The Human Rights Advisory Panel
Building D, UNMIK HQ Prishtinë/Priština, Kosovo | E-mail: hrap-unmik@un.org | Tel: +381 (0)38 504-604, ext. 5182

OPINION

Date of adoption: 18 June 2010

Case No. 01/07

Radovan PARLIĆ

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 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, makes the following findings and recommendations:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 22 February 2007 and registered on the same date.

2. The complaint was communicated to the SRSG on 19 March 2008, giving him the opportunity to provide comments on behalf of UNMIK on the admissibility and the merits pursuant to Section 11.3 of UNMIK Regulation No. 2006/12 and Rule 30 of the Panel's Rules of Procedure. The SRSG did not avail himself of this opportunity.

3. On 11 April 2008 the Panel declared the complaint admissible.

4. The SRSG submitted his comments on the merits of the complaint on 11 June 2009. The complainant replied to these comments on 31 July 2009.

II. THE FACTS

5. The complainant states that he was employed by the socially owned enterprise "Tefik Çanga/"Tefik Čanga" (the company) with a seat in Ferizaj/Uroševac in 1991. Fearing hostilities he left Kosovo in 1999 and since then has been living as a displaced person in Serbia.

6. In the course of the company's privatisation, the Kosovo Trust Agency (KTA) in October 2005 published a list of 710 employees who were deemed eligible to receive a share of the proceeds from the privatisation of the company. The complainant was not included in this list. The company was effectively privatised on 5 November 2005.

7. The Special Chamber of the Supreme Court of Kosovo (Special Chamber) received 2 group and 209 individual complaints, including the complainant's one, against the KTA's list. There were in total 417 persons who complained. The complainant's complaint was registered on 21 November 2005.

8. In his complaint to the Special Chamber the complainant noted that although there were a number of Serbian employees and employees of other ethnicities in the company, the list of eligible employees did not contain one single name of a Serbian person or a person from another ethnic group. He argued that he had been employed by the company since 1991 and that he had to leave Kosovo in 1999 "for the well known reasons". He believed that he had been discriminated against, since his name was not on the list, although he was an employee. He left open the space on the complaint form for the indication of any document that he would submit in support of the fact that he was employed by the company during more than three years. Instead, he stated that his employment booklet remained in the company. Finally, he drew the attention of the Special Chamber to the fact that the list of all employees could be found in the registers held by the company. Attached to his complaint was a certificate delivered to him in 2002 by the "displaced branch office" of the company confirming his employment on 9 June 1999 as well as a copy of his health booklet.

9. The complainant states that he received a summons dated 24 April 2006 for an evidentiary hearing before the Special Chamber scheduled for 2 May 2006. The Special Chamber directed the complainant to bring his employment booklet, a statement on discrimination, and other evidence. It stated that, if the complainant failed to appear, the hearing would nevertheless be held. The complainant did not appear.

10. By a judgment dated 15 June 2006, the Special Chamber, accepted 43 complaints of complainants seeking inclusion in the list of eligible employees, rejected the complaints of the

complainants seeking revision of the published list of eligible employees, and rejected 146 complaints of complainants, including the complainant in the present case, seeking inclusion in the list of eligible employees.

11. The Special Chamber considered that the complaints were generally to be examined in the light of Section 10 of UNMIK Regulation No. 2003/13 of 9 May 2003 on the Transformation of the Right of Use to Socially-Owned Immovable Property (hereinafter referred to as "Regulation 2003/13").

12. According to that provision, as amended by Regulation No. 2004/45 of 19 November 2004, 20 % of the proceeds from the sale of shares of a privatised socially-owned enterprise are reserved for the employees of the company (Section 10.1). The amount reserved for the employees is distributed among the "eligible" employees, *i.e.* those employees who are registered as employees at the time of privatisation and who have been on the payroll of the company for not less than three years (Section 10.4). The names of registered employees are placed on a list, issued by the KTA and made public (Section 10.3). Former employees who are not on the list, can claim "that they would have been so registered and employed, had they not been subject to discrimination" (Section 10.4). Such employees can submit a complaint to the Special Chamber pursuant to Section 10.6.

