or acts of violence can be attributed to the Mission or one of its staff. The complaint therefore appears to pertain to a suggestion that EULEX did not do enough to investigate those.
31. Having carefully considered the steps taken by the Mission (see above), and in light of all relevant circumstances, the Panel has come to the view that the Mission acted diligently in trying to protect the witness and in attempting to guarantee his fundamental rights (see, above, para. 25). That task was rendered particularly challenging by the complainant's own conduct (in particular, his disclosing his identity; his contacts with parties to the proceedings; his various changes of mind towards the Mission). Whilst the Mission remains responsible ultimately to guarantee the fundamental rights of those with which it interacts, it cannot be blamed for failing to address circumstances that are beyond its control.
32. Regarding specifically the attack on the complainant that is said to have occurred at his home on 6 July 2015, the HoM says the following:
- i. He is aware of this allegation as the complainant informed WCIU investigators about it.

- ii. He draws the Panel's attention to factual inconsistencies in the version(s) of those events given by the complainant.
- iii. He points to the fact that the incident occurred in an apartment said to have been gifted to the complainant by defendants in the "Drenica" case.
- iv. The EULEX investigator who dealt with the issue advised the complainant to report the case to the Kosovo Police as the competent authority in this matter. The HoM draws attention to the fact that the report of the (Kosovo police) officer in charge of the matter raised "reasonable and grounded doubts to believe that [the complainant] is not telling the truth or is lying".

On that basis, the HoM submits that EULEX investigators and prosecutors acted diligently and in full compliance with their human rights obligations.

- 33. Having considered all relevant circumstances, the Panel is satisfied that the course taken by the Mission to address the threats and acts of violence was reasonable and in line with its general human rights obligations. It was not unreasonable, in the circumstances, to assume that the Kosovo authorities were capable of investigating this particular incident (as they seemingly have done). Should the complainant be dissatisfied with the approach taken by the Kosovo police, he should seek to use the means of redress that exist within the Kosovo legal order. It has not been shown by the complainant that EULEX's decision not to investigate the matter itself was either arbitrary or otherwise fell short of its human rights obligations.
- 34. This part of the complaint is therefore inadmissible as well as manifestly ill-founded.

Allegation made in relation to the complaint before the Panel

- 35. On 18 October 2015, the Panel received further information from the complainant. The complainant alleged that he had received a call from an EULEX investigator on 15 October 2015 during which she allegedly told the complainant that EULEX would not deal with his case because he had filed a complaint with the Panel and that he had recorded that conversation. The complainant did not produce such recording.
- 36. On 12 November 2015, the HoM was invited by the Panel to address that claim.
- 37. The HoM did so as part of its observations of 15 December 2015. The HoM did not dispute the existence of a call between the complainant and the EULEX investigator. The HoM submits however that the complainant "also distorted the facts". According to the HoM, it was

the complainant who called the Mission on that day and asked to appear as a witness in a particular case taking place on that day. The HoM explains that the view was taken that the investigator in question should not be dealing any more with the complainant as he had named her explicitly in his complaint. The complainant was informed accordingly by the investigator. The complainant was also invited to contact another investigator of the WCIU and informed that he might be contacted by another investigator in relation to his request to appear as a witness. According to the HoM, the complainant 'was showing his disappointment and threatened to make more complaints as he felt abandoned by everyone'.

38. The Panel takes most seriously the suggestion that anyone filing a complaint before the Panel could suffer prejudice as a result of doing so. However, in the present case, absent any corroboration of the complainant's allegation on that point and in light of the clear rejection of such allegation by the Mission, the Panel is not satisfied that the complainant has established the truth of his claim.
39. Accordingly, the Panel finds that this aspect of the complaint has not been sufficiently established. The Panel need not therefore decide whether this act would come within the competence of the Panel or whether it might have amounted to a violation of fundamental rights.
40. This part of the complaint is therefore inadmissible as being manifestly ill-founded.

FOR THESE REASONS,

Unanimously holds that, pursuant to Rule 29(1)(c), (d) and (e), the present complaint fails to comply with Rule 25(3) of the Panel's Rules of Procedure and is, in some respects, ill-founded or does not pertain to conduct attributable to the Mission or one of its organs, and therefore

DECLARES THE COMPLAINT INADMISSIBLE.

For the Panel,


John RYAN
Senior Legal Officer




Magda MIERZEWSKA
Presiding Member