



**THIRD DECISION ON THE IMPLEMENTATION OF THE RECOMMENDATIONS
OF THE HUMAN RIGHTS REVIEW PANEL**

Date of adoption: 27 March 2019

Case no. 2011-20

X and 115 other complainants

Against

EULEX

The Human Rights Review Panel, sitting on 27 March 2019, with the following members present:

Mr Guénaél METTRAUX, Presiding Member
Ms Anna BEDNAREK, 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 15 January 2019,

Having deliberated, decided as follows:

I. GENERAL BACKGROUND TO THE CASE AND PANEL'S DECISION OF 22 APRIL 2015

1. This case is one that involves serious violations of human rights. By way of background, it pertains to the mistreatment and violation of the fundamental rights of 115 complainants of Roma ethnicity by acts and omissions attributable to various authorities.
2. Because of the limitations placed upon its jurisdiction, the Human Rights Review Panel (hereafter, 'the Panel') was competent only to deal with violations of rights attributable to the EULEX Kosovo Mission (hereafter, 'the Mission') in the performance of its executive mandate.

3. By decision of 22 April 2015, the Panel determined that the Mission was responsible for violating the rights of these individuals to an effective remedy as guaranteed, *inter alia*, by Article 13 of the European Convention of Human Rights (Convention) attributable to the Mission in this case. Particularly problematic was the failure of the Mission to conduct an effective investigation of the circumstances in which the fundamental rights of the victims had been violated by other authorities.
4. The Panel accordingly made the following recommendations to the Head of Mission (HOM) under Rule 34 of its Rules of Procedure:

“That the HOM instruct the competent EULEX officials to enquire from the Kosovo authorities as to whether an investigation into this matter was ongoing and, if so, at what stage of the process the matter now stands. The HOM should inform the Panel of the result of this enquiry.

Having received that information, the HOM should instruct EULEX Prosecutors to consider whether or not to take over responsibility for this case pursuant to Article 7(A) of the Law No. 04/L-273 on the Jurisdiction and Competencies of EULEX Judges and Prosecutors as amended, (Law on Jurisdiction), taking account of the relevant circumstances, as highlighted above, in particular the need for the Mission to guarantee the effective protection of the rights of the complainant. The HOM should inform the Panel of the Prosecutor’s decision in that regard.”

5. The Panel also requested the then HOM to provide the Panel with the required information no later than 15 June 2015.
6. On 31 August 2015, the HOM informed the Panel about a number of measures taken with regard to the recommendations of the Panel. In particular, he wrote to the Acting Head of EULEX Executive Division and the Acting Chief EULEX Prosecutor requesting them to consider the decision of the Panel and asking them to assess whether there would be a possibility to apply Article 7A of the Law no. 04/L-273 on Jurisdiction and Competencies of EULEX Judges and Prosecutors as amended (Law on Jurisdiction) to the criminal case subject to the Panel’s decision and assign the case to a EULEX Prosecutor due to “extraordinary circumstances” within the meaning of this provision.
7. On 19 August 2015, the Acting Head of the Mission and the Acting Chief Prosecutor informed the HOM that, as required by Article 7A, the case and the possibility of taking it over by EULEX Prosecutors had been assessed jointly by the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor. They concluded that the “extraordinary circumstances” required by Article 7A had not been met and jurisdiction of the EULEX Prosecutors could not be triggered. However, the Acting Chief EULEX Prosecutor assured the HOM that, should such circumstances emerge in the future, the case and the applicability of Article 7A might be reconsidered.
8. Further, the Acting Chief EULEX Prosecutor submitted that in its decision on the merits of the present case the Panel had criticised EULEX for initiating the investigation one day after the so called “cut-off date” of 14 April 2014. He argued that there had not been so far any ruling to initiate investigation, but the case currently remained in the preliminary investigative phase with a view to determine whether a criminal offence has been committed and if so, who would be the suspect of that offence. The Acting Chief EULEX Prosecutor also submitted that the complainants’ representative had not responded to the inquiries sent by the local prosecutor and the information provided by the complainants’ appeared to have very limited evidential value.

