



DECISION

Date of adoption: 12 September 2009

Case No. 23/08

Qaush SMAJLAJ

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, as amended,

Having deliberated, decides as follows:

I. THE FACTS

1. According to the complainant, the facts can be summarized as follows.
2. On 23 January 2005 a fire started in the complainant's house in the village of Dujakë/Dujak, Gjakovë/Đakovica Municipality, due to an oversupply of voltage.

The fire caused severe fire and smoke damage to the ground floor of the house as well as moveable property located inside.

3. The complainant immediately requested the Municipal Court of Gjakovë/Đakovica to appoint experts and to conduct a site inspection. The request was filed against the Kosovo Energy Corporation (KEK). A hearing took place on 28 January 2005, in which the court appointed an electrical engineering expert and a constructional engineering expert. The same day the court proceeded with a site inspection, the results of which were mentioned in the minutes of the hearing. The experts subsequently presented written reports.
4. Relying on the two expert reports, the complainant on 16 May 2008 lodged a claim for compensation against KEK, before the Special Chamber of the Supreme Court of Kosovo for Kosovo Trust Agency Related Matters (Special Chamber). The complainant sought damage, provisionally estimated at 7,307 euro.
5. In accordance with UNMIK Administrative Direction No. 2006/17 of 6 December 2006 amending and replacing UNMIK 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 (Administrative Direction No. 2006/17), the complainant provided certified English translations of his submission to the Special Chamber as well as of the minutes of the Municipal Court hearing mentioned above. The complainant bore the expenses of the translation.
6. The Panel is not aware of the outcome of the proceedings before the Special Chamber.

II. COMPLAINTS

7. The complainant alleges that the requirement that all documents and pleadings submitted to the Special Chamber be translated into English contained in Section 22.7 of UNMIK Administrative Direction No. 2003/13 is a violation of Article 6 § 1 of the European Convention on Human Rights (ECHR), right to a fair trial in civil proceedings, as well as of Article 14 ECHR, combined with the said Article 6 § 1, prohibition against discrimination. The complainant also argues that the Special Chamber provided the KTA with free translations from English into either Serbian or Albanian, in violation of the principle of equality of arms.

III. PROCEEDINGS BEFORE THE PANEL

8. The complaint was introduced on 24 June 2008 and registered by the Panel on 3 July 2008.
9. The complainant was initially represented by Mr Teki Bokshi, who later advised the Panel that he was no longer representing the complainant.

10. On 6 October 2008 the Panel wrote to the complainant requesting further information.
11. As no response was received to the Panel's request, the Panel wrote again to the complainant on 17 November 2008 requesting the information.
12. The complainant responded on 15 January 2009.

IV. THE LAW

13. 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.

A. Right to a fair trial

14. The complainant invokes a violation of Article 6 § 1 of the ECHR, on the one hand on the ground that the requirement to provide for a translation in English violates the right to a "free and fair trial", on the other hand on the ground that Administrative Direction No. 2003/13 treats complainants and the KTA in an unequal way.
15. Article 6 § 1 European Convention on Human Rights (ECHR) states, in relevant part:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...].

1. Access to a court

16. The Panel notes that "Article 6 § 1 [of the ECHR] embodies the „right to a court“, of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect" (ECtHR, *Tinnely & Sons Ltd and Others and McElduff and Others v. the United Kingdom*, judgment of 10 July 1998, *Reports of judgments and decisions*, 1998-IV, § 72).
17. A restriction affecting the right to access a court, such as a translation requirement or a filing fee, is incompatible with Article 6 §1 of the ECHR unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (ECtHR, *Kreuz v. Poland*, no. 28249/95, judgment of 19 June 2001, § 55, *ECHR*, 2001-VI). A violation of the right of access to a court may occur in circumstances where there is no or inadequate provision for fee waiver for claimants who cannot otherwise pay reasonable costs (ECtHR, *Ciorap v. Moldova*, no. 12066/02, judgment of 19 June 2007, § 95; ECtHR, *Kreuz v. Poland*, cited above, §§ 62-67).

18. It should be noted that, at the moment when the complainant filed his claim before the Special Chamber, Administrative Direction No. 2003/12 had been replaced by Administrative Direction No. 2006/17. The complaint should therefore be read in the light of the relevant provisions of the latter Administrative Direction.
19. Section 22.7 of Administrative Direction No. 2006/17 directs parties to submit English translations of pleadings and supporting documents to the Special Chamber. Section 22.8 of Administrative Direction No. 2006/17 states that a natural party may submit an application to the Presiding Judge for assistance with the translations of pleadings and supporting documents. Such applications must include a statement of the party's financial means. Section 22.9 of Administrative Direction No. 2006/17 provides that the Presiding Judge may direct that the translation of pleadings and supporting documents be undertaken at the expense of the Special Chamber where he or she determines that it is reasonable to do so having regard to the means of the party. If the Presiding Judge rejects a request to have the Special Chamber undertake the translation of documents, he or she shall notify the party and direct that the translation be undertaken at the party's expense within a set period of time. If the party does not provide the translation, the Special Chamber must translate the documents and award the costs thereof against that party.
20. The requirement that documents be translated into English is related to the ability of international judges of the Special Chamber to administer justice in a timely manner. The unique context of Kosovo requires the appointment of international judges whose working language is English. The Panel therefore considers the requirement of English translations to pursue a legitimate aim, namely furthering the fair administration of justice through proper decision making.
21. Having noted that the aim of the restriction is legitimate, the Panel must also determine whether the means employed are reasonably proportionate to that aim. In the present case, the Panel cannot conclude that requiring claimants who can afford to translate documents into English is disproportionate to the legitimate aim of ensuring the timely administration of justice. Furthermore, Administrative Direction No. 2006/17 explicitly requires the Special Chamber to translate documents at its own expense for claimants who can demonstrate financial hardship (compare ECtHR, *Kreuz v. Poland*, cited above, §§ 62-67). The complainant has not alleged that he does not have the financial means to provide an English translation of the documents submitted to the Special Chamber.
22. There is therefore no indication that the complainant's access to the court has been disproportionately restricted through this requirement.
23. 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.

