



DECISION

Date of adoption: 12 September 2009

Case No. 20/08

Kabaš KRASNIĆI

against

UNMIK

The Human Rights Advisory Panel sitting on 12 September 2009,
with the following members present:

Mr. Marek NOWICKI, Presiding Member
Mr. Paul LEMMENS

Mr. Nedim OSMANAGIĆ, Acting 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. The complainant is a citizen of Bosnia and Herzegovina, living in Sarajevo, Bosnia and Herzegovina.
2. The complaint relates to property rights over two pieces of land, one located in Prishtinë/Priština, the other in Pejë/Peć. Originally the property was owned by the socially owned enterprise (SOE) Šipad-Komerc. That organisation had its seat in Sarajevo and operated throughout the territory of the former Yugoslavia, including in Kosovo. The employees owned 43,94% of the company's shares while the remaining 56,06 % of its shares were socially owned.
3. Following the independence of Bosnia and Herzegovina, the legislature adopted its 1994 Law on the Transformation of Social Property into State-Owned Property. As a result, Šipad-Komerc became fully state-owned. Under the privatisation legislation of Bosnia and Herzegovina, the Cantonal Privatisation Agency of Sarajevo decided on 21 July 2001 to privatise the entity in a company with private ownership. On 17 June 2002 the Cantonal Court of Sarajevo registered Šipad-Komerc as a "joint stock company" (JSC), under the name "Šipad-Komerc JSC Sarajevo".
4. After the privatisation of Šipad-Komerc, the latter disposed of the two properties in question by entering into two separate sale contracts with the complainant, both signed, it seems, on 31 July 2001. Both contracts were certified by the Municipal Court of Sarajevo in 2001.
5. On 30 January 2002 the complainant requested the cadastral offices in Prishtinë/Priština and Pejë/Peć, the Kosovo Trust Agency (KTA) and the Supreme Court in Kosovo to register the purchased properties in his name.
6. Following failure of the cadastral offices to decide upon the complainant's request, the Supreme Court of Kosovo, by a decision dated 4 March 2003, ordered the Municipality of Prishtinë/Priština to make a decision according to the complainant's request. A decision in that sense was subsequently taken. As for the property situated in Pejë/Peć, the Kosovo Cadastral Agency carried out the registration of the change of ownership on 30 July 2004.
7. However, on 29 October 2003 the KTA, by letters to the cadastral offices in Prishtinë/Priština and Pejë/Peć, objected to the complainant's request. According to the KTA the properties were still owned by a SOE and accordingly under KTA administration. This objection in fact prevented the complainant to acquire any right over the properties at issue.
8. On 14 June 2005, the complainant filed a claim against the KTA before the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (Special Chamber). He requested the Special Chamber to issue a temporary measure against the KTA, so as to exclude the properties in question from the privatisation process of the SOE.
9. On 8 June 2006 the Special Chamber granted an injunction as requested.