9. Despite the above, the local Prosecutor assigned to the case sent the criminal report to the Special Prosecution Office of Kosovo to assess whether it would fall under their competence. The reply was negative; according to the Deputy Chief Prosecutor of the Special Prosecution Office, there was no indication of organised crime involvement in the case and thus it fell outside of its jurisdiction. Consequently, the case remained with the Kosovo prosecuting authorities.
10. The Acting Chief EULEX Prosecutor gave assurances that the EULEX Prosecutor previously assigned to the case would be available to the local prosecutor in their mentoring and advising capacity.
11. On 13 September 2015, the complainants submitted their reply to the information provided by the HOM. They disagreed with the submission of the HOM that the case was outside the jurisdiction of EULEX. They also maintained that, contrary to the assertions of the HOM, their representatives had not been contacted by EULEX Kosovo.

II. FIRST FOLLOW-UP DECISION

12. In a follow-up decision of 11 November 2015, the Panel noted the steps taken by the HOM to implement the recommendations of the Panel as outlined in his letter of 31 August 2015.
13. The Panel said that it was satisfied that the HOM implemented its recommendation to enquire with the local authorities whether or not the investigation was ongoing. It was noted in this context that the case was first brought to the attention of the Kosovo prosecution authorities in November 2013, almost two years earlier. It was further noted that the HOM did not provide any information as to whether or not any evidence had been taken during the investigation or if any witnesses had been questioned by the Kosovo prosecuting authorities. The HOM also failed to provide information as to the possible timeframe within which the case might be concluded. Nor was it established that victims were meaningfully involved in the ongoing process of investigation. It was not therefore shown to the satisfaction of the Panel that there was real progress in the investigation. In those circumstances, the right of the complainant to an effective remedy, pursuant to Article 13 of the Convention, was still regarded as being adversely affected by the absence of a demonstrable effort to promptly and effectively investigate the case.
14. Furthermore, the Panel noted the decision of the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor not to assign the case to a EULEX Prosecutor. The Panel considered that the effectiveness of the investigation would have been greatly improved if it had utilised the expertise and resources of the Chief EULEX Prosecutor.
15. Accordingly, the Panel considered that the steps taken to date by EULEX were not such as to ensure that the fundamental right of the complainant to an effective remedy was being effectively protected. The Panel therefore invited the Mission to continue liaising with the competent Kosovo authorities with a view to follow up on the progress of the investigation. The Panel further invited the HOM to provide information on the manner in which the notion of "extraordinary circumstances", within the meaning of the said Article 7A, as a deciding criterion, is interpreted in practice in cases being taken over by the EULEX prosecuting authorities.

16. The Panel declared that the HOM had implemented its recommendations *in part only*, and that the right of the complainant to an effective remedy continued to be adversely affected in the absence of a demonstrable effective investigation of the case.
17. The Panel invited the HOM to provide the clarification which it had sought in relation to the interpretation by EULEX Kosovo, of the “extraordinary circumstances” provision in Article 7A of the Law on Jurisdiction. The Panel also invited EULEX Kosovo, through the HOM, to seek regular updates from the Kosovo authorities on the progress of their investigation. The Panel further invited the HOM to update the Panel on the progress of the investigation no later than 28 February 2016 and remained seized of the matter.
18. The HOM replied to the Panel on 2 March 2016 in response to the recommendations of the Panel contained in its decision of 11 November 2015. With regard to the invitation to the HOM to provide information on the manner in which the notion of “extraordinary circumstances” within the meaning of Article 7A as a decisive criterion for cases being taken over by EULEX prosecuting authorities was interpreted in practice, the HOM responded as follows:
 - It was to be noted that that the application of Article 7A required a joint decision by the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor, thus each case was assessed jointly.
19. The HOM stated that the procedure for the assessment of the existence of such circumstances was agreed by the Chief State Prosecutor of Kosovo and the Acting Chief EULEX Prosecutor in October 2014. Specifically, it was said that the following criteria would apply in any such assessment:
 - Whether the expertise and experience of EULEX prosecutors would ensure the proper investigation and prosecution of the case;
 - There is a grounded suspicion of attempts to influence the investigation or prosecution;
 - The case under investigation or prosecution touched upon the interests of EU member states or the involvement of any EULEX staff member in Kosovo.
20. The HOM said that should one or more of these criteria be satisfied, the Chief and Deputy Chief of the Special Prosecutor of the Republic of Kosovo (SPRK), or the Chief Prosecutor of the Basic Prosecution Office, Mitrovica, together with the EULEX Prosecutor would jointly file a motivated proposal to the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor in order to assign the case to an EULEX Prosecutor, either exclusively or jointly, in a mixed team, depending on the circumstances of the case.
21. Since there had been an involvement of EULEX prosecutors in the case at hand at an early stage, none of the criteria outlined above was considered to have been met. The case did not present any features that would require the special prosecutorial expertise of EULEX prosecutors; there were no indications of an attempt to influence the investigation; the local prosecutors demonstrated a willingness and an ability to work on the case, thus, initially, a mixed team was created. Furthermore, the case did not appear to touch upon the interests of the EU Member States nor was any involvement of a EULEX staff member in the case.