13. That Section 10.6 of Regulation 2003/13 provides that complaints regarding the list of eligible employees or the distribution of funds are subject to review by the Special Chamber. Section 10.6 (b) concerns the evidence to be presented to the Special Chamber by former employees seeking to be included in the list: "Any complaint filed with the Special Chamber on the grounds of discrimination as reason for being excluded from the list of eligible employees has to be accompanied by documentary evidence of the alleged discrimination."

14. In its judgment of 15 June 2006 the Special Chamber held that Section 10.6 (b) of Regulation 2003/13 had been superseded by Article 8.1 of the Anti-Discrimination Law (Law No. 2004/3), adopted by the Assembly of Kosovo on 19 February 2004 and promulgated by the Special Representative of the Secretary General (SRSG) on 20 August 2004 (UNMIK Regulation No. 2004/32 on the Promulgation of the Anti-Discrimination Law adopted by the Assembly of Kosovo).

15. The Anti-Discrimination Law was adopted in order to prevent discrimination and to promote and put into effect the principle of equal treatment of the citizens of Kosovo. Its relevant provisions read as follows:

- Article 8:

"Burden of proof

8.1. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
8.2. Paragraph 8.1 shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a complainant may establish or defend

their case of discrimination by any means, including on the basis of statistical evidence."

- Article 11:

"11.1. When this law comes into effect it supersedes all previous applicable laws of this scope.
11.2. The provisions of the legislation introduced or into force for the protection of the principle of equal treatment are still valid and should be applied if they are more favourable than provisions in this Law."

16. The Special Chamber came to its conclusion with respect to the applicability of Article 8.1 of the Anti-Discrimination Law on the following grounds:

"In order to verify the fact whether the Anti-Discrimination Law supersedes the UNMIK Regulation 2003/13, Section 10.6 (b), when dealing with the grounds of evidence requested to prove discrimination, the Chamber, on 28.10.2005, asked the Special Representative of [the] Secretary General (SRSG) to provide a clarification of this issue.

On 11 January 2006, the SRSG answered affirmatively. Especially, he added: "Pursuant to Section 11 of the Anti-Discrimination Law, Article 8 of this Law that was adopted subsequently, supersedes the section 10.6 (b) of UNMIK Regulation 2003/13."

The principle set out in Section 8 of the Anti-Discrimination Law is different from the requirements of documentary evidence as provided by Section 10.6 (b) of Regulation 2003/13.

With regard to complaints filed, when a complainant is not included in the list of employees as a result of discrimination, Section 8.1 of the Anti-Discrimination Law provides clearly that facts, from which it may be presumed that there has been direct or indirect discrimination, shall be presented."

17. After having determined the applicable law with respect to the burden of proof, the Special Chamber went on to examine each of the complaints separately. The relevant part of the judgment with regard to the complainant in the present case reads as follows:

"Radovan Parlić confirms that he was employed with the SOE from the year 1991 having a total of 14 years of working experience. He has submitted no fact regarding the date of employment and failed to submit the discrimination statement. Although duly summoned he did not respond to the summons of the court.

The respondent objected to the complaint of the claimant on the basis that legal requirements pursuant to section 10.4 of Regulation 2003/12 are not met in order to be entitled to the right to share 20%.

Having assessed the evidence, the Chamber finds that the complaint of the complainant is not legally grounded. He submitted no facts based on which

direct or indirect discrimination can be presumed and there are no facts that he was working at the time of privatization. Complaint is rejected as not being supported by facts."