10. On 26 February 2007 the complainant filed a claim with the Special Chamber requesting that the Special Chamber order the KTA to enable the complainant to take possession and not to interfere with the exercise of the complainant's property rights over the real estate at issue. He also requested that the Special Chamber order that the competent cadastral offices register these various parcels as the property of the private company Šipad Komerc Sarajevo and of the complainant.
11. The dispute before the Special Chamber gave rise to a complex question relating to the determination of the status of the properties in question. On the one hand, the complainant argued that according to the Agreement on Succession Issues, signed in Vienna on 29 June 2001 by Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia, Annex G ("Private property and acquired rights"), Section 2, all rights to property existing on 31 December 1990 had to be mutually recognised throughout the territory of the former Yugoslavia. This would mean that the property rights of the former SOE Šipad-Komerc had to be recognised in Kosovo. As a result, that entity could lawfully dispose of its property, in conformity with the law of Bosnia and Herzegovina. On the other hand, the KTA argued that according to Section 5.1 (a) (i) of UNMIK Regulation No. 2002/12 of 13 June 2002 on the Establishment of the Kosovo Trust Agency, it had the authority to administer SOEs that were registered in Kosovo as of 31 December 1988. Since Šipad-Komerc was an SOE on 31 December 1988, the KTA had to administer its working units in Kosovo, as they had functioned as independent entities. The private company into which Šipad-Komerc was transformed in Bosnia and Herzegovina was not at liberty to sell the property belonging to these Kosovo working units.
12. On 5 February 2008 the Special Chamber issued a judgment in the complainant's case. It referred to UNMIK Regulation No. 2000/54 of 27 September 2000 amending UNMIK Regulation No. 1999/1, as amended, on the Authority of the Interim Administration in Kosovo. Since the properties in question were socially owned property, they fell under the administration of UNMIK and they could not freely be transferred to the complainant. The Special Chamber also referred to UNMIK Regulation No. 2002/12, to conclude that they fell under the administration of the KTA. Having reached that conclusion, the Special Chamber held that "the issue of the Succession Treaty need not be examined". Since the complainant could not prove a valid property title, his claim could not be accepted, and was declared unfounded.
13. On 7 April 2008 the complainant filed a request for review as well as an appeal against the judgment of 5 February 2008.
14. On 22 April 2008 the Special Chamber rejected the complainant's request for review on the ground that the claimant had not presented any new decisive relevant facts.
15. By a separate decision of the same date, the Special Chamber declared the appeal inadmissible. It held that the relevant provision of UNMIK Regulation No. 2008/4 of 5 February 2008 amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, which provided for the possibility of an appeal against a judgment of

a trial panel of the Special Chamber to the appellate panel of the Special Chamber (new Section 9.5 of UNMIK Regulation No. 2002/13), had not yet entered into force. According to the Special Chamber, Section 14 of UNMIK Regulation No. 2008/4 had originally determined that the said regulation would enter into force on 31 March 2008, but the date of entry into force had been postponed until 31 May 2008 by UNMIK Regulation No. 2008/19 of 31 March 2008.

II. COMPLAINT

16. The complainant alleges that his right to a fair trial, guaranteed by Article 6 of the European Convention on Human Rights (ECHR), has been violated. According to the complainant:

- the Special Chamber was not a tribunal “established by law”, as the judgment was handed down by a panel of four judges, while UNMIK Administrative Direction No. 2006/17 of 6 December 2006 amending and replacing Administrative Direction No. 2003/13 implementing UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters provided that the panel was to be composed of five judges;
- the Special Chamber went outside the framework of the dispute submitted to it, as it in fact decided the ownership rights, while the complainant had only requested that the administrative barriers imposed by the KTA against his registration in the relevant records would be removed;
- the Special Chamber has made a number of procedural and factual errors. In particular, it erroneously considered that there was no need to discuss the issue of the Agreement on Succession Issues, and it failed to address the complainant’s arguments relating to that Agreement.

17. The complainant further complains about a violation of his property and his economic rights (Universal Declaration of Human Rights and Article 1 of Protocol No. 1 to the ECHR). According to the complainant,

- the judgment allows the KTA to administer the property belonging to the complainant, while for nearly ten years since 10 June 1999 the KTA has allowed usurpers and illegal occupants to use the properties in question;
- the judgment violates the property rights to which the complainant is entitled pursuant to the Agreement on Succession Issues, thus creating “double standards” in the former Yugoslavia.

18. Finally, the complainant invokes a violation of his right to an “effective remedy”. He has been unable to appeal against the judgment of 5 February 2008, which allegedly has violated a number of his fundamental rights. In fact, by postponing the date of entry into force of Regulation No. 2008/4, which creates the possibility of an appeal against such judgment, UNMIK has deprived the complainant of the right to an effective remedy.

III. PROCEEDINGS BEFORE THE PANEL

19. The complaint was introduced on 3 July 2008 and registered on 4 July 2008. In the proceedings before the Panel, the complainant is represented by Mr. Teki Bokshi, a practicing lawyer from Gjakovë/Djakovica.
20. On 11 and 17 July 2008 and on 20 August 2008 the complainant transmitted additional documents to the Panel.
21. The Panel communicated the complaint to the Special Representative of the Secretary-General (SRSG) on 23 October 2008, with a view to obtaining UNMIK's comments on both the admissibility and the merits of the complaint.
22. The SRSG commented on 25 November 2008 on the admissibility and the merits of the complaint.
23. On 14 April 2009 the Panel obtained copies of several documents from the Special Chamber on the complainant's case.
24. On 23 April 2009, the Panel re-communicated the complaint to the SRSG, together with the documents obtained from the Special Chamber.
25. On 14 May 2009 the SRSG submitted additional comments on the case.

