



DECISION

Date of adoption: 31 March 2010

Case No. 26/08

N.M. and Others

against

UNMIK

The Human Rights Advisory Panel on 31 March 2010,
with the participation of the following members:

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

Assisted by
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, including through electronic means, in accordance with Rule 13 § 2 of its Rules of Procedure,

Decides as follows:

I. THE FACTS¹

1. The complainants are 143 members of the Roma, Ashkali and Egyptian communities in Kosovo (referred to as the 'Roma' in this decision) who are, or

¹ For a more detailed description of the facts of the case, see the Panel's decision on admissibility of 5 June 2009, §§ 1-13.

have been, resident in five UNMIK administered camps for internally displaced persons (IDPs) throughout northern Mitrovica/Mitrovicë. All complainants claim to have suffered lead poisoning and other health problems on account of the soil contamination in the camp sites due to the proximity of the camps to the Trepça smelter and mining complex and/or on account of the generally poor hygiene and living conditions in the camps.

2. Medical records submitted by the complainants indicate a variety of serious medical conditions including the following: paralysis, encephalitis (inflammation of the brain), weakened immune systems, anemia, weight loss, behavioral disorders, hypertension, breathing difficulty, fainting, high blood pressure, muscle and joint pain and spasms, kidney problems, vomiting, stomach aches, impaired hearing and breathing, fatigue and headaches.
3. At least three persons are alleged to have died as a consequence of the harmful levels of lead in their bodies. Others are suspected to have died from lead-contamination related illnesses, but on account of the lack of proper medical testing and/or autopsies these claims have been difficult to verify. Lead poisoning has formally been diagnosed as a cause of illness in many of the complainants.
4. Medical conditions suffered by complainants and said to be attributable to the poor hygiene and living conditions in the camps include: rheumatism, high blood pressure, diabetes, hearing problems and breathing difficulties.
5. On 10 February 2006, the European Roma Rights Centre (ERRC) filed a compensation claim, on behalf of the complainants, under the United Nations Third Party Claims Process.
6. In October 2008, the complainants received a letter from the United Nations Under-Secretary-General for Legal Affairs stating that “the United Nations, together with the relevant agencies in Kosovo, is continuing its review of this matter, and we hope to be in a position to provide a more substantive response in the near future.” In August 2009, the complainants received another letter from the Assistant Secretary-General for Legal Affairs stating: “[W]e hope to provide you with a substantive response by the end of the fall. Given that the United Nations’ review of this matter is ongoing, we do not think that it would be useful to discuss this matter at this point in time.”
7. The claim for compensation remains pending with the United Nations Third Party Claims Process as of the date of adoption of this decision.

II. COMPLAINTS²

8. The complainants allege, on account of various UNMIK actions and failures to act, multiple violations of various international human rights instruments, in particular of the European Convention on Human Rights (ECHR, Articles 2, 3, 6.1, 8, 13 and

² For a more detailed description of the complaints, see the Panel’s decision on admissibility of 5 June 2009, §§ 14-17.

14, and Article 1 of Protocol No. 12 to the ECHR), Universal Declaration on Human Rights (UDHR, Article 25.1), International Covenant on Civil and Political Rights (ICCPR, Articles 2, 3, 6, 7, 14 and 17), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT, Article 2), International Covenant on Economic, Social and Cultural Rights (ICESCR, Articles 2.2, 11 and 12), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, Articles 2 and 5), Convention on the Rights of the Child (CRC, Articles 2, 3, 5, 6, 16, 19, 23, 24, 27 and 37), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, Articles 2, 3, 5.2, 12 and 14).

III. PROCEEDINGS BEFORE THE PANEL

9. The complaint was introduced on 4 July 2008 and registered on the same date. The complainants are represented by Ms. Dianne Post.

10. The Panel communicated the case to the Special Representative of the Secretary-General (SRSG) on 24 July 2008 giving him the opportunity to provide comments on behalf of UNMIK on the admissibility and merits pursuant to Section 11.3 of UNMIK Regulation No. 2006/12 and Rule 30 of the Panel's Rules of Procedure.

11. By letter dated 18 September 2008 the SRSG addressed the issue of admissibility in a response to the Panel.

12. The SRSG's response was provided to the complainants for comment on 7 October 2008 and a response was received on 8 October 2008.

13. By a decision of 5 June 2009, the Panel declared the complaint admissible in part and inadmissible in part.

14. On 11 August 2009, the SRSG raised an objection to the admissibility of the complaint based on the non-exhaustion of available avenues. The objection was communicated to the complainants, who sent their response on 25 August 2009.