18. The judgment of the Special Chamber was notified to the complainant on 20 October 2006.

III. COMPLAINT

19. The complainant claims that the unfavourable decisions of the KTA and the Special Chamber in his case did not take into account all the evidence and the circumstances of the complainant as a displaced person, which as a consequence deprived him of the material entitlements deriving from the privatisation process. In this respect he invokes his right to peaceful enjoyment of property (Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereafter: ECHR)). He further claims that his right to a fair trial (Article 6 § 1 of the ECHR) has been violated on a number of points: the Special Chamber gave him an unrealistic time limit to produce the employment booklet and the original of his health booklet, given that he was summoned on 26 April 2006 to attend a hearing and to submit the evidence on 2 May 2006; the Special Chamber did not deem it necessary to order the company to produce the required evidence; the Special Chamber did not consider the evidence submitted by the complainant and did not explain why it did not attach any weight to it. Finally, the complainant claims that the Special Chamber ignored the indirect discrimination of persons of Serbian and other ethnic minorities. He states that he was unable to continue to work in the company because of his Serbian origin, which as a consequence eliminated him *de facto* from the privatisation process. In this respect he claims that the principle of non-discrimination has been violated (Article 14 of the ECHR).

IV. THE LAW

A. As to the admissibility of the complaint

20. In his submissions of 11 June 2009, presented after the complaint had been declared admissible, the SRSG raised an objection as to the admissibility of the complaint. According to the SRSG, the complainant complains about a judgment handed down by the Special Chamber on 15 June 2006, while the complaint has been submitted to the Panel on 22 February 2007. The SRSG invited the Panel to ascertain that the Special Chamber's judgment has been served on the complainant no more than six months before the filing of his complaint.

21. By letter of 12 June 2009, the Secretariat of the Panel drew the attention of the SRSG to the fact that the complainant had on 24 October 2006 signed an acknowledgement of receipt of the judgment.

22. By letter of 30 June 2009 the SRSG declared that he withdrew his objection.

B. As to the merits of the complaint

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

23. The complainant alleges violations of Article 6 § 1 of the ECHR, which in relevant part reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair … hearing within a reasonable time by [a] ... tribunal ..."

a. Arguments before the Panel

24. The complainant claims that the Special Chamber gave him an unrealistic time limit to produce the employment booklet and the original of his health booklet, given that he was summoned by an order of 24 April 2006 to attend a hearing and to submit evidence on 2 May 2006. He claims that according to Section 9.4 (b) of UNMIK Regulation No. 2002/13 of 13 June 2002 on the establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters (hereafter: Regulation 2002/13), the Special Chamber had to provide him "reasonably sufficient time to submit documentary evidence", and that this requirement was not met, especially not in the situation where he was a displaced person, unable to go back to Kosovo to retrieve the employment booklet, due to the lack of security and his own financial situation.

25. He further claims that the Special Chamber did not deem it necessary to order the company to produce the required evidence, in spite of the fact that according to Article 8.1 of the Anti-Discrimination Law it was for the defendant to prove that there had been no discrimination. He also claims that the Special Chamber did not consider the evidence submitted by him and that it did not explain why it did not attach any weight to it. It is true that the Special Chamber noted that he had not submitted a discrimination statement, but there is no regulation that requires such a statement by a complainant.

26. With regard to the short notice for the hearing on 2 May 2006, the SRSG admits that under Section 34.1 of UNMIK Administrative Direction No. 2003/13 of 11 June 2003 implementing the above-mentioned Regulation No. 2002/13 (hereafter: Administrative Direction 2003/13), the summons for a first hearing "shall be served on the parties no later than two weeks before the date of the hearing". The legal time-limit of two weeks before the hearing for serving a summons was shortened, as in a large number of other cases, due to the volume of evidence to be collected. In any case, the SRSG argues, if the complainant had thought that the timeframe to produce the evidence requested and to appear before the Special Chamber was insufficient, he could have applied for a postponement of the hearing in accordance with Section 34.2 of Administrative Direction 2003/13. Nothing indicates that the complainant has made such application for a postponement of the hearing.

