



DECISION

Date of adoption: 12 February 2010

Case No. 320/09

Kadri BALAJ (on behalf of Mon BALAJ), Shaban XHELADINI (on behalf of Arben XHELADINI), Zenel ZEMELI and Mustafa NERJOVAJ

against

UNMIK

The Human Rights Advisory Panel sitting on 12 February 2010
with the following members present:

Mr. Marek NOWICKI, Presiding Member
Mr. Paul LEMMENS
Ms. Christine CHINKIN

Mr. Rajesh TALWAR, 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 complaint is addressed against UNMIK Administrative Direction No. 2009/1 implementing UNMIK Regulation No. 2006/12 on the establishment of the Human Rights Advisory Panel of 17 October 2009.

2. According to its preamble, UNMIK Administrative Direction No. 2009/1 was issued “for the purpose of clarifying the character and setting of proceedings at public hearings of, the consideration of the admissibility of complaints by, and providing a deadline for the submission of any complaints to, the Human Rights Advisory Panel in view of UNMIK’s diminished ability to effectively exercise executive authority in all areas from which the subject matter of human rights complaints has emanated”.
3. UNMIK Administrative Direction No. 2009/1 contains six sections:
 - Section 1 (“Public Hearings”) provides that public hearings “shall be conducted in such manner and settings that allow a clear sense of non-adversarial proceedings to be conveyed to all participants and to the public at large”, and provides further rules on the conduct and purpose of hearings;
 - Section 2 (“Issues of Admissibility”) provides that issues of admissibility shall be examined at any stage of the proceedings. It also provides that “any complaint that is or may become in the future the subject of the UN Third Party Claims process or proceedings under section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo of 18 August 2000, as amended, shall be deemed inadmissible for reasons that the UN Third Party Claims Process and the procedure under section 7 of Regulation No. 2000/47 are available avenues pursuant to Section 3.1 of the Regulation”. Section 2 finally provides that comments on the merits of an alleged violation of human rights shall be submitted only after the Panel has determined the admissibility of the complaint; where a new admissibility issue arises after the complaint has been declared admissible, the Panel shall suspend its deliberation on the merits until the admissibility of the complaint is determined anew;
 - Section 3 (“Appointment and Resignation of Panel Members”) provides that the President of the European Court of Human Rights shall propose “a sufficient number of suitable candidates” for appointment to the Panel. If no proposals or an insufficient number of proposals are received by UNMIK within a period of one month, the Special Representative of the Secretary-General (SRSG) can make the necessary appointment without the requested proposal, “following consultation with relevant international human rights bodies”. It also provides that in case one or more members of the Panel resign from their position, the Panel can make no determinations until new appointments have been made;
 - Section 4 (“Publications of the Advisory Panel”) provides that “all publications, announcements and press releases” of the Panel shall be made through the UNMIK Office of the Spokesperson and Public Information;
 - Section 5 (“Cut-Off Date for Submission of Complaints”) provides that no complaint shall be admissible if received later than 31 March 2010;
 - Section 6 (“Entry into Force”) provides that UNMIK Administrative Direction No. 2009/1 shall enter into force on 17 October 2009, and shall apply to all complaints that are pending before the Panel.

4. The complainants in the present case are also the complainants in another case, no. 04/07, which was filed on 11 October 2007 and is currently pending before the Panel. The Panel declared that case admissible on 6 June 2008 (Human Rights Advisory Panel (hereafter HRAP), *Balaj and others*, no. 04/07, decision of 6 June 2008). During the merits stage of the proceedings in the said case, the SRSG, by a submission of 16 September 2008, further developed on 15 December 2008, 11 March 2009, 1 July 2009 and 11 August 2009, raised an objection to the admissibility of the complaint based on the non-exhaustion of available remedies. According to the SRSG, the complaint was the object of an ongoing review by an UNMIK Claims Review Board, which is part of the United Nations Third Party Claims Process. The complainants replied that the United Nations Third Party Claims Process did not amount to a remedy, and that in any event it was ineffective.
5. That issue was still under consideration by the Panel when the SRSG issued UNMIK Administrative Direction No. 2009/1 on 17 October 2009.
6. With a submission dated 30 October 2009 and received on 18 January 2010, the SRSG reiterated, now relying on Section 2 of UNMIK Administrative Direction No. 2009/1, that the complaint in case no. 04/07 is inadmissible, on the ground that the complaint is the object of a United Nations Third Party Claims Process under section 7 of Regulation No. 2000/47.
7. The Panel has not yet taken a position on the SRSG's objection in case no. 04/07. As stated above, case no. 04/07 is still pending before the Panel.

II. COMPLAINTS

8. The complainants allege a violation of their right to a fair trial as guaranteed by Article 6 § 1 of the European Convention on Human Rights (ECHR). According to the complainants, Administrative Direction 2009/1 “purports to have the effect of (1) reopening the issue of admissibility, (2) determining the live issue of admissibility, (3) preventing the Panel from considering the merits of the complaint, (4) prevent[ing] adversarial proceedings, in application no. 04/07, and (5) undermining the independence and impartiality of the Panel”. They state that the Administrative Direction constitutes “an obvious attempt by the executive, in this case the SRSG, to provide a binding interpretation of the relevant law”, and as such amounts to “a very serious breach” of the right to a fair hearing.
9. The complainants explicitly state that they “reserve their right to argue that the provisions of Administrative Direction 2009/1 are *ultra vires* and contrary to the requirements of [Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel (hereafter: Regulation 2006/12)]”.

III. PROCEEDINGS BEFORE THE PANEL

10. The complaint was introduced on 12 November 2009 and registered on 20 November 2009. During the proceedings before the Panel, the complainants were represented by Mr. Halim Sylejmani, a lawyer from Kosovo, and by Messrs. Paul Troop and Jude Bunting, lawyers from London.

11. The complaint was communicated to the SRSG on 24 November 2009, for comments on admissibility. The SRSG replied with comments on 14 December 2009.

IV. THE LAW

12. 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.

13. As the Panel held in HRAP, *Demirović*, no. 57/08, decision of 17 April 2009 and HRAP, *Jovanović*, no. 52/08, decision of 23 May 2009, it is within the discretion of the SRSG to determine the regulatory scheme of the complaint system before the Panel, and the Panel has no jurisdiction to examine the compatibility of the legal basis of its own functioning with human rights standards.

14. It is true that in *Demirović* and *Jovanović* the complaints were directed against UNMIK Regulation No. 2006/12, while in the present case the complaint is directed against an Administrative Direction implementing that Regulation.

15. However, even if it may be seriously questioned whether the SRSG has the competence to alter some of the basic principles contained in UNMIK Regulation No. 2006/12 by an “implementing” Administrative Direction, the Panel considers that for the purpose of its jurisdiction it makes no difference whether the modifications are made by a Regulation or by an Administrative Direction. The fact remains that the provisions of UNMIK Administrative Direction No. 2009/1 form part of the basis of the Panel’s functioning.

16. The Panel therefore regretfully concludes that it has no jurisdiction to examine the complaint.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT INADMISSIBLE.

Rajesh TALWAR
Executive Officer

Marek NOWICKI
Presiding Member