



DECISION AND FINDINGS

Date of adoption: 26 August 2014

Case No. 2012-21

Mirko Krlić

Against

EULEX

The Human Rights Review Panel sitting on 26 August 2014 with the following members present:

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

Assisted by
Mr John J. RYAN, Senior Legal Officer
Ms Joanna MARSZALIK, Legal Officer
Mr Florian RAZESBERGER, 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:

PROCEDURE

1. The complaint was registered on 6 December 2012.
2. On 8 April 2013 the Panel decided to give notice of the complaint to the Head of Mission (HoM) of EULEX Kosovo, inviting him to submit written observations on the complaint. It was also decided to examine the merits of the application at the same time as its admissibility (Rule 30 paras 1 and 2 of the Rules of Procedure of the Panel, hereafter ROP).
3. The observations of the HOM were received on 27 May 2013. They were subsequently communicated to the complainant for his reply.

4. On 24 June 2013, the complainant sent his reply which was forwarded to the HOM for information.
5. Additional information was requested from the HoM on 5 September 2013. It was received on 20 November 2013.

FACTS

I. CIRCUMSTANCES OF THE CASE

6. The complainant is the Assistant Director in the Office for Kosovo and Metohija, a Serbian governmental body.
7. On 22 November 2012, he arrived from Serbia proper at the administrative boundary, to the crossing at Jarinjë/Rudnice (the so called "Gate 1"). The complainant submits that his visit to Kosovo was of a private character. He was invited by the priest of Saint Dimitrij Church in Mitrovicë/Mitrovica to visit his church (22 November was the second day of "slava" celebrations, the feast of Saint Michael).
8. After waiting for two hours at the crossing, he was refused entry in Kosovo by EULEX Border Police. The Standard Form for Refusal Entry he was issued reads that "Mr Mirko Krić is an official from Serbia and therefore must make an official request to the Kosovan authorities prior to entry. This includes for private visits". The form was signed by an EULEX Border Police officer. According to a handwritten note on the form, the complainant refused to sign it.

II. COMPLAINTS

9. The complainant alleges that by denying him entry to Kosovo and participation in religious celebrations EULEX violated Article 9 (freedom of religion) and Article 2 of Protocol No. 4 (freedom of movement) of the European Convention on Human Rights and Fundamental Freedoms (the Convention).

THE LAW

10. The complainant alleges that EULEX actions infringed Article 9 and Article 2 of Protocol No. 4 of the Convention. These provisions, in so far as relevant, read:

Article 9:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 2 of Protocol No. 4:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(...)

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

11. The Panel decided, *proprio motu*, to communicate the case and to examine it also under Article 8 of the Convention, which reads as follows:

Article 8:

"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."

Submissions by the parties

12. In his submissions the HoM maintains that there has been no violation of the complainant's human rights. At the material time, the EULEX Border Police officers were exercising full border control executive functions including those related to authorisation and refusal of entry into Kosovo, in accordance with the EULEX Kosovo OPLAN and an agreement of integrated management of crossing points (IBM). As regards the entry of Serbian government officials into Kosovo, there is an informal agreement in place, accepted and followed by both Serbia and Kosovo since 2009. By virtue of this agreement, any visit by such an official to Kosovo requires a request to the Office of the Deputy Prime Minister of Kosovo, lodged through EU offices in Belgrade and Kosovo. The HoM points out that prior to the situation complained of the complainant was part of official delegations to Kosovo, when he assisted his superior, the Director of the Office for Kosovo and Metohija, during the latter's visits. On those occasions, requests for his entry were submitted following the above procedure. This is also why the complainant's status as a government official was registered in the border police database already prior to 22 November 2012. The

HoM provides a list of requests for police escort for persons visiting Kosovo, with the complainant's name as a Serbian official on it.