27. The SRSG further submits that the decision of the Special Chamber was taken on the basis of the evidence produced by the complainant, which was, in the Special Chamber's opinion, insufficient to support his claim that he satisfied the condition relating to the years of employment with the company. The complainant moreover failed to provide a "discrimination statement" to support his claim that he had suffered discrimination because of his Serbian ethnicity and, as a result, had been unable to show up at work from 1999 onwards. The SRSG considers that, even if this discrimination had indeed taken place, it would certainly not

constitute a human rights violation committed by the KTA or the Special Chamber, but rather a discrimination that would have stemmed from the circumstances of the Kosovo post-1999 conflict situation.

b. The Panel's assessment

1. As to the notice of the hearing

28. Insofar as the complainant argues that, as a displaced person living in Serbia with restricted freedom of movement at the relevant time, he was not able to obtain the documents requested by the Special Chamber within the time-limit imposed by it, the Panel notes the following provisions of Regulation 2002/13 and Administrative Direction 2003/13:

- Sections 7, 8 and 9 of Regulation 2002/13, in their version at the time of the proceedings before the Special Chamber, provide as follows:

"Section 7. Rules of procedure before the Special Chamber

The Special Representative of the Secretary-General shall promulgate rules for the conduct of proceedings before the Special Chamber through the issuance of an Administrative Direction. Such rules shall provide a party with a meaningful opportunity to have his claim adjudicated in an impartial and transparent manner within a reasonable period of time and in accordance with norms established under the European Convention on Human Rights and having regard to generally accepted international standards.

Section 8. Production of evidence and conduct of hearings

8.1. The Special Chamber may order any person in Kosovo to submit documents, give testimony, or otherwise provide relevant information necessary for the adjudication of a case, in accordance with the procedural rules to be promulgated under section 7.
8.2. The Special Chamber may delegate the collection of evidence and/or the conduct of hearings to a panel consisting of no fewer than two of its members, one of whom shall be an international judge. In matters where the amount in controversy does not exceed ten thousand euro (€ 10,000), the Special Chamber may make such delegation to a single judge. Evidence taken before a panel or a single judge under this paragraph shall be deemed submitted to the Special Chamber.

Section 9. Decisions of the Special Chamber

9.1 – 9.3. (…)
9.4. The Special Chamber may issue a decision under section 9.2 without undertaking a hearing to receive testimony and other evidence:
(a) If the claimant has submitted a claim on which no relief can be awarded as a matter of law, assuming the truth of the allegations in the submission of the claimant; or

(b) If, after providing the parties reasonably sufficient time to submit documentary evidence, the Special Chamber determines that no genuine disputes of material fact necessary to decide the case remain.

9.5 – 9.7. (…)"

- Sections 34 and 64 of Administrative Direction 2003/13, issued pursuant to Section 7 of Regulation 2002/13, provide as follows:

"Section 34. Notice of hearing

34.1. The parties shall be summoned to the first hearing by written notice. The notice shall contain the date, time and venue of the hearing and shall be served on the parties no later than two weeks before the date of the hearing.

34.2. Upon application by any of the parties, the Presiding Judge shall postpone a hearing, if the party shows that it is prevented from appearing at the hearing for an important reason. The other party may be given an opportunity to comment on the request. The Presiding Judge shall decide on the postponement of the hearing without a hearing and such decision shall be served on the parties. When granting a request for postponement, the Presiding Judge may order that the requesting party pay the costs which that party has caused the other party or parties to incur.

Section 64. Complaints regarding lists of eligible employees

64.1. The procedure for complaints brought under section 10.6 of UNMIK Regulation No. 2003/13 of 9 May 2003 on the Transformation of the Right of Use to Socially-Owned Immovable Property (a 'section 10.6 complaint') shall be governed by the present section. Sections 19, 20, 22.1-22.6, 23, 32, 33 and 45-48 shall apply to a section 10.6 complaint.

