The Human Rights Advisory Panel
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OPINION

Date of adoption: 13 May 2011

Case no. 20/08

Kabaš KRASNIĆI

against

UNMIK

The Human Rights Advisory Panel sitting on 13 May 2011,
with the following members present:

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

Assisted by
Ms Anila PREMTI, 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, makes the following findings and recommendations:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 3 July 2008 and registered on 4 July 2008. In the proceedings before the Panel, the complainant is represented by Mr Teki Bokshi, a practicing lawyer from Gjakovë/Djakovica.

2. On 11 and 17 July 2008 and on 20 August 2008 the complainant transmitted additional documents to the Panel.

3. The Panel communicated the complaint to the Special Representative of the Secretary-General (SRSG) on 23 October 2008, with a view to obtaining UNMIK's comments on both the admissibility and the merits of the complaint.

4. The SRSG commented on 25 November 2008 on the admissibility and the merits of the complaint.

5. On 14 April 2009 the Panel obtained copies of several documents from the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (Special Chamber) on the complainant's case.

6. On 23 April 2009, the Panel re-communicated the complaint to the SRSG, together with the documents obtained from the Special Chamber.

7. On 14 May 2009 the SRSG submitted additional comments on the case.

8. By decision of 12 September 2009 the Panel declared the complaint admissible insofar as it related to the composition of the Special Chamber, and inadmissible as to the remainder of the complaint.

9. On 8 October 2009 the SRSG submitted his comments on the merits of the complaint.

10. The comments of the SRSG were communicated to the complainant on 2 March 2011. The complainant was invited to submit comments if he so wished. The complainant sent comments on 1 April 2011.

II. THE FACTS

11. The complainant is a citizen of Bosnia and Herzegovina, living in Sarajevo.

12. The facts, insofar as relevant for the part of the complaint that has been declared admissible, can be summarised as follows.

13. The complaint relates to a dispute over the property right concerning two pieces of land, one located in Prishtinë/Priština, the other in Pejë/Peć. Originally these pieces of land belonged to the socially owned enterprise (SOE) Šipad-Komerc, an organisation that had its seat in Sarajevo and operated throughout the territory of the former Yugoslavia, including in Kosovo. Following the independence of Bosnia and Herzegovina and the subsequent enactment of legislation in that country on the transformation of social property into state-owned property and on the privatisation of enterprises, Šipad-Komerc was transformed in 2001 into a private company under the name "Šipad-Komerc JSC Sarajevo".

14. The new company sold the two properties in question to the complainant, by contracts signed on 31 July 2001 and certified by the Municipal Court of Sarajevo in the same year.

15. When the complainant tried in 2003 to obtain in Kosovo the registration of the properties in his name, the Kosovo Trust Agency (KTA) objected to the

complainant's request by letters of 29 October 2003 to the cadastral offices in Prishtinë/Priština and Pejë/Peć. According to the KTA, the properties still belonged to Šipad-Komerc, an SOE that had working units in Kosovo. The KTA argued that the properties accordingly fell under its administration and could not be sold.

16. On 14 June 2005, the complainant filed a claim with the Special Chamber, requesting the Special Chamber to order the KTA to remove any ban or restriction on the transfer of the property to him and to order the competent cadastral offices to register the properties under his name. The complainant also requested the Special Chamber to issue an injunction against the KTA, so as to exclude the properties in question from the privatisation process of the SOE.

17. By decision of 8 June 2006 the Special Chamber rejected the KTA's plea to the effect that the claim was time-barred. The decision was taken by the full Chamber, composed of five judges.

18. By judgment of 5 February 2008 the Special Chamber gave its decision on the merits of the claim. It held that the two properties in question were under KTA administration at the date of the purchase contract, and were therefore not freely transferable. Since the complainant failed to prove that he had a valid property title for the two properties, his claim was declared unfounded. This judgment was handed down by a panel composed of four judges.

19. On 7 April 2008 the complainant filed a request for review as well as an appeal against the judgment of 5 February 2008.

20. By decision of 22 April 2008 the Special Chamber rejected the complainant's request for review on the ground that the claimant had not presented any new decisive relevant facts. This decision was taken by the full Chamber, composed of five judges.

21. By a separate decision of the same date the Special Chamber declared the appeal inadmissible, on the ground that the provisions providing for the possibility of an appeal had not yet entered into force. This decision was also taken by the full Chamber.

III. THE COMPLAINT

22. Insofar as the complaint has been declared admissible, the complainant argues that the Special Chamber was not a tribunal "established by law", in the sense of Article 6 § 1 of the European Convention on Human Rights (ECHR). He complains about the fact that the judgment of 5 February 2008 was handed down by a panel of four judges, while the relevant legislation provided that the panel was to be composed of five judges.

IV. THE LAW

A. Scope of the case before the Panel

23. In his submissions on the merits the complainant provides further arguments in support of his position that the Special Chamber violated various fundamental rights, including the property right claimed by him and the right to an effective remedy.

24. The Panel, in its decision of 12 September 2009, declared admissible only the complaint "relating to the composition of the Special Chamber of the Supreme Court". The scope of the case on the merits is defined by the Panel's decision on admissibility. The Panel cannot therefore consider the various complaints relating to the proceedings before the Special Chamber or to the substance of the Special Chamber's decision (see Human Rights Advisory Panel (HRAP), *Todorović*, no. 33/08, opinion of 15 April 2011, § 22).