15. On 16 September 2009, the complainants' 25 August 2009 response was forwarded to the SRSG for comments.

16. In the meantime, on 23 October 2009 the Panel, having noted that on 17 October 2009 Administrative Direction No. 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel had been issued by the SRSG, invited UNMIK to submit comments in relation to the effect of that Administrative Direction on the present case. On 30 October 2009, the Panel invited the complainants to submit comments on the same Administrative Direction.

17. The SRSG responded to the 16 September 2009 request for comments on 4 November 2009, which were again sent to the complainants for response. The complainants provided their reply to the Panel's 30 October 2009 query and the SRSG's comments on 9 November 2009.

18. On 18 January 2010, the Panel received the SRSG's reply to its letter of 23 October 2009. This reply was dated 30 October 2009.

19. On 16 March 2010 the Panel requested further information from the complainants. They replied on the same day.

IV. RELEVANT NORMATIVE FRAMEWORK

20. While the present complaint was pending before the Panel, awaiting an opinion on the merits, the SRSG issued on 17 October 2009 Administrative Direction No. 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel. Sections 2.1, 2.2 and 2.3 of that Administrative Direction read as follows:

“2.1. At any stage of the proceedings of a human rights complaint before it, the Advisory Panel shall examine all issues of admissibility of the complaint before examining the merits.

2.2. 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 (Regulation No. 2006/12).

2.3 Comments on the merits of an alleged human rights violation shall only be submitted after the Advisory Panel has completed its deliberation on and determined the admissibility of such complaint. If issues of admissibility of a complaint are addressed at any time after the Advisory Panel has made a determination on admissibility of a complaint and commenced its considerations of the merits, the Advisory Panel shall suspend its deliberations on the merits until such time as the admissibility of the complaint is fully re-assessed and determined anew.”

21. Section 5 of Administrative Direction No. 2009/1 provides that no complaint to the Panel shall be admissible “if received by the Secretariat of the Advisory Panel later than 31 March 2010”.

22. Section 6 provides that Administrative Direction No. 2009/1 shall enter into force on 17 October 2009, that is the date of its issuance, and that it “shall be applicable (to) all complaints submitted to the Advisory Panel including such that are currently pending before the Advisory Panel”.

23. The UN Third Party Claims Process referred to in Section 2.2 forms the object of General Assembly resolution 52/247 of 17 July 1998 on “Third-party liability: temporal and financial limitations” (A/RES/52/247). The relevant provisions of that resolution read as follows:

“5. *Decides* that the temporal and financial limitations set out in paragraphs 8 to 11 below shall apply to third-party claims against the Organization for personal injury, illness or death, and for property loss or damage (including non-consensual use of premises) resulting from or attributable to the activities of members of peacekeeping operations in the performance of their official duties, as described in paragraph 13 of the report of the Secretary-General (A/51/903);

6. *Endorses* the view of the Secretary-General that liability is not engaged in relation to third-party claims resulting from or attributable to the activities of members of peacekeeping operations arising from ‘operational necessity’, as described in paragraph 14 of the first report of the Secretary-General on third-party liability (A/51/389);

7. *Also endorses* the views of the Secretary-General, reflected in paragraph 14 of his report (A/51/903), with regard to third-party claims resulting from gross negligence or wilful misconduct of the personnel provided by troop-contributing States for peacekeeping operations, and requests him to report on their implementation in the relevant performance reports;

8. *Decides* that, where the liability of the Organization is engaged in relation to third-party claims against the Organization resulting from peacekeeping operations, the Organization will not pay compensation in regard to such claims submitted after six months from the time the damage, injury or loss was sustained, or from the time it was discovered by the claimant, and in any event after one year from the termination of the mandate of the peacekeeping operation, provided that in exceptional circumstances, such as described in paragraph 20 of the report of the Secretary-General (A/51/903), the Secretary-General may accept for consideration a claim made at a later date;

9. *Decides also*, in respect of third-party claims against the Organization for personal injury, illness or death resulting from peacekeeping operations, that:

(a) Compensable types of injury or loss shall be limited to economic loss, such as medical and rehabilitation expenses, loss of earnings, loss of financial support, transportation expenses associated with the injury, illness or medical care, legal and burial expenses;

(b) No compensation shall be payable by the United Nations for non-economic loss, such as pain and suffering or moral anguish, as well as punitive or moral damages;

(c) No compensation shall be payable by the United Nations for homemaker services and other such damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the injury or loss itself;

