



DECISION ON THE IMPLEMENTATION OF THE RECOMMENDATIONS

Date of adoption: 26 August 2014

Case No. 2011-07

W

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:

I. DECISION OF THE PANEL OF 10 APRIL 2013

1. On 10 April 2013, the Panel adopted the following decision and made a number of recommendations in relation to the complaint of W:

“The Panel, unanimously:

1. *Holds* that there has been no violation of Article 3 of the Convention [the Convention for the Protection of Human Rights and Fundamental Freedoms];
2. *Holds* that there has been a violation of Article 8 to the Convention;
3. *Finds* it appropriate, in the light of its above findings of fact and law, to make recommendations to the HoM under Rule 34 of its Rules of Procedure; and
4. *Recommends* the following actions to be taken by the HoM:
 - A declaration should be made acknowledging that the circumstances of the case amounted to a breach of the complainant's rights attributable to the acts of EULEX in the performance of its executive mandate;
 - The HoM should order that the following measures be adopted without delay, i.e.:
 1. EULEX Prosecutors in charge of this case should be invited to request their Serbian counterparts to return copies of any documents provided to them which bears the name or refers to the complainant. This would include the two statements given by the complainant to EULEX.
 2. EULEX Prosecutors in charge of the case should be invited to request their Serbian counterparts –
 - i. To destroy any copy made of the above-mentioned documents and to redact the name and any information in other documents that could identify the complainant; and
 - ii. To give notice to EULEX Prosecutors that this has been done, and
 - iii. Not to disclose to any suspect or defendant any information provided by the complainant to EULEX
 - The HoM should order an evaluation of what legal instruments are available to EULEX Prosecutors to cooperate in matters of judicial and criminal cooperation and, should available legal basis be determined to be inadequate or insufficient, to undertake the necessary steps to try to bring all necessary legal instruments into force;
 - Pending this evaluation, the HoM should instruct EULEX Prosecutors not to communicate any information provided by witnesses to any authorities – Serbian or any other – without having received an assurance from the competent investigative and prosecutorial organs of EULEX that the requisite legal basis is in place for that purpose and that EULEX Prosecutors will comply with these legal requirements in all circumstances;
 - The HoM should order the competent organs of EULEX to conduct a thorough evaluation of the risk incurred by the complainant and/or his family as a result of his statement having been provided to Serbian authorities. Once this has been done and if a risk has been identified, the Panel recommends that EULEX should discuss with the complainant any step or measure which could be taken to limit and prevent the risk of harm.

- The HoM is invited to disseminate the present decision to relevant EULEX officials involved in the investigation and prosecution of crimes in Kosovo with a view to ensure that they are duly made aware of their duties and responsibilities vis-à-vis witnesses from whom they obtain information. “

II. INFORMATION FROM THE HEAD OF MISSION OF EULEX AND THE COMPLAINANT

2. On 30 May and 16 August 2013, the Head of Mission (HoM) informed the Panel about a number of measures which he intended to take with regard to the Panel’s recommendations. In particular, the HoM indicated that he had addressed communications to the Head of EULEX Executive Division and to the Chief EULEX Prosecutor (CEP), informing them of the Panel’s decision and requesting them to take appropriate actions in order to have the recommended measures implemented.
3. As regards the recommendation that EULEX prosecutors in charge of the case should be invited to request their Serbian counterparts to return, destroy or redact copies of any documents bearing information that could identify the complainant, the HoM argued that such action would be detrimental to the cooperation in criminal investigations between EULEX and Serbia. Moreover, the HoM maintained that a request to implement the above-mentioned measures would run counter to “the autonomous position” of the EULEX prosecutors.
4. Regarding the Panel’s recommendation to carry out an evaluation of legal instruments on cooperation in matters of judicial and criminal cooperation, the HoM took the view that the appropriate legal instruments (in particular to Art. 88 of the Law No. 04/L-031 on International Cooperation in Criminal Matters) were already in place and were being adequately implemented.
5. With regard to the recommendation on evaluation of the risk incurred by the complainant and/or his family as a result of his statement having been provided to the Serbian authorities, the HoM submitted that, according to the CEP, before providing the complainant’s witness statement to the Serbian authorities the EULEX prosecutor had considered the location of the suspects (they were at the time in Serbia), the lack of any prospect of arresting and prosecuting them in Kosovo and the willingness of the Serbian authorities to take over the investigation. Moreover, there was no information or intelligence indicating any risk to the complainant. All this had led to the decision to hand over the complainant’s statement to the Serbian authorities. The CEP had also assured the HoM that no further risk assessment was necessary.

6. The HoM made no mention of the Panel's recommendation to acknowledge a violation of the complainant's' rights and to disseminate the Panel's decision to the relevant staff in his reply. In reply to the Panel's subsequent letter, reiterating the importance of the dissemination of its decision, the HoM informed the Panel, on 3 September 2013, that he had adopted necessary measures to ensure its dissemination to EULEX officials and units involved in the investigation and prosecution of crimes.
7. The complainant gave an oral statement, commenting on the HoM's actions. He disagreed with the HoM's proposition that an assessment of the risk incurred by the complainant and/or his family was unnecessary. He also submitted that he had repeatedly asked EULEX for witness protection as he feared retaliation by persons in relation to whom he had provided information. He further expressed his disappointment that EULEX did not apologise to him.