2. Equality of arms

24. The complainant also alleges that Albanian and Serbian language applicants to the Special Chamber suffer from an inequality of arms because Section 64.7 of Administrative Direction No. 2003/13 obliges the Presiding Judge of the Special Chamber to provide translations of the Kosovo Trust Agency (KTA)'s submissions from English into Albanian. The KTA is thus not obliged to address the Special Chamber in languages used by the parties.
25. It is to be noted that, at the time when the complainant filed his claim with the Special Chamber, the provision of Section 64.7 of the old Administrative Direction No. 2003/13 was replaced by the provision of Section 64.11 of the new Administrative Direction No. 2006/17. The latter provision is contained in "Title V. Complaints brought under UNMIK Regulation No. 2003/13 [of 9 May 2003 on the Transformation of the Right of Use to Socially-Owned Immovable Property]". However, Section 64 only pertains to "Complaints related to Lists of Eligible Employees". In contrast, the complainant filed his action against KEK under UNMIK Regulation No. 2002/13 of 13 June 2002 on the Establishment of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters in relation to a civil damages. Therefore Section 64 of Administrative Direction No. 2006/17 does not apply to the complainant's case.
26. It follows that there can be no inequality of arms between the complainant and the KTA.
27. The Panel would moreover like to observe that, unlike Section 64.7 of the old Administrative Direction No. 2003/13, Section 64.11 of the new Administrative Direction No. 2006/17 provides that the Special Chamber shall arrange only for translations into English of the complaint and subsequent submissions and supporting documents. By contrast, Section 64.8 of Administrative Direction No. 2006/17 provides that the KTA's written comments and other documents shall be filed "in English and in the language of the complaints". There is thus no "privileging" of the KTA, to the detriment of the complainant.
28. This part of the complaint must therefore also be rejected as being manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.

B. Prohibition of discrimination

29. The complainant alleges that he was discriminated against in the enjoyment of his right to a fair trial. He invokes a violation of Article 14 of the ECHR, read in combination with Article 6 § 1 of the ECHR.
30. Article 14 of the ECHR reads as follows:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other

opinion, national or social origin, association with a national minority, property, birth or other status.

31. The complainant states in the first place that UNMIK discriminates against Albanian and Serbian speaking complainants by requiring those who can afford it to arrange for translations of their submissions into English. He also states that he is “not aware of a case in which a national in his/her own country does not have the possibility to address the state institutions in his/her own language but instead has to use a language which is not his/her mother tongue”. The requirement to provide English translations of documents drafted in Albanian or Serbian allegedly places the official languages in Kosovo in an undervalued position.
32. The Panel notes that the Human Rights Committee (HRC) has addressed a similar issue in cases concerning the use of the Breton language in France, in the context of criminal proceedings under Article 14 of the International Covenant on Civil and Political Rights (ICCPR). In the case of *Cadoret and Le Bihan v. France*, Communication No. 323/1988 [UN Doc. CCPR/C/41/D/323/1988] (1991), § 5.6, the HRC noted that the right to a fair trial does not “obligate States parties to make available to a person whose mother tongue differs from the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself or herself adequately in the official language”. Only if the accused or a witness has difficulty understanding or expressing him or herself in the language of the court, would the court then be obliged to provide a translator.
33. Although not explicitly stated in the legislation establishing the Special Chamber, Section 1.1 of UNMIK Regulation No. 2000/46 on the Use of Language in Court Proceedings in Which an International Judge or International Prosecutor Participates provides that court proceedings in which an international judge or prosecutor participate “shall be conducted in English, in addition to any other language or languages required by [the] applicable law.” Section 1.2 of UNMIK Regulation No. 2000/46 requires that “immediate interpretation and translation into another language or languages shall be made in accordance with the applicable law.”
34. In the context of a complex United Nations mission for which the working language is English, the requirement for translation does not constitute a discrimination of Albanian and Serbian speakers, compared to those who speak another language. The Panel refers to what it has already noted above, with respect to the restriction of the access to a court. It has found, more specifically, that in the given circumstances a requirement of translation pursues a legitimate aim and is in principle not disproportionate. It must again be underlined that exceptions are allowed if the requirement is unreasonable with regard to the financial means of the complainant (see §§ 19-20 above). The same reasoning applies in the context of the difference in treatment between Albanian and Serbian speakers and other speakers.
35. The Panel notes that Administrative Direction No. 2006/17 does not prioritise one of Kosovo’s indigenous linguistic groups over any other. The translation requirement is applied equally to all communities in Kosovo.

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

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINANT INADMISSIBLE.

Nedim OSMANAGIĆ
Acting Executive Officer

Marek NOWICKI
Presiding Member