(d) The amount of compensation payable for injury, illness or death of any individual, including for the types of loss and expenses described in subparagraph (a) above, shall not exceed a maximum of

50,000 United States dollars, provided, however, that within such limitation the actual amount is to be determined by reference to local compensation standards;

(e) In exceptional circumstances, the Secretary-General may recommend to the General Assembly, for its approval, that the limitation of 50,000 dollars provided for in subparagraph (d) above be exceeded in a particular case if the Secretary-General, after carrying out the required investigation, finds that there are compelling reasons for exceeding the limitation;

10. *Decides further* in respect of third-party claims against the Organization for property loss or damage resulting from peacekeeping operations that:

(a) Compensation for non-consensual use of premises shall either: (i) be calculated on the basis of the fair rental value, determined on the basis of the local rental market prices that prevailed prior to the deployment of the peacekeeping operation as established by the United Nations pre-mission technical survey team; or (ii) not exceed a maximum ceiling amount payable per square metre or per hectare as established by the United Nations pre-mission technical survey team on the basis of available relevant information; the Secretary-General will decide on the appropriate method for calculating compensation payable for non-consensual use of premises at the conclusion of the pre-mission technical survey;

(b) Compensation for loss or damage to premises shall either: (i) be calculated on the basis of the equivalent of a number of months of the rental value, or a fixed percentage of the rental amount payable for the period of United Nations occupancy; or (ii) be set at a fixed percentage of the cost of repair; the Secretary-General will decide on the appropriate method for calculating compensation payable for loss or damage to premises at the conclusion of the pre-mission technical survey;

(c) No compensation shall be payable by the United Nations for loss or damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the loss of or damage to the premises;

11. *Decides* that:

(a) Compensation for loss or damage to personal property of third parties arising from the activities of the operation or in connection with the performance of official duties by its members shall cover the reasonable costs of repair or replacement;

(b) No compensation shall be payable by the United Nations for loss or damages that, in the sole opinion of the Secretary-General, are impossible to verify or are not directly related to the loss of or damage to the personal property;

12. *Requests* the Secretary-General to take the necessary measures to implement the present resolution in respect of the status-of-forces agreements in accordance with paragraph 40 of his report (A/51/903);

13. *Also requests* the Secretary-General to ensure that the terms of reference of the local review boards include the temporal and financial limitations on the liability of the Organization, as set out in paragraphs

8 to 11 above, and that those boards rely on those temporal and financial limitations as a basis for their jurisdiction and recommendations for compensation for third-party claims against the Organization resulting from its peacekeeping operations.”

24. Section 7 of UNMIK Regulation No. 2000/47 of 18 August 2000 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, referred to in Section 2.2 of Administrative Direction No. 2009/1, states:

“Third Party claims for property loss or damage and for personal injury, illness, or death arising from or directly attributed to KFOR, UNMIK, or their respective personnel and which do not arise from “operational necessity” of either presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for.”

V. THE LAW

A. Whether the complaint is deemed inadmissible

i. Arguments of the parties

25. Invited by the Panel to comment on the effect of Section 2 of Administrative Direction No. 2009/1 on the present case, UNMIK points out that the complainants’ case is the subject of “the UN Third Party Claims process under UNMIK Regulation No. 2000/47”. It argues that Section 2.2 of Administrative Direction No. 2009/1 is applicable and that the complaint is therefore deemed inadmissible. It expects the Panel to act in accordance with the Administrative Direction and to arrive at a determination that duly implements that legislation.

26. The complainants reply that the promulgation of UNMIK Administrative Direction No. 2009/1 itself is a collateral attack on the Panel’s decision on admissibility of 5 June 2009, which violates fundamental principles of international administrative law and the rule of law, including due process, non-retroactivity, and fundamental fairness. The complainants attack a number of provisions of the Administrative Direction as being internally inconsistent, overbroad and in violation of the rule of law.

27. The complainants also argue that their claim has been pending in the United Nations Third Party Claims Process since 10 February 2006. They claim that the delay in bringing those proceedings to a conclusion, coupled with the immediate application of UNMIK Administrative Direction No. 2009/1 to pending cases, is an act of bad faith on the part of UNMIK intended to frustrate any process and which essentially voids the complainants’ claims.

28. The complainants further argue that the promulgation of the Administrative Direction denies the complainants access to a remedy, further compounding the already alleged violation of their rights to a fair trial and an effective remedy.

ii. Findings of the Panel

29. Before continuing with the consideration of the merits of the complaint, the Panel must first consider UNMIK's new objection to admissibility, pursuant to Section 2.3 of UNMIK Administrative Direction No. 2009/1.