IV. THE LAW

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

A. Alleged violation of Article 6 § 1 of the ECHR (right to a fair trial)

27. Article 6 § 1 of the ECHR, in its relevant part reads as follows: "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]."

1. Composition of the Special Chamber

28. The complainant alleges that his claim was adjudicated by a panel of four judges and that the panel was therefore not composed in accordance with the law. He refers to UNMIK Regulation No. 2002/13 of 13 June 2002, which provides in Section 3.1 that "the Special Chamber shall be composed of a panel of five judges of which three shall be international judges and two shall be judges who are residents of Kosovo [...]."
29. In his comments, the SRSG states that the said provision sets the number of judges who "will be working for the entire Special Chamber as a court", and that it does not determine the composition of individual panels sitting to adjudicate the claims. He further refers to Administrative Direction No. 2003/13 of 11 June 2003 implementing

UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters. Section 13.3 states that the Presiding Judge may assign claims and complaints to panels composed of three judges. This provision sets out the minimum number of judges sitting in the Special Chamber's panels. It implies that a panel may be composed of four judges, as in the complainant's case.

30. The Panel notes that, at the moment when the Special Chamber handed down its judgment on 5 February 2008, its organisation was regulated in UNMIK Regulation No. 2002/13 of 13 June 2002 in its original version. Section 3.1 provides, as indicated above, that the Special Chamber is "composed of a panel of five judges". Section 9.2 provides that decisions of the Special Chamber "shall require the supporting vote of at least three (3) judges".
31. Section 7 of UNMIK Regulation No. 2002/13 provides that the SRSG shall promulgate rules for the conduct of proceedings before the Special Chamber through the issuance of an Administrative Direction. At the moment when the Special Chamber handed down its judgment, such rules were contained in UNMIK Administrative Direction No. 2006/17 of 6 December 2006 amending and replacing Administrative Direction No. 2003/13 implementing UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters. As the SRSG rightly indicates, Section 13.3 of that Administrative Direction provides that "the Presiding Judge may assign claims and complaints to panels composed of three judges". The same provision states that "all judgments or decisions of such panels shall be adopted by consensus failing which the matter shall be referred to the full Chamber".
32. Having regard to the above, the Panel considers that the complaint relating to the composition of the Special Chamber raises serious issues of fact and law, the determination of which should depend on an examination of the merits. The Panel concludes therefore that this complaint is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.
33. No other ground for declaring this aspect of the complaint inadmissible has been established.

2. Alleged procedural and factual errors

34. With regard to the complaints that the Special Chamber went beyond its jurisdiction and that it committed various errors of fact and law, the Panel finds that the complainant argues in substance that the Special Chamber wrongly interpreted and applied the relevant provisions of procedural and material law.
35. However, the Panel recalls that it is not its task to act as an appellate court over the Special Chamber (Human Rights Advisory Panel (HRAP), *Todorović*, no. 33/08, decision of 17 April 2009, § 21). It is the role of the latter to decide which law is applicable and to interpret and apply the relevant rules of the applicable law. For its part, the Panel finds no element to conclude that the Special Chamber acted in an

arbitrary or unreasonable manner in deciding on the issues in dispute. In particular, the Panel does not find that the Special Chamber arbitrarily or unreasonably decided to apply the law relating to the administration of socially owned property by the KTA and held that the Agreement on Succession Issues was not relevant for the determination of the claim.

36. It follows that this part of the complaint must be rejected as being manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.

