The Human Rights Advisory Panel
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DECISION

Date of adoption: 18 June 2010

Cases Nos. 28/08, Živko ŽIVKOVIĆ; 65/08, Božidar PEROVIĆ; 68/08, Arsenije DIMITRIJEVIĆ; 40/09, Dragiša ALEKSIĆ

against

UNMIK

The Human Rights Advisory Panel sitting on 18 June 2010
with the following members present:

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

Assisted by

Mr. Rajesh TALWAR, Executive Officer

Having considered the aforementioned complaints, 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. PROCEEDINGS BEFORE THE PANEL

1. The complaint of Mr Živković (case no. 28/08) was lodged on 18 July 2008 and registered on the same date, while the other complaints at issue (Perović, case no. 65/08, Dimitrijević, case no. 68/08, and Aleksić, case no. 40/09) were lodged on 15 December 2008 and registered on the same date. In the proceedings before the

Panel, Messrs. Perović, Dimitrijević and Aleksić were initially represented by the Danish Refugee Council (DRC). However, the DRC withdrew from participation in the proceedings before the Panel in December 2009.

2. The Panel communicated the complaint of Mr Živković to the Special Representative of the Secretary-General (SRSG) on 21 October 2008 and 19 January 2009, requesting his comments on behalf of UNMIK on the admissibility and the merits of the complaint. The SRSG responded with comments by a letter dated 11 March 2009. The Panel communicated the complaints of Mr Perović on 26 May 2009, of Mr Dimitrijević on 25 March 2009, and of Mr Aleksić on 28 May 2009. The SRSG submitted UNMIK's comments in the case of Mr Perović on 15 June 2009, in the case of Mr Dimitrijević on 18 June 2009 and in the case of Mr Aleksić on 17 June 2009.

3. The Panel received further information from Mr Živković on 29 May 2009, from Mr Perović in April 2009, and from Mr Aleksić in September 2009.

II. THE FACTS

4. All four complainants are residents of Kosovo currently living as displaced persons in Serbia. They were owners of real property in Kosovo, where they lived until 1999 when, fearing hostilities, they left Kosovo. Later on they became aware that their property had been damaged or destroyed during the second half of 1999.

5. All complainants lodged claims with the competent courts against UNMIK, KFOR, the Kosovo Provisional Institutions of Self-Government (PISG) and the relevant municipalities, seeking compensation for the damage caused to their property. Their claims were recorded by the courts in the second half of 2004.

6. By the end of 2008, the courts had not contacted the complainant, and no hearing had been scheduled.

7. The complainants' claims belong to a group of approximately 17,000 compensation claims, all filed by ethnic Serbs who because of the hostilities had left their homes in Kosovo in 1999 and whose property was later damaged or destroyed. With a view to meeting the statutory five-year time-limit for submitting civil compensation claims, these claimants lodged their claims around the same time in 2004 before Kosovo courts. The claims were directed against UNMIK, KFOR, the PISG and in most cases also the relevant municipality (see Human Rights Advisory Panel (hereinafter HRAP), *Milogorić and Others*, cases nos. 38/08, 58/08, 61/08, 63/08 and 69/08, opinion of 24 March 2010, § 1; for the legal basis upon which the claimants based their claim, see the same opinion, § 5).

8. With respect to these cases the Director of the UNMIK Department of Justice (DOJ) sent a letter to all municipal and district court presidents and to the President of the Supreme Court of Kosovo on 26 August 2004. In the letter, the Director of DOJ 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" (for the full text of the letter, see the *Milogorić and Others* opinion, cited in § 7 above, § 6).

9. On 15 November 2005, the DOJ called on the courts to begin processing claims for damages caused by identified natural persons and for damages caused after October 2000, considering that the "obstacles to the efficient processing of these cases" did not exist any longer. Claims related to the 1999 armed conflict were not affected by this letter.

10. On 28 September 2008 the Director of DOJ advised the courts that cases which had not been scheduled according to the 26 August 2004 request should now be processed.

11. On 9 December 2008, UNMIK's responsibility with regard to the judiciary in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo.

12. The circumstances of the individual cases at issue are outlined in the annex to this decision.

III. COMPLAINTS

13. The complainants in substance allege that the relevant courts have stayed the proceedings concerning their claims for damages for destroyed property and that as a result these proceedings have not been concluded within a reasonable time, in breach of Article 6 § 1 of the European Convention on Human Rights (ECHR). They allege that for the same reason their right to an effective remedy under Article 13 of the ECHR has been violated as well.