The question of the legality of Administrative Direction No. 2009/1

30. As the Panel held in *Balaj II*, no. 320/09, decision of 12 February 2010, 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.

31. The Panel reiterates that, 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, for the purpose of the Panel's jurisdiction it makes no difference whether the modifications are made by regulation or 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.

32. Regretfully, the Panel must conclude that it has no jurisdiction to deal with the arguments raised by the complainants concerning the illegality of Administrative Direction No. 2009/1.

33. The Panel is therefore required to examine the substance of the objection raised by UNMIK.

The objection raised by UNMIK

34. Section 2.2 of Administrative Direction No. 2009/1 provides that any complaint "that is or may become in the future" the subject of the UN Third Party Claims Process, made applicable to UNMIK by Section 7 of Regulation No. 2000/47, "shall be deemed inadmissible", for reasons that this process is considered an available avenue in the sense of Section 3.1 of Regulation No. 2006/12.

35. Under Section 3.1 of Regulation No. 2006/12 normal recourse should be had by a complainant to avenues which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the avenues in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (compare, with respect to the requirement of exhaustion of domestic remedies under Article 35 § 1 of the ECHR, European Court of Human Rights (ECtHR) (Grand Chamber), *Demopoulos and Others v. Turkey*, nos. 46113/99 and other, decision of 1 March 2010, § 70, quoting from ECtHR, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions*, 1996-IV, p. 1210, § 66). It would normally be for the Panel to satisfy itself that the UN Third Party Claims Process, like any other avenue that may be advanced by UNMIK, "was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing

redress in respect of the (complainants') complaints and offered reasonable prospects of success" (compare ECtHR, *Akdivar and Others v. Turkey*, judgment quoted above, p. 1211, § 68).

36. Section 2.2 of Administrative Direction No. 2009/1 removes this jurisdiction from the Panel. That provision has the effect of obliging the Panel to consider the UN Third Party Claims Process as an accessible and sufficient avenue.

37. This does not imply, however, that the mere fact of UNMIK raising an objection based on Section 2.2 of Administrative Direction No. 2009/1 inevitably and without more leads to the conclusion that the complaint is deemed inadmissible. The Panel considers that, when such an objection is raised, it must ascertain whether the object of the complaint before the Panel is of such a nature that it can reasonably give rise to a claim that can be dealt with in the UN Third Party Claims Process. It will declare a complaint inadmissible only when it is satisfied that the claim is one that falls *prima facie* within the ambit of the UN Third Party Claims Process. By contrast, it is precluded from examining whether the outcome of the process is capable of providing sufficient redress in respect of the complaint before the Panel, nor whether the process offers reasonable prospects of success to the complainants.

38. The procedure set forth in General Assembly resolution 52/247 and in Section 7 of UNMIK Regulation No. 2000/47 allows the United Nations, at its discretion, to provide compensation for claims for personal injury, illness or death as well as for property loss or damage arising from acts of UNMIK which were not taken out of operational necessity. Therefore, complaints about violations of human rights attributable to UNMIK will be deemed inadmissible under Section 2.2 of UNMIK Administrative Direction No. 2009/1 to the extent that they have resulted either in personal injury, illness or death, or in property loss or damage. Complaints about violations of human rights that have not resulted in damage of such nature will normally not run counter to the requirement of exhaustion of the UN Third Party Claims Process.

39. Turning to the objection raised by UNMIK in the present case, the Panel recalls that the complaint as submitted concerns the allegedly dire situation faced by the entire community formerly resident in the Roma Mahalla area of Mitrovica/Mitrovicë.

40. The substantive complaints declared admissible by the Panel in its 5 June 2009 decision on admissibility are all directly linked to the initial operational choice to place the IDPs in the camps in question and/or the failure to relocate them, and the subsequent effects which resulted in personal injury, illness or death. The Panel considers that these parts of the complaint fall *prima facie* within the ambit of the UN Third Party Claims Process and therefore are deemed inadmissible.

41. The procedural complaints declared admissible by the Panel, such as the complaints about violations of the procedural aspects of the right to life and the prohibition of inhuman or degrading treatment, as well as about violations of the right to a fair trial and the right to an effective remedy, concern acts, omissions or situations that clearly did not result in personal injury, illness or death, nor in property loss or damage. As such, these parts of the complaint are therefore not covered by the UN Third Party Claims Process.