3. Alleged denial of the right to appeal

37. The complainant states that the Special Chamber on 22 April 2008 declared his appeal against the judgment of 5 February 2008 inadmissible, although UNMIK Regulation No. 2008/4 of 5 February 2008 amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters had created a right of appeal against a judgment of a panel of the Special Chamber. The reason for not allowing the appeal was that UNMIK Regulation No. 2008/4 had not yet entered into force, taking into account the postponement of the date of entry into force by UNMIK Regulation No. 2008/19 of 31 March 2008. The complainant considers that by postponing the entry into force of the Regulation that created the possibility of an appeal, UNMIK denied him an effective remedy.

38. The Panel considers that the complainant in substance alleges that he has been denied access to an appeal mechanism, and that this complaint is also to be examined from the point of view of Article 6 § 1 of the ECHR

39. At the date of adoption of the judgment of the Special Chamber, on 5 February 2008, UNMIK Regulation No. 2002/13 did not provide for any possibility of appeal against a judgment of the Special Chamber.

40. It is true that UNMIK Regulation No. 2002/13 had been replaced, namely by UNMIK Regulation No. 2008/4 of 5 February 2008 (promulgated the same day as the judgment was handed down). According to that Regulation, the Special Chamber is composed of five panels of three judges, which can hear claims in the first instance (Section 3.2). There is also an appellate panel, presided over by the President of the Special Chamber and composed of five judges, competent to hear appeals (Section 3.3). Section 9.5 provides as follows:

9.5 A Judgement or Decision of a trial panel shall be served on the parties within thirty (30) days of adoption. Within thirty days from the receipt thereof, a party may appeal to the appellate panel for a review of such Judgement or Decision. Where a Decision, including a Judgement issued pursuant to section 4.3, is appealed the appellate panel shall first determine whether the Decision or Judgement so appealed merits a review. If the appellate panel decides not to review the Decision or Judgement issued pursuant to section 4.3 of the trial panel such Judgement or Decision becomes final. Where the appellate panel reviews a

Judgement or Decision it may decide to confirm, revoke or alter the Judgement or Decision made by a trial panel.

41. Section 14 of UNMIK Regulation No. 2008/4 initially provided that the regulation would enter into force on 31 March 2008, “by which time the procedural rules promulgated under section 7 shall have been duly adjusted”. However, this date was modified by UNMIK Regulation No. 2008/19 of 31 March 2008, “for the purpose of providing for additional time that is required for duly adjusting the procedural rules of the Special Chamber promulgated under section 7 of UNMIK Regulation No. 2002/13”. The entry into force of UNMIK Regulation No. 2008/4 was thus postponed until 31 May 2008. The Panel notes that Section 14 was later modified by UNMIK Regulation No. 2008/29 of 31 May 2008, UNMIK Regulation No. 2008/35 of 30 June 2005 and UNMIK Regulation No. 2008/36 of 1 November 2008, each time “for the purpose of providing for additional time that is required to establish specialized first instance panels and an appeals panel at the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters”. As a result, the entry into force of UNMIK Regulation No. 2008/4 was postponed successively until 30 June 2008, 31 October 2008 and finally 31 December 2008.
42. It is clear from the foregoing that the complainant could not rely on UNMIK Regulation No. 2008/4 when he appealed against the judgment of the Special Chamber of 5 February 2008. While the complainant filed his appeal on 7 April 2008, the Panel observes that, at the moment when that judgment was handed down on 5 February 2008, UNMIK Regulation No. 2008/4 had not yet entered into force, its entry into force being envisaged for 31 March 2008. Therefore, by postponing the entry into force of UNMIK Regulation No. 2008/4, UNMIK has not deprived the complainant of any right of appeal, as such right had not yet been actually granted.
43. Moreover, as the European Court of Human Rights has held, Article 6 of the ECHR does not guarantee, as such, a right of appeal or a right to a second level of jurisdiction in civil matters (see, e.g., ECtHR, *Guérin v. France*, judgment of 29 July 1998, *Reports of Judgments and Decisions* 1998-V, § 44; ECtHR, *Marpa Zeeland b.v. and Metal Welding b.v. v. Netherlands*, no. 46300/99, judgment of 9 November 2004, § 48). The Panel does not see a provision in any of the other international human rights instruments mentioned in Section 1.2 of UNMIK Regulation No. 2006/12 which could be understood as guaranteeing such a right in cases other than criminal ones. By deferring the entry into force of UNMIK Regulation No. 2008/4, the SRSG cannot be said to have violated any fundamental right of the complainant.
44. The Panel concludes that this part of the complaint is incompatible with the human rights set forth in the international human rights instruments referred to in Section 1.2 of UNMIK Regulation No. 2006/12, or at least does not disclose any appearance of a violation of the rights and freedoms guaranteed by these instruments. It follows that this complaint must be rejected as being manifestly ill-founded within the meaning of Section 3.3 of the said Regulation (see, in the same sense, the HRAP, *Todorović*, no. 33/08, decision of 17 April 2009, §§ 32-38).