14. The complainants further complain about a violation of their right to property, guaranteed by Article 1 of Protocol No.1 to the ECHR. Mr Živković generally complains about the fact that his property has been damaged or destroyed. Messrs. Perović, Dimitrijević and Aleksić complain about the refusal of the competent courts to decide on their claims for damages.

15. Messrs. Perović, Dimitrijević and Aleksić also allege a violation of their right to family life and home (Article 8 of the ECHR), as they are prevented from returning to their homes.

IV. JOINDER OF THE COMPLAINTS

16. The Panel decides, pursuant to Rule 20 of its Rules of Procedure, to join the four complaints.

V. THE LAW

17. 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 of 23 March 2006 on the establishment of the Human Rights Advisory Panel.

18. Given the common factual and legal background of the complainants' cases, the Panel considers it appropriate to merge the SRSG's different comments in the four cases at issue and to consider that the various arguments raised with regard to each individual case were raised in respect of all four joint cases.

19. The SRSG submits that the complaints submitted by the four complainants are inadmissible on the basis of non-exhaustion of remedies. He submits that on 15 November 2005, the DOJ called on the courts to begin processing claims for damages caused by identified natural persons and for damages caused after October 2000, considering 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 were informed accordingly. The SRSG notes that the aforementioned cases have been recently reactivated.

20. Accordingly, given that the legal proceedings with regard to the claims for relevant damages are pending before the competent courts, and will now be processed, the SRSG states that the complaints at issue are *prima facie* inadmissible on the basis of non-exhaustion of remedies.

21. The Panel notes that the purpose of the requirement of exhaustion of available avenues for review is to afford UNMIK the opportunity of preventing or putting right the violations alleged against it before those allegations are submitted to the Panel. 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 also in practice, failing which they will lack the requisite accessibility and effectiveness (Human Rights Advisory Panel (HRAP), *Balaj and Others*, no. 04/07, decision of 31 March 2010, § 45, and *N.M. and Others*, no. 26/08, decision of 31 March 2010, § 35; 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 *etc.*, 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).

22. 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, HRAP, *Milogorić*, no. 38/08, decision of 22 May 2009, § 15).

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

23. The Panel considers that, insofar as the complainants invoke a violation of Articles 6 § 1 and 13 of the ECHR, they in fact raise two complaints (see the approach adopted in HRAP, *Milogorić*, cited in § 22 above; compare ECtHR, *Aćimović v. Croatia*, no. 48776/99, decision of 30 May 2000; ECtHR, *Kutić v. Croatia*, no. 48778/99, decision of 11 July 2000). On the one hand, they complain about the fact that due to the stay of the proceedings in the competent courts, they have been unable to obtain the determination of their claims for damages for destroyed property. The Panel considers that this complaint may raise an issue of their right of access to a court under Article 6 § 1 of the ECHR and of their right to an effective remedy under Article 13 of the ECHR. On the other hand, they complain about the length of the proceedings before the competent courts, due to the fact that the proceedings have been instituted in 2004 and that their claims have not been examined since then. This complaint may raise an issue of their right to a judicial decision within a reasonable time, in the sense of Article 6 § 1 of the ECHR.

24. The Panel notes that in his comments the SRSG has not indicated any specific legal remedy available to the complainants 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 claims like those of the complainants is not relevant from the point of view of remedies to be exhausted by the complainants. The Panel therefore concludes that the complaints under Articles 6 § 1 and 13 of the ECHR cannot be rejected for non-exhaustion of remedies within the meaning of Section 3.1 of UNMIK Regulation No. 2006/12 (see HRAP, *Milogorić*, cited in § 22 above, § 17).

25. The Panel further recalls its decision in the case of *Milogorić* 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 (HRAP, *Milogorić*, cited in § 22 above, § 18).

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

Alleged violation of Article 1 of Protocol No. 1 to the ECHR

27. The complainants all complain about a violation of their right to property (Article 1 of Protocol No.1). Mr Živković generally complains about the fact that his property has been damaged or destroyed. Messrs. Perović, Dimitrijević and Aleksić complain about the refusal of the competent courts to decide on their claims for damages.

28. The Panel recalls that, according to Section 2 of UNMIK Regulation No. 2006/12, it 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 damaging or the destruction of property are instantaneous acts, which do not give rise to a continuing violation (see HRAP, *Lajović*, no. 09/08, decision of 16 July 2008, § 7). It follows that this part of the complaint made by Mr Živković lies outside the Panel's jurisdiction *ratione temporis*.