22. The HOM also stated that the case had been, and continued to be, in the preliminary phase of the investigative process in order to determine whether or not a criminal offence had been committed and where this is the case, which offence it might be and who the suspect(s) might be. The representative of the complainants did not respond to the recent inquiries that had been sent to them by the local prosecutor and the information provided by the complainants thus far seemed to be of limited evidential value.
23. In relation to the enquiry of the Panel with regard to the current status of the case, the HOM stated that the EULEX prosecutor met with the local prosecutor to discuss the steps which had been undertaken. As the local prosecutor initially assigned to the case had by now been suspended on suspicion of misconduct in office, the case was assigned to another local prosecutor. This local prosecutor regretted that he was unable to undertake any investigate steps since the case had been assigned to him as he claimed to be overloaded with the investigation of more urgent cases in which the defendants were in detention on remand. However, the local prosecutor informed the EULEX prosecutor of his intention to consult the State Prosecution Office in order to obtain guidance on the case and said that he would proceed thereafter based on the outcome of his consultation with the State Prosecution Office.
24. The local prosecutor, however, stated that the criminal offence that was most likely to emerge in the case was that of "Causing General Damage" which was punishable under Article 365 of the Kosovo Criminal Code, (Law no. 04/L-082). In that event, the statutory limitation period prescribed in Article 106 of the Kosovo Criminal Code would be taken into consideration and there was thus a high likelihood that this offence had by now become statute barred. This meant, in effect, that the criminal report would have to be dismissed.
25. The HOM stated that the Chief EULEX Prosecutor had provided his assurance that the EULEX prosecutor previously assigned to the case could, in any event, be made available to the local prosecutor in a mentoring and advising capacity, outside of the executive function of EULEX Kosovo. In addition, as mentioned above, a detailed petition by any party could be addressed at any time to the Chief State Prosecutor as well as to the Chief EULEX Prosecutor if it was considered that the circumstances had altered so that the conditions set out in Article 7A of the Law on Jurisdiction would be met. The HOM also said that the Chief EULEX Prosecutor had further transmitted the decision of the Panel and its own (Chief EULEX Prosecutor) analysis of the case to the Chief State Prosecutor of Kosovo for his consideration.
26. The Secretariat of the Panel subsequently wrote to the HOM on 12 July 2016 to inform him that the Panel was about to examine the case further with a view to the issuance of a second follow-up decision. In that regard, the Panel wished to know from the HOM if there was any additional information available and in particular, as to whether there had been progress in the investigative proceedings. The Panel also asked the HOM if the EULEX Prosecutor had been involved in a mentoring and monitoring capacity. The Panel requested a response from the HOM by 19 August 2016.
27. The HOM replied on 17 August 2016 to indicate that the case now fell under the exclusive competence of the local prosecutor in the Basic Prosecution Office of Mitrovica and, further, that the EULEX prosecutors were not in fact involved in any formal mentoring and monitoring activity. However, the HOM stated that the team leader of the EULEX prosecutors in Mitrovica had met with the newly assigned local prosecutor on 2 February 2016 and 3 August 2016 in order to establish if any further progress had been made in the investigation.