64.2. A section 10.6 complaint shall be in writing and shall contain:

(a) The name(s) of the individual or individuals in whose name the complaint is brought (the 'complainant(s)');

(b) The address for service of the complainant(s);

(c) The grounds for the complaint regarding the list of eligible employees as determined by the Agency and/or the distribution of funds from the escrow account provided for in section 10.5 of UNMIK Regulation No. 2003/13; and

(d) All documentary evidence in support of the section 10.6 complaint, including, if applicable, the documentary evidence required by section 10.5 of UNMIK Regulation No. 2003/13.

64.3 – 64.5. (…)

64.6. An oral hearing shall be held, unless the complainant requests in writing that an oral hearing not be held and the Presiding Judge accepts such request. If an oral hearing is held, the Special Chamber shall inform the complainant(s) and the Agency of the date of such hearing by written notice.

64.7 – 64.8. (…)"

29. The Panel notes that, for the ordinary proceedings before the Special Chamber, Section 34.1 of Administrative Direction 2003/13 provides for a two-week notice of the hearing at which the evidence is to be produced. However, it follows from Section 64.1 of that administrative direction that the said Section 34 is not applicable in proceedings relating to complaints against lists of eligible employees. For such proceedings no minimum time for the notice of the hearing is provided. However, the right to a fair trial implies that the notice should afford a complainant sufficient opportunity to comply with the Special Chamber's direction.

30. In the present case, it results from the case file of the Special Chamber that on 24 April 2006 the Judge Rapporteur issued an order inviting the complainant to appear at a hearing scheduled on 2 May 2006 and to present his employment booklet, a statement on discrimination, and other evidence. This summons was sent on 25 April 2006 with a registered letter to the complainant. No receipt of delivery was returned to the Special Chamber.

31. In order to comply with the request of the Judge Rapporteur to present certain evidence, the complainant would have to make the necessary arrangements to obtain his employment booklet. The complainant is a displaced person living outside Kosovo, and before the Special Chamber he was not represented by a lawyer. He argues that he was unable to go back to Kosovo to retrieve his employment booklet himself, due to the lack of security and his own financial situation. On this point he is not contradicted by the SRSG.

32. It is unclear when the complainant actually received the summons. The Panel considers that he may well have received it after the date of the hearing. In any event, having regard to the specific situation of the complainant as a displaced person practically unable to travel to Kosovo, a one-week notice to appear before the Special Chamber and to present relevant documents was unreasonably short, as such time-limit did not allow him to properly prepare his case.

33. The SRSG argues that the complainant could have asked for a postponement of the hearing. The Panel notes, however, that the order of 24 April 2006 did not mention such a possibility. To the contrary, it explicitly stated that the hearing would take place as scheduled, even if the complainant would not show up. Moreover, while Section 34.2 of Administrative Direction 2003/13 provides for the possibility for any of the parties to apply for a postponement of the hearing, and that such application is granted "if the party shows that it is prevented from appearing at the hearing for an important reason", Section 34 is not applicable in proceedings relating to complaints against lists of eligible employees. It therefore seems to the Panel that the possibility for the complainant to apply for a postponement was not a realistic option at that time.

34. The Panel therefore concludes that there has been a violation of Article 6 § 1 of the ECHR in this respect.

2. As to the examination of the case

35. With regard to the complaint that the Special Chamber did not take into account all the evidence and the relevant circumstances and failed to order the company to produce the required evidence, the Panel would like to clarify at the outset that it is not to substitute its own assessment of the facts for that of the Special Chamber. As a general rule, it is for the

competent courts to assess the evidence before them as well as the relevance of the evidence which parties seek to adduce and the Panel will only interfere where the assessment of the evidence or establishment of the facts by the courts can be impeached on the ground that they were manifestly unreasonable or in any other way arbitrary (see European Court of Human Rights (hereafter: ECtHR), *I.J.L. and Others v. United Kingdom*, nos. 29522/95, 30056/96 and 30574/96, judgment of 19 September 2000, § 99, *ECHR*, 2000-IX). The Panel's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was assessed, were fair (ECtHR, *Ebanks v. United Kingdom*, no. 36822/06, judgment of 26 January 2010, § 74).