B. Alleged violation of Article 1 of Protocol No. 1 to the ECHR (protection of property)

45. Insofar as the complainant alleges that his right to protection of property has been violated, the Panel considers that this complaint has to be examined in the light of Article 1 of Protocol No. 1 to the ECHR. The Panel notes that the complainant does not develop any argument with respect to the alleged violation of his economic rights, invoked together with his right of property, and it considers that an examination of the complaint from the point of view of the right to protection of property is sufficient.
46. Article 1 of Protocol No. 1 to the ECHR reads, in relevant part, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions.”
47. The concept of “possessions” referred to in Article 1 of Protocol No. 1 to the ECHR has an autonomous meaning. As the European Court of Human Rights has held on many occasions, Article 1 of Protocol No. 1 to the ECHR applies only to a person's existing possessions. It is true that, in certain circumstances, a “legitimate expectation” of obtaining an “asset” may also enjoy the protection of Article 1 of Protocol No. 1 to the ECHR, provided that there is a sufficient basis for the proprietary interest in national law, for example where there is settled case-law of the domestic courts confirming its existence (European Court of Human Rights (ECtHR) (Grand Chamber), *Kopecký v. Slovakia*, no. 44912/98, § 52, *ECHR*, 2004-IX). However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the complainant's submissions are subsequently rejected by the courts (ECtHR (Grand Chamber), *Kopecký v. Slovakia*, judgment cited above, § 50; ECtHR (Grand Chamber), *Anheuser-Busch Inc. v. Portugal*, judgment of 11 January 2007, no. 73049/01, § 65).
48. The Panel notes that the complainant claimed, in substance, to have acquired property rights over the property located in Kosovo through contracts concluded in Bosnia and Herzegovina. However, these rights have not been recognised by a competent court in Kosovo.
49. In the absence of prevailing agreements between the relevant authorities, i.e. those of Bosnia and Herzegovina and UNMIK (for Kosovo), both authorities are competent to set conditions for acquiring property rights. Accordingly, the title held by a company, by virtue of the relevant legislation in force in the jurisdiction in which it has its seat, is not necessarily to be recognised in the jurisdiction where the property is located.
50. In the present case the Special Chamber found that under applicable law the claimant did not have a valid property right. The Panel, having regard to the information before it and considering that it has only limited power to deal with alleged errors of fact or law committed by the competent courts, to which it falls in the first place to interpret and apply the applicable law, finds no appearance of arbitrariness in the way in which the Special Chamber determined the complainant's claim..

51. It follows that the complainant did not have a “possession” within the meaning of the first sentence of Article 1 of Protocol No. 1 to the ECHR. The guarantees of that provision do not therefore apply in the present case.
52. Accordingly, this part of the complaint is incompatible with Article 1 of Protocol No. 1 to the ECHR, or at least does not disclose any appearance of a violation of the right guaranteed by that provision. It follows that this part of the complaint must be rejected as being manifestly ill-founded within the meaning of Section 3.3 of Regulation No. 2006/12.

FOR THESE REASONS,

The Panel, unanimously,

- DECLARES ADMISSIBLE THE COMPLAINT RELATING TO THE COMPOSITION OF THE SPECIAL CHAMBER OF THE SUPREME COURT (ARTICLE 6 § 1 OF THE ECHR);

- DECLARES INADMISSIBLE THE REMAINDER OF THE COMPLAINT.

Nedim OSMANAGIĆ
Acting Executive Officer

Marek NOWICKI
Presiding Member