III. DECISION OF 26 NOVEMBER 2013 (*FOLLOW-UP DECISION*)

8. In its follow-up decision of 26 November 2013, the Panel commended the steps taken by the HoM to follow a significant number of its recommendations. The Panel noted, however, that a number of its recommendations had not been implemented.
9. In particular, the Panel observed that the HoM did not make a declaration acknowledging a breach of the complainant's rights and invited the HoM once again to consider making such declaration.
10. Further, the Panel noted that the recommendation that EULEX Prosecutors should request their Serbian counterparts to return or destroy copies of documents which bear the name of the complainant and to redact any information in other documents that could identify him had not been implemented. The Panel rejected the HoM's argument that its recommendation would have the detrimental effect alleged on cooperation between EULEX and the Serbian authorities. Nor was it satisfied that a fair balance had been struck between the interests of the prosecutors and those of the complainant. The Panel also rejected the suggestion by the CEP that compliance with such a request might interfere with the "autonomous position" of EULEX Prosecutors. The Panel held that EULEX Prosecutors are part of the mission and, as such, subject to relevant human rights standards and safeguards which have been put in place in order to guarantee the effective protection of these rights. In that sense, no claim of "autonomy" could warrant actions by the Prosecution taken in violation of those standards.

11. The Panel acknowledged that a new Law on International Cooperation in Criminal Matters had come into force since the events complained of. It urged EULEX to ensure that, in its application, the law is being interpreted and implemented by its agents in a manner consistent with the fundamental rights of those concerned.
12. The Panel noted with concern that the risk assessment it had recommended had not been carried out. It pointed out that it had not been provided with evidence that an effective risk assessment had been conducted in the first place and found to be unjustified the conclusion that no risk existed and that no “further” risk assessment was necessary. The Panel once again invited the HoM to consider instructing the competent authorities to carry a thorough assessment of this matter.
13. Lastly, the Panel expressed its satisfaction with the HoM’s assurance that the recommendation to disseminate its decision to relevant EULEX officials involved in the investigation and prosecution had been implemented.
14. In conclusion the Panel, unanimously
 - Declared that the HoM had implemented its recommendations in part,
 - Invited the HoM to once again consider implementing the remaining recommendations.
 - Recommended that the HoM should ensure full dissemination of the present decision to relevant EULEX officials involved in the investigation and prosecution of crimes in Kosovo.
15. The present Decision constitutes a follow-up to the Panel’s decision of 26 November 2013. 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 2010-01, *Djeljalj Kazagic v. EULEX*, 23 November 2011 and 2010-07, *Blerim Rudi v. EULEX*, 23 November 2011).

IV. HEAD OF MISSION’S SUBMISSIONS REGARDING THE DECISION OF 26 NOVEMBER 2013

16. In his letter of 21 February 2014, the HoM informed the Panel that the recommended risk-assessment had been conducted and no verifiable or active threats towards the complainant and his family had been found. The Mission’s decision not to request the Serbian authorities to return and/or destroy the information provided to them took the conclusions of the risk assessment as a precondition. Furthermore, the HoM explained that in order to maintain good institutional relations

with the Serbian justice and law enforcement authorities, and given the political reality in which EULEX is functioning as well as its obligations and commitment to pave the way forward for the local Kosovo institutions in their contact and exchange with Serbian authorities, the need to implement the recommendations is outweighed by the expected detrimental effect of the implementation.

V. EVALUATION BY THE PANEL

17. In its evaluation of the HoM's compliance with the Panel's recommendations, the Panel's task is limited to assessing the compatibility of the HoM's decision with relevant human rights standards. It does not have the power or competence to assess or review the political and/or diplomatic merit of the HoM's decision.
18. As regard the present case, the Panel notes that the HoM has implemented most of its recommendations. In particular, he has requested that a risk-assessment be conducted and has taken steps to ensure the dissemination of the Panel's previous decisions in this matter. The HoM has also carefully reviewed the basis and reasons for those decisions and has conducted further relevant consultations. He has consequently taken the view that, on balance, the need for cooperation with Serbian authorities outweighs the implementation of the measures the Panel recommended. On that basis, the HoM has taken the view that he would not follow the Panel's recommendation to request the return and destruction of material provided to the Serbian authorities.
19. The Panel has given careful consideration to the difficulties associated with the fulfilment of the HoM's duties and responsibilities and the challenge that these may cause to meeting the Mission's human rights responsibilities. Having regards thereto and considering the limitations placed upon the Panel's jurisdiction, the Panel concludes that the violation of the complainant's rights has not been entirely remedied by the Mission in this case.

THE PANEL, UNANIMOUSLY

Declares that HoM has implemented a majority of the Panel's recommendations, but decided not to implement one,

Decides to close the examination of the case.

For the Panel,

John J. RYAN
Senior Legal Officer

Magda MIERZEWSKA
Presiding Member