36. In the present case, it appears from the case file before the Special Chamber that in his complaint received on 21 November 2005 the complainant argued that he had been employed by the company since 1991 and that he had a total of 14 years (*sic*) of service. He further stated that he had to abandon the territory of Kosovo in June 1999 "for the well known reasons" and temporarily move to the territory of Serbia proper, where he had been staying since that date, "waiting for the conditions to be restored for safe and normal living in Kosovo, where [he] would like to return and live in [his] own house". He stated that he believed that he was discriminated against because of the fact that his name was not included in the published list of eligible employees. As to the evidence in support of the fact that he had been employed for more than three years, he stated that his employment booklet remained in the company, and that the list of employees of the company could be found in the registers of employees kept in his work unit. The Special Chamber rejected the complaint on the ground that the complainant did not prove that he was working at the time of the privatisation and, taking into account that he failed to submit the discrimination statement, that he did not submit facts on which direct or indirect discrimination could be presumed.

37. According to Article 8.1 of the Anti-Discrimination Law, it was for the complainant, who was no longer at work in the company at the time of privatisation (2005), to establish "facts from which it may be presumed that there has been direct or indirect discrimination", in which case it would be for the KTA to rebut the presumption, *i.e.* to prove that there has been no breach of the principle of equal treatment.

38. It results from the judgment of the Special Chamber of 15 June 2006 that the Special Chamber accepted the complaints of a number of other complainants, although they were not able to produce their employment booklet. The Special Chamber accepted in these cases that discrimination could result from the "post-war situation created and [the] impossibility [for the complainant] to return to work due to [his or her] personal security concerns" and from the fact "that the name [of the complainant] was not included in the published list although [he or she] met the legal requirements for the inclusion in the list". These were exactly the grounds upon which also the complainant in the present case based his complaint.

39. It seems that the only reason why the Special Chamber considered that the complainant did not establish facts resulting in a shift of the burden of proof, as provided by Article 8.1 of the Anti-Discrimination Law, was that he did not submit "the discrimination statement". By using this term, the Special Chamber clearly referred to one of the documents requested by the Judge Rapporteur in his order of 24 April 2006. In this respect the Special Chamber also noted that the complainant, although duly summoned, did not respond to the summons.

40. The Panel is struck by the fact that, although the complainant made clear in his complaint to the Special Chamber the grounds on which he based the allegation that he had

been the victim of discrimination, the Special Chamber does not seem to have taken that statement into account. It appears that the Special Chamber would consider such allegation only if it had been confirmed formally in a "discrimination statement" of a later date.

41. To the extent that the Special Chamber's decision should be interpreted as meaning that the discrimination statement could only be taken into account if it had orally been confirmed by the complainant during the hearing, it is subject to the criticism developed above with respect to the notice of the hearing (§§ 29-34).

42. The Panel finds that, by not taking into account the statement made by the complainant in his original complaint and by basing its decision on an alleged failure of the complainant to submit evidence as requested, the Special Chamber did not assure him a fair trial.

43. The Panel therefore concludes that there has been a violation of Article 6 § 1 of the ECHR in this respect too.

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

44. The complainant alleges a violation of Article 1 of Protocol No. 1 to the ECHR. The first sentence of the first paragraph of that article reads as follows:

> "Every natural of legal person is entitled to the peaceful enjoyment of his possessions."

a. Arguments before the Panel

45. The complainant claims that the KTA and the Special Chamber did not duly take into account all the evidence submitted by him. Nor did they attach sufficient importance to the circumstances of the complainant as a displaced person, who was unable to obtain his employment booklet that was left in the company in Kosovo. As a consequence he was deprived of material entitlements deriving from the privatisation process.

