The Human Rights Advisory Panel
UNMIK HQ, East Wing, 10000 Pristina, Kosovo

DECISION

Date of adoption: 19 September 2008

Case No. 01/08

Sabri SALIHU

against

UNMIK

The Human Rights Advisory Panel sitting on 19 September 2008,
with the following members present:

Mr. Marek NOWICKI, Presiding Member
Mr. Paul LEMMENS

Mr. John J. RYAN, Executive Officer

Having considered the aforementioned complaint, introduced pursuant to Section 1.2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel,

Having deliberated, decides as follows:

I. THE FACTS

1. On 14 July 2004 the Kosovo Trust Agency (KTA) announced its 3rd wave of privatisations. A number of Socially Owned Enterprises (SOEs) were being liquidated and new companies had been created on the basis of their assets. These companies were sold through an open and competitive tender. One of the companies was the Derma Commerce Warehouse Mitrovica L.L.C., formerly the SOE "Kozhar", situated in Mitrovica/Mitrovicë. According to the announcement of the tender, it was a "warehouse for the storage of animal hides, with a surface area of 2150 square metres on a parcel of about 9481 square metres".

On 28 February 2006 the complainant was the successful bidder in the tender for sale of the SOE "Derma Commerce". On 2 November 2006 he signed a sale agreement with the KTA for this property.

On 5 November 2006 he signed a contract to lease the property to NTP “Lenita”, based in Shtime/Štimlje, allowing “Lenita” to use the warehouse. One of the complainant’s obligations under the lease agreement was that he would hand the property over to “Lenita” and that he would take whatever proceedings were necessary for the formal delineation of the property’s borders.

2. It appears that part of the property bought by the complainant, which had belonged to the SOE “Kozhar”, had been the object of a property restitution claim filed by B.B. against the said enterprise before the Municipal Court of Ferizaj/Urosevac in March 1997. According to B.B.’s application to the court, he had been forced, around 1949, to transfer his property to the SOE “Kozhar”. It seems that B.B. has used the property since some time, notably by crossing through it, by putting up constructions and by planting trees on it.

On 17 May 2004 the heirs of the late B.B. had notified the KTA of the existence of this claim against the SOE “Kozhar”. They had also indicated that at that time, the claim was still pending before the Municipal Court of Ferizaj/Urosevac.

When the complainant became the owner of the property in question, it was used by the heirs of B.B. The heirs also took over the restitution claim, still pending before the Municipal Court.

Shortly after the tender for the sale of the goods belonging to the SOE “Kozhar”, the heirs of B.B. on 13 June 2006 filed a claim against the KTA with the Special Chamber of the Supreme Court of Kosovo (Special Chamber), asking for the annulment of the decision on the privatisation of the SOE “Kozhar” with respect to the disputed property. On 8 June 2007 the Special Chamber noted that the issue of the legality of the privatisation of the disputed parcel depended on the outcome of the proceedings relating to their above mentioned claim for recognition of their ownership, pending before the Municipal Court of Ferizaj/Urosevac. The Special Chamber therefore stayed the proceedings “until the requirements provided by Article 215, paragraph 2 of the Law on Civil Procedure (were) met”.

3. Meanwhile the complainant had tried to obtain possession of the disputed property.

On 15 November 2006 he had submitted a request to the Municipal Court of Ferizaj/Urosevac to have the borders of the property delineated. The heirs of B.B., as the former owner of the property, made an objection on the grounds that the property was subject to the prior ownership claim made by B.B. The case was heard on 18 December 2006. The Municipal Court then stayed the proceedings, pending the outcome of the above mentioned claim for restitution, instituted by their father.

On 15 March 2007 the complainant filed a claim with the Municipal Court of Ferizaj/Urosevac against the heirs of B.B. for unlawful occupation of the property concerned. On 4 April 2008 the Municipal Court rejected the claim. It held that, although the KTA had sold the property to the complainant, the latter had not factually possessed the property when he started to carry out the marking of the borders. To the contrary, it were the heirs of B.B. who then factually possessed the property. In these circumstances, the complainant could not claim that he had been hindered in his factual possession. The Panel has not been informed of any appeal against this decision.

Finally, the complainant asked the KTA on 29 March 2007 to take the measures within its power so that the complainant could take possession of his property, free of

illegal constructions. As this request remained unsuccessful, the complaint on an unspecified date in 2007 filed a claim against the KTA and the new company “Derma Commerce” with the Special Chamber. The complainant argued that the KTA had negligently failed to transfer the property to him free of legal encumbrances, and had in the privatisation proceedings ignored the fact that the dispute about the ownership of the property concerned had been pending before the courts. He requested the Special Chamber to resolve the property issue, “in collaboration with the Municipal Court of Ferizaj/Uroševac” so that the privatised property could be properly handed over to him. He further claimed damages of 90,000 euro as compensation for damage which he had sustained, with interest at 3.5%, this amount being an equivalent of damages which the NTP “Lenita” had meanwhile claimed against him for a breach of the lease agreement, in an action brought before the Municipal Court of Ferizaj/Uroševac on 20 July 2007. On 22 October 2007 the Special Chamber requested the complainant to submit a number of documents. The complainant complied with that request on 7 November 2007. At the time of the present decision the case is still pending (case no. SCC-07-0311).

II. COMPLAINT

4. The complainant complains in substance that his right to the peaceful enjoyment of his property, guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR), was breached as the KTA acted negligently in selling him property which was encumbered by a third party’s claims. This allegedly caused serious problems and exposed him to the risk of suffering a substantial pecuniary damage.

III. PROCEEDINGS BEFORE THE PANEL

5. The complaint was introduced on 6 March 2008.

On 9 June 2008 the complainant was requested to submit certain further documents and to check whether the statement of the facts of the case prepared by the Panel for the purposes of initial examination of the case was correct. He complied with this request on 11 July 2008.

IV. THE LAW

6. Before considering the case on its merits the Panel has to decide whether to accept the case, taking into consideration the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.

7. Under Section 3.1 of UNMIK Regulation No. 2006/12 the Panel may only deal with a matter after it determines that all other available avenues for review of the alleged violations have been pursued.

The Panel notes that the complainant alleges a violation of his right to the peaceful enjoyment of property in that the KTA sold him property which was encumbered by a third party’s claims. The sale was the result of a competitive tender organized by the KTA, for the purposes of privatization of a so-called “socially owned enterprise”, and won by the complainant. Subsequently, as difficulties arose which hindered the complainant in the effective enjoyment of economic benefits originating in his winning the tender, he brought a case against the KTA to the Special Chamber.

UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related Matters, amended in particular by UNMIK Regulation No. 2005/18, provides that the Special Chamber has primary jurisdiction for all claims against the KTA, including in cases concerning privatization carried out by the latter. The Panel notes that the complainant's case is currently pending before the Special Chamber. Unlike the proceedings brought before the Special Chamber by the heirs of B.B., the Special Chamber has not suspended the examination of the complainant's application.

In these circumstances, it cannot be said, at the present stage of the proceedings, that the procedure before the Special Chamber does not constitute an effective remedy with respect to the complaints raised by the complainant against the KTA. Since the proceedings against the KTA are currently still pending before the Special Chamber, the Panel finds that the complainant has not complied with the requirement of exhaustion of remedies.

The Panel considers that the complaint is therefore premature and must be rejected under Section 3 of Regulation No. 2006/12 for non-exhaustion of available remedies.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT INADMISSIBLE.

John J. RYAN	Marek NOWICKI
Executive Officer	Presiding Member