



DECISION

Date of adoption: 6 June 2009

Case No. 58/08

Milisav ZIVALJEVIĆ

against

UNMIK

The Human Rights Advisory Panel sitting on 6 June 2009
with the following members present:

Mr. Marek NOWICKI, Presiding Member

Ms. Snezhana BOTUSHAROVA

Mr. John 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. According to the complainant, he was the owner of an apartment in the town of Pejë/Pec. He lived there with his family for 10 years until the outbreak of hostilities in Kosovo. He and his family then moved to central Serbia proper. His apartment remained locked and completely furnished. The complainant was informed in 2000 by his neighbours that his property has been looted and demolished during the second half of 1999.

2. On 13 December 2004 the complainant lodged a claim with the Municipal Court of Pejë/Pec against the Municipality of Pejë/Pec and the Provisional Institutions of Self-Government (the PISG) seeking compensation for the damages caused to his property.

3. The complainant submits a copy of a letter sent on 26 August 2004 by the Director of the UNMIK Department of Justice (DoJ) to all Municipal and District Court presidents and to the President of the Supreme Court of Kosovo regarding compensation claims for damage to property that arose after the entry into Kosovo of NATO forces in 1999. In the letter, the DoJ Director mentioned that "over 14.000" such claims had been lodged. He referred to "the problems that such a huge influx of claims will pose for the courts", and asked that "no [such] case be scheduled until such time as we have jointly determined how best to effect the processing of these cases."

4. According to the complainant, up to the present time, he has not been contacted by the Municipal Court and no session has been held.

II. COMPLAINTS

5. The complainant alleges that his right to a fair trial (Article 6 § 1 of the European Convention on Human Rights (ECHR)) and his right to an effective remedy have been violated (Article 13 of the ECHR). He further complains that by the refusal of the Municipal Court in Pejë/Pec to decide his claim for damages his right to property (Article 1 of Protocol No. 1 to the ECHR) has been violated. He also alleges a violation of his right to family life and home, as he is prevented from returning to his home (Article 8 of the ECHR).

III. PROCEEDINGS BEFORE THE PANEL

6. The complaint was introduced on 15 December 2008 and registered on the same date. During the proceedings before the Panel, the complainant is represented by Ms. Jasmina Zupanjac, Senior Legal Officer from the Danish Refugee Council.

7. The Panel communicated the case to the Special Representative of the Secretary-General (SRSG) on 28 April 2009 requesting his comments on behalf of UNMIK on the admissibility and merits of the complaint. The SRSG provided comments by letter dated 18 May 2009.

IV. THE LAW

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

9. In his comments, the SRSG states that "the case appears *prima facie* inadmissible" on the basis of non-exhaustion of remedies. He submits that as of November 2005, the Director of DoJ called on the courts to start processing claims for damages caused by identified natural persons and for damages caused after October 2000, as he considered that in these cases the obstacles to their efficient processing did not exist any longer. On 28 September 2008, following consultations with the Kosovo Judicial Council, which agreed to provide logistical support for processing the remaining claims, the DoJ opined that the remaining cases should be processed and the courts should be informed accordingly. The SRSG submits that the afore-mentioned cases will now be processed, and the courts before which the cases are pending should be able to issue decisions in due course.

10. Section 3.1 of UNMIK Regulation No. 2006/12 provides that 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.

11. The Panel notes that the rationale for the exhaustion requirement is to give the competent authorities, in particular the courts, the opportunity to remedy the alleged violation. However, complainants are only required to exhaust remedies that are effective, available in theory and in practice (see, among others, European Court of Human Rights (ECtHR), *Vernillo v. France*, judgment of 20 February 1991, *Publications of the Court*, Series A, no. 198, p. 12, § 27; ECtHR (Grand Chamber), *Selmouni v. France*, judgment of 27 July 1999, no. 25803/99, § 76, *ECHR*, 1999-V).

12. The Panel considers that the objection based on non-exhaustion of remedies cannot be examined in a general way, but should be examined in the specific context of each of the various complaints. It is in that context that the Panel will also consider whether certain complaints do not raise other objections to their admission (see, in the same sense, the decision of the Panel of 22 May 2009 in case no. 38/08, *Milogorić*).