13. The HoM further submits that the complainant identity was established by the border police upon presentation of his Serbian identification document, in accordance with the Agreed Conclusions of Freedom of Movement between Serbia and Kosovo of 2 July 2001. The HoM emphasises that according to Article 28.2 of the Law No. 04/L-069 on Foreigners applicable at the material time, border police "may require (...) from the foreigner to prove (...) the purpose of entry in the Republic of Kosovo". There is no record that the complainant submitted any documents to substantiate his claim that his visit was of private character.
14. As regards possibilities of appeal against the refusal, the HoM states that pursuant to Article 9.4. of the Administrative Instruction No. 03/2010-MIA on Prohibition of Entry into the Republic of Kosovo, a person whose entry is refused has a right to appeal within eight days to the Appeals Committee for Temporary Residence.
15. The HoM argues further that Article 2 of Protocol No. 4 to the Convention is not applicable in the present case, as it only applies to liberty of movement of persons lawfully within the territory of a state.
16. As regards alleged violation of a right to private and family life (Article 8 of the Convention) and to freedom of religion (Article 9 of the Convention), the HoM maintains that an intervention by the EULEX police was in compliance with the law and reasonable in the given circumstances. It was therefore within the limitations set out by Articles 8 par.2 and 9 par.2 of the Convention.
17. In his response to those observations, the complainant denies that he is an official of the Serbian government and argues that the procedure described by HoM applies only to visits on a ministerial level and not to him. He states that he has never travelled to Kosovo with the Director of the Office for Kosovo and Metohija. He points out that his identity card could not serve as an indicator of his status as a Serbian official and that no other documents were requested from him by the border police. Moreover, he explained to the border police that his visit was of a private nature. The requirement to produce additional evidence as to a nature of ones visit to Kosovo is unacceptable, as it would imply that Serbs coming to Kosovo for private visits are treated as foreign citizens.
18. The complainant reiterates that his rights to freedom of movement and freedom of religion were violated. He points out that any interference by public authorities with those rights may only be allowed "in the interest of national security, public safety or economic well-being of the country, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of

others". He maintains that his private visit to a church could not have possibly undermined any of those values.

The Panel's assessment

Mandate of the Panel (Rule 25 par. 1 of the Rules of Procedure)

19. 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 which must be guaranteed by public authorities in all democratic legal systems.
20. 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.
21. No observations were made by the parties with regard to the admissibility of the complaint.
22. 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.
23. The Panel has already established that the actions of the EULEX police are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel's mandate (see, for instance, *Y against EULEX*, no. 2011-28, 15 November 2012). It sees no reason to hold otherwise in the present case.

Alleged violations of Articles 8, 9 and Article 2 of Protocol No. 4 to the Convention

24. The Panel will first examine the complaint under Article 8. It reiterates that, according to well established case-law of the European Court of Human Rights (the Court) the notion of "private life" within the meaning of this provision is a broad concept which encompasses, inter alia, the right to establish and develop relationships with other human beings (see, for instance, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 33, § 29; *E.B. v. France* [GC], no. 43546/02, § 43, *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III; *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 165, ECHR 2013). The Panel therefore accepts that this provision is applicable to the circumstances of the case.

25. The Panel further reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the authorities to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. The boundaries between the positive and negative obligations of the authorities under Article 8 do not lend themselves to precise definition, but the applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the general interest and the individual interests; and in both contexts the authorities enjoy a certain margin of appreciation (see, among many other authorities, *Fernández Martínez v. Spain* [GC], no. 56030/07, § 114, 12 June 2014, *Schüth v. Germany*, no. 1620/03, § 55, ECHR 2010; *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI).
26. The main question which arises in the present case is thus whether EULEX was required, in the context of its positive obligations under Article 8, to uphold the complainant's right to respect for his private life by allowing him entry to Kosovo and a visit to his acquaintance and a church there.
27. The Panel finds that the complainant did not comply with the applicable procedural requirements. The requirements applying to visits of Serbian government officials were specified in the informal agreement, in force and followed by Serbia and Kosovo since 2009. The applicant did not comply with these as he had not lodged a request to the Office of the Deputy Prime Minister of Kosovo. In the Panel's view the complainant has adduced no persuasive arguments that he could not have known the established procedure. He holds a position in the Office for Kosovo and Metohija and had visited Kosovo with his superior on a number of occasions prior to the situation complained of (see requests for police escort document submitted by EULEX, par. 12 above) and would therefore have to be aware of the applicable formalities.
28. The Panel will leave open the question whether, for the purposes of the present case, Kosovo should be considered a separate state or not with regard to entry requirements.
29. In view of the above, the Panel considers that the EULEX Border Police acted within their margin of appreciation, that a fair balance has been struck between the competing interests in the present case and, consequently, a refusal to allow the complainant entry into Kosovo was justified in the circumstances of the case. Accordingly, there was no violation of Article 8 of the Convention.
30. Having regard to the findings under Article 8, the Panel considers that it is not necessary to examine the complaint under Article 9 and Article 2 of Protocol No. 4 to the Convention separately.

FOR THESE REASONS, THE PANEL, UNANIMOUSLY

1. *Holds* by that there has been no violation of Article 8 of the Convention;
2. *Holds* that it is not necessary to examine the case under Article 9 and Article 2 of Protocol No. 4 to the Convention.

John J. RYAN
Senior Legal Officer

Magda MIERZEWSKA
Presiding Member