28. During the course of the meeting on 2 February 2016, the EULEX Prosecutor informed the newly assigned local Prosecutor about the meeting which had taken place earlier with the Kosovo prosecutor who had been previously assigned to the case and what investigative steps had been taken.
29. The EULEX Prosecutor also informed the newly appointed local Prosecutor about the decision and recommendations of the Panel as well as about the Panel's wish to learn of any further investigative steps which might have been taken. The newly appointed local Prosecutor expressed his regret that he had not been able to take any investigate steps in the case and indicated that he was overloaded with other more urgent cases in which the defendants were in detention under remand. Furthermore, the said local Prosecutor was not prepared to have a further follow up meeting due to his workload and other commitments.
30. At the next meeting on 3 August 2016, the local Prosecutor stated that he had not taken any other investigative steps since the previous meeting on 2 February 2016. However, he did indicate that he had reviewed the case and had concluded that it could progress in two possible directions. Firstly, the case could be tried under the charge of "Causing General Danger"; and secondly, the case could be tried under the charge of "Organised Crime", which would mean that the case would fall under the exclusive competence of the Chief State Prosecutor. He seemed to favour the first option, which would lead to the closure of the case based on the statutory time limit as prescribed in Article 106 of the Criminal Code of Kosovo, (Law no. 04/L-082).
31. The EULEX Prosecutor scheduled a follow up meeting with the local Prosecutor for 10 August 2016 but this meeting was later cancelled by the local Prosecutor on the basis that he had more urgent tasks to attend to.
32. The HOM stated in conclusion that due to the lack of progress in the case and the absence of genuine engagement by the local Prosecutor in the case, the Chief EULEX Prosecutor had requested the EULEX Advisory Unit on Justice Matters to monitor the case on a formal basis on 10 August 2016.

III. SECOND FOLLOW-UP EVALUATION BY THE PANEL

33. On 10 January 2017, the Panel once again returned to this case to consider the measures adopted by the Mission in the implementation of the Panel's recommendations. In its Decision of that date, the Panel took note of the further additional steps taken by the HOM to implement the Panel's recommendations. However, the Panel also considered that these steps 'have not been such as to ensure that the right of the complainants to an effective remedy is being effectively protected'. It further noted that the Chief EULEX Prosecutor provided his assurance that the EULEX Prosecutor previously assigned to the case may be available to the local prosecutor in a mentoring and advising capacity outside the executive function of EULEX (Letter from HOM, 2 March 2016). The Panel also took note of the fact that the Chief EULEX Prosecutor requested the EULEX Advisory Unit on Justice Matters to monitor the case on a formal basis because of the absence of progress and the lack of a genuine engagement on the part of the local prosecutor on 10 August 2016 (Letter from HOM 17 August 2016).
34. Having examined the latest information provided by the HOM with regard to the implementation of the recommendations of the Panel, the Panel made the following findings and recommendations:

“Declares that the HOM has not been able to further implement the recommendations of the Panel thus far, as contained in its original Decision and Findings of the Panel on 22 April 2015.

Declares that the rights of the complainant to an effective remedy, continues to be adversely affected by the absence of a demonstrable effective investigation in the case.

Invites the Mission, through the HOM, to seek regular updates from the Kosovo authorities on the progress of the investigation, in particular, the status of the formal monitoring of the case by the EULEX Prosecutor.

Invites the Mission to continue its liaising with the competent Kosovo authorities with a view to following up on the progress of this case.

Invites the HOM to update the Panel of the progress of the said investigation by 28 February 2017.”

35. In response to the above, by letter of 29 May 2017, the HOM wrote to the Panel and informed it that, contrary to earlier indications, the case had not been closed but was being investigated by the Basic Prosecution Office in Mitrovica (Vushtrri).

IV. THIRD FOLLOW-UP EVALUATION BY THE PANEL

36. On 15 December 2017, the Panel wrote again to the Head of Mission to inquire about new developments in the case.
37. The HOM responded by letter of 30 March 2018. In that letter, the HOM indicated that the Mission had had several meetings with relevant police and prosecutorial authorities ‘to seek updates on the progress of the investigation’. The HOM also clarified that the investigation of that case had been monitored since August 2016 by the Advisory Unit on Justice Matters in the Strengthening Division. The HOM specified that the case remained active but was at the preliminary investigative phase and that it continued to be monitored by the Advisory Unit on Justice Matters.
38. By letter of 12 April 2018, the Panel acknowledged receipt of the HOM’s latest letter and invited her to complement her response with information on any further progress achieved in the case.
39. The HOM responded by letter of 22 May 2018 in which she indicated that ‘there has been no further substantial progress since [the] letter of 30 March 2018’. Whilst pointing to a number of meetings that had taken place in relation to this case, the HOM indicated that the situation ‘has not changed’ since her last update and that a ruling on the initiation of investigation had yet to be rendered. The HOM also emphasised her view that ‘it is the responsibility of Kosovo institutions to conduct an effective investigation’. Finally, the HOM committed to continuing to monitor developments in the case within the means and capabilities of the Mission.
40. By letter of 17 January 2019, the Panel sent another request for updates on this case. In particular, the HOM was asked to provide indications regarding the following:
 - a. Whether the Mission was aware of any development in this case since the last update;