Alleged violation of Articles 6 § 1 and 13 of the ECHR

13. The Panel considers that, insofar as the complainant invokes a violation of Articles 6 § 1 and 13 of the ECHR, he in fact raises two complaints (see the approach adopted in the above-mentioned *Milogorić* case; compare ECtHR, *Aćimović v. Croatia*, decision on admissibility of 30 May 2000, no. 48776/99; ECtHR, *Kutić v. Croatia*, decision on admissibility of 11 July 2000, no. 48778/99). On the one hand, he complains about the fact that due to the stay of the proceedings in the Municipal Court, he has been unable to obtain the determination of the claim for damages for destroyed property. The Panel considers that this complaint may raise an issue of his right of access to a court under Article 6 § 1 of the ECHR and of his right to an effective remedy under Article 13 of the ECHR, read in combination with Article 1 of Protocol No. 1. On the other hand, he complains about the length of the proceedings before the Municipal Court, due to the fact that the proceedings have been instituted on 13 December 2004, and that his claim has not been examined since then. This complaint may raise an issue of his right to a judicial decision within a reasonable time, in the sense of Article 6 § 1 of the ECHR.

14. The Panel notes that in his comments the SRSG has not indicated any specific legal remedy available to the complainant with regard to the stay or the duration of the proceedings. For its part, the Panel does not see any such remedy. The fact that on 28 September 2008 the courts were instructed to proceed with the claims like the one of the complainant is not relevant from the point of view of remedies to be exhausted by the complainant. The Panel therefore concludes that the complaint cannot be rejected for non-exhaustion of remedies within the meaning of Section 3.1 of UNMIK Regulation No. 2006/12.

15. The Panel considers that the complaints under Articles 6 § 1 and 13 of the ECHR raise serious issues of fact and law, the determination of which should depend on an examination of the merits. The Panel concludes therefore that these complaints are not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.

16. No other ground for declaring these complaints inadmissible has been established.

Alleged violation of Article 1 of Protocol No. 1

17. The complainant complains about a violation of his right to property (Article 1 of Protocol No.1), due to the refusal of the Municipal Court of Pejë/Pec to decide on his claim for damages.

18. In its decision of 22 May 2009 on the admissibility of the complaint in the *Milogorić* case, no. 38/08, the Panel found that the proceedings concerning the complainant's claim

were still pending before the Municipal Court, that this complaint therefore was premature and that it had to be rejected for non-exhaustion of remedies, in accordance with Section 3.1 of UNMIK Regulation No. 2006/12.

19. Given the fact that the complainant argues that the remedy offered by the Municipal Court thus far has not been effective, the Panel would like to add that this part of the complaint is also inadmissible for being outside the Panel's jurisdiction.

20. Indeed, the Panel notes that the complainant's claim before the Municipal Court relates to the destruction and the looting of his property. According to the complainant, these acts took place between June 1999 and the end of the year 1999.

21. The Panel recalls that, according to Section 2 of UNMIK Regulation No. 2006/12, the Panel has jurisdiction only over "complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights". The destruction and the looting of property are instantaneous acts, which do not give rise to a continuing violation (see the decision of the Panel of 16 July 2008, Lajović, no. 09/08, § 7).

22. It is true that before the Panel the complainant does not complain directly about the said acts, but only about the fact that, due to the stay of the proceedings, he has been unable thus far to obtain compensation for the damage caused by the said acts. Nevertheless, insofar as the court proceedings are referred to from the point of view of the right of property, they cannot be detached from the acts upon which the claim before the court is based. Or, to state it positively, as the European Court of Human Rights has done with respect to its jurisdiction under the ECHR:

"... the Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing this interference cannot bring it within the Court's temporal jurisdiction" (ECtHR (Grand Chamber), *Blečić v. Croatia*, judgment of 8 March 2006, no. 59532/00, §77, *ECHR*, 2006-III).

23. It follows that this part of the complaint lies, in any event, outside the Panel's jurisdiction *ratione temporis* (see, in a case similar to the present one, ECtHR, *Aćimović v. Croatia*, decision on admissibility of 7 November 2002, no. 61237/00).

Alleged violation of Article 8 of the ECHR

24. The complainant complains about a violation of his right to family life and home (Article 8 of the ECHR).

25. As noted above, the complainant's property, including the house in Kosovo where he lived with his family, was destroyed sometime between June 1999 and the end of the year 1999. For the above-mentioned reason, any complaint relating to the destruction of the complainant's home therefore lies outside the Panel's jurisdiction *ratione temporis*.

26. In addition, this part of the complaint is not substantiated.

FOR THESE REASONS,

The Panel, unanimously,

- DECLARES ADMISSIBLE THE COMPLAINTS RELATING TO THE RIGHT OF ACCESS TO A COURT AND THE RIGHT TO AN EFFECTIVE REMEDY (ARTICLES 6 § 1 AND 13 OF THE ECHR) AND THE RIGHT TO A JUDICIAL DECISION WITHIN A REASONABLE TIME (ARTICLE 6 § 1 OF THE ECHR);

- DECLARES INADMISSIBLE THE REMAINDER OF THE COMPLAINT.



John RYAN
Executive Officer



Marek NOWICKI
Presiding Member