46. The SRSG submits that the Special Chamber considered that the complainant did not submit sufficient evidence supporting his claim that he fulfilled the conditions to be considered an eligible employee. The Special Chamber also held that the complainant failed to submit a "discrimination statement" to support his claim that he had suffered discrimination. The SRSG concludes that neither the decision of the KTA nor the judgment of the Special Chamber constituted a violation of the complainant's right to property.

b. The Panel's assessment

47. The Panel notes that the question arises as to whether Article 1 of Protocol No. 1 to the ECHR is applicable. The concept of "possessions" referred to in the first sentence of the first paragraph of that provision has an autonomous meaning. As the ECtHR has held on many occasions, Article 1 of Protocol No. 1 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, provided that there is a sufficient basis for the proprietary interest in the applicable law, for example where there is settled case-law of

the domestic courts confirming its existence (ECtHR (Grand Chamber), *Kopecký v. Slovakia*, no. 44912/98, judgment of 28 September 2004, § 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. In the present case the Special Chamber held that the complainant failed to adduce facts supporting his claim that he was entitled to a share of the proceedings from the privatisation of the company. This normally should lead to the conclusion that the complainant did not have a "possession" within the meaning of the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the ECHR.

49. It is not excluded that UNMIK could nevertheless be held responsible for the adverse effects on the complainant's proprietary interests caused by the determination made by the Special Chamber, if the latter's decision were to be regarded as arbitrary or manifestly unreasonable (compare ECtHR, *Beshiri and Others v. Albania*, no. 7352/03, judgment of 22 August 2006, § 89). However, the examination of this issue would to a large extent coincide with the examination of the relevant complaint under Article 6 § 1 of the ECHR (§§ 35-43). The Panel found that the complainant did not receive a fair trial with respect to examination of his case. Consequently, it does not consider it necessary to determine the question of whether the complainant had a possession within the meaning of Article 1 of Protocol No. 1, and accordingly, to give an opinion on the complaint based on that Article (see ECtHR, *Glod v. Romania*, no. 41134/98, judgment of 16 September 2003, § 46; ECtHR, *Albina v. Romania*, no. 57808/00, judgment of 28 April 2005, § 43).

3. Alleged violation of the right to non-discrimination (Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1 to the ECHR and Article 6 § 1 of the ECHR)

50. The complainant alleges a violation of Article 14 of the ECHR, which in relevant part reads as follows:

> "The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as … national or social origin…"

The Panel will consider Article 14 of the ECHR in combination with Article 1 of Protocol No. 1 to the ECHR and Article 6 § 1 of the ECHR.

a. Arguments before the Panel

51. The complainant alleges that the Special Chamber completely ignored the existence of an indirect discrimination of persons of Serbian and other ethnic minorities. This discrimination is a generally known fact, which does not require any special proof. The complainant also argues that he had to leave Kosovo and was unable to return to the company and to continue to perform his working activities because of his Serbian origin. Had the security situation allowed persons of Serbian and other minority ethnic communities to stay in

the territory, he would have remained on the payroll of the company, and thus would be fully entitled to a share of the proceeds deriving from the company's privatisation. As a result of his inability to return to work, he was *de facto* eliminated from the privatisation process. To require a more detailed showing of discrimination, based on concrete circumstances, puts a great number of vulnerable minority communities in a very unjustifiable situation.

52. As indicated above, the SRSG submits that in the proceedings before the Special Chamber, the complainant failed to provide a "discrimination statement" to support his claim that he had suffered discrimination because of his Serbian ethnicity and, as a result, had been unable to show up at work from 1999 onwards. The SRSG further considers that, even if this discrimination had indeed taken place, it would certainly not constitute a human rights violation committed by the KTA or the Special Chamber, but rather a discrimination that would have stemmed from the circumstances of the Kosovo post-1999 conflict situation.

b. The Panel's assessment

53. The Panel recalls that under Section 10.4 of Regulation No. 2004/45 of 19 November 2004 former employees who are not on the list, can nevertheless claim "that they would have been so registered and employed, had they not been subject to discrimination" (see above, § 12). The complainant argues that it should have been sufficiently clear to the Special Chamber that it was because of his Serbian origin that he was obliged to leave Kosovo, and that it was therefore because of discrimination that he was no longer employed at the time of privatisation. According to the complainant the Special Chamber failed to admit that the complainant had been discriminated against, and thus itself violated the right not to be discriminated against.