- b. Whether the Mission had taken any additional steps or measures in the implementation of the Panel's recommendations since that time;
 - c. Whether, to the Mission's knowledge, any steps had been taken by local authorities to further the investigation of this case and, in particular, whether the case was still active or had been closed;
 - d. Whether the Decisions of the Panel in relation to this case had been communicated to the local authorities together with the file of the case;
 - e. Whether any follow-up – in the form of monitoring or otherwise – by the Mission is being conducted or planned in relation to that case.
41. On 20 February 2019, the HOM responded to the Panel's enquiries and indicated the following. The HOM indicated that the Case Monitoring Unit contacted the competent Prosecutor at the Mitrovica Basic Prosecution's Office and was informed that the case is still at the preliminary stage of investigation. The HOM also pointed to the change in the nature of the Mission's mandate and indicated that the Mission would continue to periodically monitor the present case. The HOM highlighted the fact that, under the current mandate, the Mission is not empowered to advise local institutions in relation to individual cases. The HOM submitted, furthermore, that under the current mandate the Mission is not in a position to ensure that victims enjoy the rights of the complainants to an effective remedy. It was also indicated that the Kosovo Chief State Prosecutor was informed about the decision of the Panel and the HRAP's decision in relation to this case.
 42. On 22 February 2019, the letter of the HoM was provided to the complainants' representation for information and so as to afford them an opportunity to make any submissions in response to the HoM's letter. On the same day, 22 February 2019, the complainants' representative acknowledged receipt of the letter and indicated that she would provide any further submissions no later than 15 March 2019.
 43. On 3 March 2019, Ms Dianne Post, representative of the complainants, wrote to the Panel and responded to the HOM's submissions. She indicated that the HOM's response was 'nothing new' and consisted of suggesting that a) the responsibility was not that of the Mission and b) refused to acknowledge or abide by the Panel's decisions. Ms Post also questions the veracity and credibility of the claim that the matter is currently being investigated by the Kosovo authorities. She also invites the Panel to consider ordering compensation for each of the families.
 44. The present decision constitutes a follow-up to the Panel's decisions of 22 April 2015, 11 November 2015 and 10 January 2017 and the recommendations made therein. The power and authority of the Panel to follow-up on its decisions and recommendations is provided for in Rule 45 *bis* of the Panel's Rules of Procedure (see e.g. the decisions on the implementation of recommendations *W against EULEX*, 2011-07, 26 August 2014; *H&G against EULEX*, 2012-19&20, 27 May 2014).
 45. In light of the above, the Panel finds that the complainants in this case have yet to be granted access to an effective remedy to validate their fundamental rights and to obtain adequate relief and reparation for the violation of these rights.
 46. The Panel takes note of the fact that local authorities are properly seized of the case and are presently investigating it. The Panel also notes the Mission's commitment to regularly monitor the course of action of the authorities in relation to the investigation of this case. The Panel wishes to underline clearly the need for the Mission to impress

upon the competent local authorities the fact that this case is to be investigated fully and effectively as it pertains to the most serious sort of human rights violations.

47. Finally, in response to Ms Post's submissions, the Panel notes that it does not have the authority under its statutory instrument to order that financial compensation be paid to a complainant (Annual Report 2016 of the HRRP, pages 2 and 48-50; *Zahiti against EULEX*, 2012-14, 11 November 2014, in particular, para. 16).

THE PANEL, THEREFORE, UNANIMOUSLY

Takes note and commends the Head of Mission for the Mission's ongoing efforts to monitor this case;

Notes that the complainants have yet to be provided with an adequate remedy and reparation for the violation of their rights;

Underlines the importance of providing the victims with access to justice and an effective remedy to validate their rights;

Notes furthermore that the case has been pending before a variety of successive authorities for two decades;

Invites the Mission to continue performing its mandate to the fullest with a view to ensuring that the complainants' rights are fully vindicated and to provide a copy of the present decision to the competent local authorities;

Keeps the present case open for possible further follow-up;

For the Panel,


Guénaél METTRAUX
Presiding Member




Anna BEDNAREK
Member