29. With respect to the complaints made by Messrs. Perović, Dimitrijević and Aleksić, it is true that these complainants do not complain directly about the original damaging and destruction of their property, but about the fact that, due to the stay of the proceedings they instituted, they have been unable thus far to obtain compensation for the damage. Nevertheless, insofar as the court proceedings are referred to from the point of view of the right of property, these proceedings cannot be detached from the acts upon which the claims before the courts are 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), *Blečič v. Croatia*, no. 59532/00, judgment of 8 March 2006, § 77, *ECHR*, 2006-III).

30. It follows that this part of the complaints of Messrs. Perović, Dimitrijević and Aleksić also lies outside the Panel's jurisdiction *ratione temporis* (see HRAP, *Gojković*, cited above, §§ 24-25).

Alleged violation of Article 8 of the ECHR

31. Messrs. Perović, Dimitrijević and Aleksić complain about a violation of their right to family life and home (Article 8 of the ECHR).

32. As noted above, the complainants' property, including the house in Kosovo where they lived with their family, was destroyed sometime in the second half of 1999. For the above-mentioned reason, any complaint relating to the destruction of the complainants' home therefore lies outside the Panel's jurisdiction *ratione temporis* (see §§ 29-30).

33. In addition, this part of the complaints 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 EUROPEAN CONVENTION ON HUMAN RIGHTS) AND THE RIGHT TO A JUDICIAL DECISION

WITHIN A REASONABLE TIME (ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS);

- DECLARES INADMISSIBLE THE REMAINDER OF THE COMPLAINTS.

Rajesh TALWAR	Marek NOWICKI
Executive Officer	Presiding Member

Annex

Case No. 28/08, Živko Živković

1. The complainant is a resident of Kosovo currently living as a displaced person in Serbia.

2. He is the owner of a residential house located in Prishtinë/Priština, where he lived until August 1999. He was informed by his neighbours that his property had been devastated and demolished during the second half of 1999.

3. In June 2004 the complainant lodged a compensation lawsuit before the District Court of Prishtinë/Priština against the Municipality of Prishtinë/Priština, the PISG, UNMIK and KFOR seeking compensation for the destruction of his property. He claims 36,000 euros in compensation for this damage.

4. By the end of 2008, the District Court had not contacted the complainant, and no hearing had been scheduled.

Case No. 65/08, Božidar Perović

5. The complainant is a resident of Kosovo currently living as a displaced person in Serbia.

6. The complainant is the owner of a residential house located in the Municipality of Deçan/Dečane, where he lived until June 1999. He has been informed by his neighbours that his property has been devastated and demolished during the second half of 1999.

7. On 2 July 2004 the complainant lodged a compensation lawsuit before the Municipal Court of Deçan/Dečane against the Municipality of Deçan/Dečane, the PISG, UNMIK and KFOR seeking compensation for the destruction of his property. He claims 68,000 euros in compensation for this damage.

8. By the end of 2008, the Municipal Court had not contacted the complainant, and no hearing had been scheduled.

Case No. 68/08, Arsenije Dimitrijević

9. The complainant is a resident of Kosovo currently living as a displaced person in Serbia.

10. He is the owner of two residential houses located in Prizren where he lived until June 1999. He has been informed by his neighbours that one of his houses has been destroyed during the second half of 1999.

11. On 9 June 2004 the complainant lodged a compensation lawsuit before the Municipal Court of Prizren against the Municipality of Prizren, the PISG, UNMIK

and KFOR seeking compensation for the destruction of his property. He claims 604,000 euros in compensation for this damage.

12. By the end of 2008, the Municipal Court had not contacted the complainant, and no hearing had been scheduled.

Case No. 40/09, Dragiša Aleksić

13. The complainant is a resident of Kosovo currently living as a displaced person in Serbia.

14. The complainant's deceased father was the owner of a residential house located in the Municipality of Podujevë/Podujevo where he and his family lived until June 1999. They have been informed by their neighbours that the house has been destroyed during the second half of 1999.

15. On 6 July 2004 the complainant, in his capacity of heir of his late father, lodged a compensation lawsuit before the Municipal Court of Podujevë/Podujevo against the Municipality of Podujevë/Podujevo, the PISG, UNMIK and KFOR seeking compensation for the destruction of his property. He claims 103,500 euros in compensation for this damage.

16. By the end of 2008, the Municipal Court had not contacted the complainant, and no hearing had been scheduled.