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

DECISION

Date of adoption: 6 August 2010

Cases Nos. 27/08, Esat BERIŠA; 42/08, M.R.; 44/08, Ž.S.; 32/09, Slobodan AĆIMOVIĆ

against

UNMIK

The Human Rights Advisory Panel sitting on 6 August 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 Beriša (case no. 27/08) was lodged on 18 July 2008 and registered on the same date, the complaint of Ms M.R. (case no. 42/08) was lodged and registered on 27 October 2008, the complaint of Ms Ž.S. (case no. 44/08) was lodged and registered on 28 October 2008 and the complaint of Mr Aćimović (case no. 32/09) was lodged and registered on 27 February 2009. In the

proceedings before the Panel, Mr Aćimović was 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 Beriša to the Special Representative of the Secretary-General (SRSG) on 23 October 2008 and 25 November 2008, requesting his comments on behalf of UNMIK on the admissibility and the merits of the complaint. The SRSG responded with comments by letters dated 13 November 2008 and 15 December 2008. The Panel communicated the complaint of Ms M.R. on 28 April 2009 and received the SRSG's comments on 18 May 2009; the complaint of Ms Ž.S. was communicated on 25 November 2008 and the SRSG's comments were received on 11 December 2008; and Mr Aćimović's complaint was communicated on 19 June 2009, with the SRSG's comments received on 9 July 2009.

II. THE FACTS

3. 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.

4. The complainants lodged claims with the competent courts against UNMIK, KFOR, the Kosovo Provisional Institutions of Self-Government (PISG) and the relevant municipalities, with the exception of Ms M.R. who directed her claim only against the Municipality and the PISG, all seeking compensation for the damage caused to their property. Their claims were recorded by the courts in the second half of 2004.

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

6. The complainants' claims belong to a group of approximately 17,000 compensation claims, the vast majority of which were 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 some combination of UNMIK, KFOR, the PISG and 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).

7. 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 § 6 above, § 6).

8. 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 events arising before October 2000 were not affected by this letter.

9. 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.

10. 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.

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

III. COMPLAINTS

12. 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.

13. The complainants further complain about a violation of their right to property, guaranteed by Article 1 of Protocol No.1 to the ECHR. Mr Beriša and Ms M.R. generally complain about the fact that their property has been damaged or destroyed. Ms Ž.S. and Mr Aćimović complain about the refusal of the competent courts to decide on their claims for damages.

14. Mr Aćimović also alleges a violation of his right to family life and home (Article 8 of the ECHR), as he is prevented from returning to his home.

IV. JOINDER OF THE COMPLAINTS

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

V. THE LAW

16. 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.

17. 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 joined cases.

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

18. 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*, no. 38/08, decision of 22 May 2009; compare European Court of Human Rights (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.

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 (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, 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. In his comments the SRSG has not indicated any specific 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 § 18 above, § 17).

23. 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 § 18 above, § 18).

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

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

25. The complainants all complain about a violation of their right to property (Article 1 of Protocol No.1). Mr Beriša and Ms M.R. generally complain about the fact that their property has been damaged or destroyed. Ms Ž.S. and Mr Aćimović complain about the refusal of the competent courts to decide on their claims for damages.

26. 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 those parts of the complaints made by Mr Berisha and Ms M.R. lay outside the Panel's jurisdiction *ratione temporis*.

27. With respect to the complaints made by Ms Ž.S. and Mr Aćimović, 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).

28. It follows that this part of the complaints of Ms Ž.S. and Mr Aćimović also lies outside the Panel's jurisdiction *ratione temporis* (see HRAP, *Gojković*, no. 63/08, decision of 4 June 2009, §§ 24-25).

Alleged violation of Article 8 of the ECHR

29. Mr Aćimovć complains about a violation of his right to family life and home (Article 8 of the ECHR).

30. As noted above, the complainant's property, including the house in Kosovo where he lived with his family, was destroyed sometime in the second half of 1999. For the above-mentioned reason, any complaint relating to the destruction of the complainant's home therefore lies outside the Panel's jurisdiction *ratione temporis* (see §§ 27-28).

31. 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
Executive Officer

Marek NOWICKI
Presiding Member

Annex

Case No. 27/08, Esat Beriša

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

2. He is the owner of two residential houses located in Graçanicë/Gračanica, 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 August 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 220,000 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. 42/08, M.R.

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 Istog/Istok, where she lived until June 1999. She was informed by her neighbours that her property had been devastated and demolished during the second half of 1999.

7. On 10 June 2004 the complainant lodged a compensation lawsuit before the Municipal Court of Istog/Istok against the Municipality of Istog/Istok and the PISG seeking compensation for the destruction of her property. She claims 158,000 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. 44/08, Ž.S.

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

10. She is the owner of a residential house located in Prizren where she lived until June 1999. She was informed by her friends that her property had been destroyed during the second half of 1999.

11. On 3 September 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. She claims 82,000 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. 32/09, Slobodan Aćimović

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

14. He is the owner of a residential house located in the Municipality of Ferizaj/Uroševac where he and his family lived until June 1999. He was informed by a friend that the house had been destroyed during the second half of 1999.

15. On 24 August 2004 the complainant lodged a compensation lawsuit before the Municipal Court of Ferizaj/Uroševac against the Municipality of Ferizaj/Uroševac, the PISG, UNMIK and KFOR seeking compensation for the destruction of his property. He claims 143,000 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.