54. The Panel considers that the complainant in substance complains about the failure by the Special Chamber to correct an existing inequality of which the complainant and other Serbian former employees were the victim.

55. A generally applicable rule, although apparently neutral, may have the effect of treating people differently, *e.g.* on the ground of their ethnic origin. Where a group of persons is, because of its ethnic origin, in a vulnerable position compared to persons of another origin, the competent authorities are obliged to give special consideration to the specific needs of that particular group. This special consideration is required both in the relevant regulatory framework and in the decisions in particular cases (consult, with respect to the situation of the Roma in a number of Central and Eastern European countries, ECtHR (Grand Chamber), *D.H. and Others v. Czech Republic*, no. 57325/00, judgment of 13 November 2007, § 181; ECtHR (Grand Chamber), *Oršuš v. Croatia*, no. 15766/03, judgment of 16 March 2010, § 148).

56. The Panel notes that according to the SRSG, even if the complainant had suffered discrimination, this discrimination would have stemmed from the circumstances of the Kosovo post-1999 conflict situation and would not entail any responsibility of UNMIK, on behalf of the KTA or the Special Chamber. The Panel considers that such argument is not pertinent. Even if the discrimination resulted from a situation for which UNMIK is not responsible, this does not reduce its obligation to give special consideration to the specific needs of the displaced former employees in privatisation cases.

57. It is, however, not necessary to proceed further with the examination of the complaint under Article 14 of the ECHR. The Panel notes that this complaint again concerns the way the Special Chamber examined this case. In the light of its conclusions in respect of Article 6 § 1 of the ECHR (see §§ 35-43) the Panel considers that there is no reason to examine separately whether the complainant was also the victim of discrimination on the ground of his ethnic origin contrary to Article 14 of the ECHR, in combination with either Article 1 of Protocol No. 1 to the ECHR or Article 6 § 1 of the ECHR.

V. RECOMMENDATIONS

58. The Panel recalls that it has found that the complainant did not have the benefit of the guarantees of Article 6 § 1 of the ECHR in the proceedings before the Special Chamber. Whilst the Panel cannot speculate as to the outcome of the proceedings had the position been otherwise, it does not find it unreasonable to regard the complainant as having suffered a loss of real opportunities. To this has to be added the non-pecuniary damage which the mere finding of a violation of the complainant's human right to a fair trial is not sufficient to make good (see ECtHR (Grand Chamber), *Pélissier and Sassi v. France*, no. 25444/94, judgment of 25 March 1999, § 80, *ECHR*, 1999-II; ECtHR, *G.B. v. France*, no.44069/98, judgment of 2 October 2001, § 74, *ECHR*, 2001-X).

59. The Panel considers that UNMIK should award adequate compensation to the complainant.

FOR THESE REASONS,

The Panel, unanimously,

- FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS WITH RESPECT TO THE NOTICE OF THE HEARING AND THE ASSESSMENT OF THE EVIDENCE;

- FINDS THAT THERE IS NO NEED TO EXAMINE THE COMPLAINT RELATING TO THE VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS;

- FINDS THAT THERE IS NO NEED TO EXAMINE THE COMPLAINT RELATING TO THE VIOLATION OF ARTICLE 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS OR ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;

- RECOMMENDS THAT UNMIK TAKE THE FOLLOWING MEASURES:
a. AWARD ADEQUATE COMPENSATION TO THE COMPLAINANT FOR PECUNIARY AND NON-PECUNIARY DAMAGE;
b. TAKE IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATION OF THE PANEL AND INFORM THE COMPLAINANT AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.

Rajesh TALWAR
Executive Officer

Marek NOWICKI
Presiding Member