42. The Panel considers, however, that the substantive and procedural complaints pending before the Panel are so interlinked that it would be artificial to separate them, resulting in the substantive complaints being dealt with in the UN Third Party Claims Process and the procedural complaints at the same time being dealt with by the Panel.

43. The Panel therefore considers that the entire complaint is deemed inadmissible.

B. Effects of the determination that the complaint is deemed inadmissible

44. The Panel considers it useful to explain the effects of its decision holding that the complaint is deemed inadmissible.

45. Requirements of exhaustion of available avenues are by their very nature only temporary restrictions on admissibility. The effect of a declaration of inadmissibility on account of non-exhaustion of an available remedy is in principle of a dilatory nature only, not of a peremptory nature. This means that a complainant may resubmit his or her complaint once all the required processes have been concluded. This view is accepted in the present case by UNMIK. In a note from the Director of the Office of Legal Affairs of 30 October 2009, attached to the letter of the SRSG of the same date, it is said that cases deemed inadmissible by virtue of Section 2.2 of Administrative Direction No. 2009/1, “may be resubmitted by the complainants to the (Panel) after completion of the processing of their related claims under the (...) UN Third Party Claims process”.

46. If the complainants want to make use of this possibility, they would normally be required to file a fresh complaint with the Panel once the UN Third Party Claims Process has been concluded. According to the said note of the Director of the Office of Legal Affairs, the complainants would be able to do so “until 31 March 2010, the cut-off date for submission of complaints before the (Panel)”, imposed by Section 5 of UNMIK Administrative Direction No. 2009/1.

47. However, if the complainants are required to re-file a complaint after the conclusion of the UN Third Party Claims Process, they would invariably run afoul of the 31 March 2010 deadline for the submission of new complaints. The requirement of going through the UN Third Party Claims Process would in that case in effect extinguish the complaint without the possibility of the complainants resubmitting it to the Panel, despite the fact that, as the Panel found on 5 June 2009, the complaint was admissible under the regulatory framework applicable when it was filed. Such a result would offend basic notions of justice. In the specific context of the cut-off date set by Administrative Direction No. 2009/1, the Panel considers that a specific arrangement is called for, which will preserve the possibility for the complainants to have their complaint further examined by the Panel upon completion of the UN Third Party Claims Process, should they then wish to proceed with the case before the Panel.

48. The Panel notes, with respect to proceedings before various international tribunals, that in certain special circumstances applicants may seek to obtain the reopening of proceedings that have been closed, where new circumstances arise and where the reopening of those proceedings is in the interests of justice.

49. It is for instance the common practice of the European Court of Human Rights to strike cases out of the list, pursuant to Article 37 § 1 (c) of the ECHR, where for some objective reason it is no longer justified to continue the examination of the application. In such cases the Court may, according to Article 37 § 2 of the ECHR, decide to restore the application to its list of cases if it considers that the circumstances justify such a course (for applications, see ECtHR, *Aleksentseva and 28 Others v. Russia*, nos. 75025/01 and other, decision of 23 March 2006; ECtHR, *Jashi v. Georgia*, no. 10799/06, decision of 9 December 2008).

50. Likewise, in the *Nuclear Tests Case*, the International Court of Justice (ICJ) decided in 1974, having regard to a unilateral statement made by the respondent State, that the claim of the applicant State no longer had any object and that the Court was therefore not called upon to give a decision thereon. In the same judgment it allowed the applicant State to request an examination of the situation “if the basis of (its) judgment were to be affected” (ICJ, *New Zealand v. France*, judgment of 20 December 1974, *I.C.J. Reports*, 1974, p. 457, § 63). Some 20 years later, the applicant State attempted to have the proceedings reopened. The ICJ explained that, by inserting the above-quoted words in its 1974 judgment, it could not have intended to limit the applicant’s access to legal procedures such as the filing of a new application, a request for interpretation or a request for revision, since such procedures would have been open to it in any event. It rather “did not exclude a special procedure” (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, order of 22 September 1995, *I.C.J. Reports*, 1995, p. 288, §§ 52-53).

51. Having regard to these practices, the Panel considers that a similar “special procedure” should be available in the present case too. In accordance with Rule 49 of the Panel’s Rules of Procedure, which provides that questions not governed by these Rules shall be settled by the Panel, it decides that once the UN Third Party Claims Process has been concluded, the complainants can request the Panel to reopen the present proceedings. The Panel will then decide, on the basis of the information then available to it, whether or not to accept such a request.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT INADMISSIBLE.

Nedim OSMANAGIĆ
Acting Executive Officer

Marek NOWICKI
Presiding Member