B. Alleged violation of Article 6 § 1 of the European Convention on Human Rights

Arguments of the parties

25. The complainant alleges that his claim was adjudicated by a panel of four judges and that the panel was therefore not composed in accordance with the law. Although the complainant refers to Administrative Direction No. 2006/17 of 6 December 2006 amending and replacing UNMIK Administrative Direction No. 2003/13, Implementing UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, it seems that his complaint is in reality based on 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. Section 3.1 of UNMIK Regulation No. 2002/13 provides that "the Special Chamber shall be composed of a panel of five judges […]".

26. The SRSG argues that Section 3.1 of UNMIK Regulation No. 2002/13 sets the number of judges who "will be working for the Special Chamber", and that it does not determine the composition of panels sitting to hold hearings, deliberate and decide on claims brought before the Special Chamber. The SRSG further refers to Section 13.3 of UNMIK Administrative Direction No. 2006/17, which provides that "the Presiding Judge may assign claims and complaints to panels composed of three judges". It is the latter provision that regulates the composition of panels sitting for hearing, deliberating and deciding on a claim. The word "may" indicates that it is not mandatory for the Presiding Judge to establish a panel composed of only three judges. Section 13.3 rather sets the minimum number of judges, and does not exclude that a panel can be composed of four judges, as in the complainant's case.

The Panel's assessment

27. Article 6 § 1 of the ECHR in its relevant part reads as follows:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]."

28. As the European Court of Human Rights has held, the requirement that a tribunal must always be "established by law" reflects the principle of the rule of law. The phrase "established by law" covers not only the legal basis for the very existence of a "tribunal", but also, among other things, the composition of the bench in each case (see ECtHR, *Buscarini v. San Marino*, no. 31657/96, decision of 4 May 2000; ECtHR, *Lavents v. Latvia*, no. 58442/00, judgment of 28 November 2002, § 114).

29. Failure by a tribunal to comply with the provisions of the rules governing its organisation normally gives rise to a violation of Article 6 § 1 of the ECHR. Following the case law of the European Court on this point, the Panel considers that it therefore has jurisdiction to rule on compliance with the relevant rules. However, in accordance with the general principle that it is for the Kosovo courts to interpret the law applicable in Kosovo, the Panel takes the view that it should challenge the assessment of the courts only where there has been a flagrant breach of the legislation (see ECtHR, *Lavents*, cited above, *ibid.*).

30. Turning to the present case, the Panel notes that at the moment when the Special Chamber handed down its judgment of 5 February 2008, its organisation was the object of UNMIK Regulation No. 2002/13 of 13 June 2002. Section 3.1 provided that the Special Chamber was "composed of a panel of five judges of which three shall be international judges and two shall be judges who are residents of Kosovo". Section 9.2 provided that "decisions of the Special Chamber adjudicating a claim under section 4.1 […] shall require the supporting vote of at least three (3) judges".

31. UNMIK Regulation No. 2002/13 did not provide for the possibility to set up panels composed of less than five judges, except for the collection of evidence or the conduct of hearings. With respect to such procedural activities, Section 8.2 provided that "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". The decision on a claim is obviously not a matter covered by the delegation clause of Section 8.2.

32. UNMIK Regulation No. 2002/13 was supplemented by subordinate legislation. Pursuant to Section 7 of UNMIK Regulation No. 2002/13 it was for the SRSG to "promulgate rules for the conduct of proceedings before the Special Chamber through the issuance of an Administrative Direction". At the moment when the Special Chamber handed down its judgment in the case of the complainant, such rules were contained in UNMIK Administrative Direction No. 2006/17 of 6 December 2006 amending and replacing Administrative Direction No. 2003/13 implementing UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related

Matters. As the SRSG rightly indicates, Section 13.3 of that Administrative Direction provided that "the Presiding Judge may assign claims and complaints to panels composed of three judges". The same provision stated that "all judgments or decisions of such panels shall be adopted by consensus failing which the matter shall be referred to the full Chamber". Echoing Section 9.2 of UNMIK Regulation No. 2002/13, Section 16.4 of UNMIK Administrative Direction No. 2006/17 provided that "all judgments and decisions shall be decided by an affirmative vote of at least three judges".

33. While UNMIK Regulation No. 2002/13 did not provide for panels of less than five judges to adjudicate claims, UNMIK Administrative Direction No. 2006/17 did so. The first question therefore is whether the Administrative Direction, by allowing for the setting up of a panel composed of fewer than five judges, is compatible with the Regulation. If the answer is positive, the next question is whether it allowed for panels composed of four judges, as in the case of the complainant.

34. At first view, the text of Section 3.1 of UNMIK Regulation No. 2002/13 may appear clear. It seems to provide for a single panel within the Special Chamber, composed of five judges. The number of five judges could be interpreted as the number of judges to sit in each case. The majority rule contained in Section 9.2 would, under that interpretation, simply refer to the absolute majority within the panel of five judges.

35. There are, however, elements that point in the direction of another interpretation. Since the Special Chamber is a separate formation within the Supreme Court, it is understandable that UNMIK Regulation No. 2002/13 determines the number of judges of the Special Chamber in terms of the composition of a "panel". The word "panel" can indeed be understood to refer to a separate panel within the Supreme Court, and thus to the composition of the Special Chamber as such. Moreover, the provision that the "supporting vote" of at least three judges is required for the adoption of a judgment does not really add anything to the generally applicable majority rule, if the Special Chamber would always have to sit with five judges. By contrast, the "three-judge" majority rule receives a distinct meaning if it is to be understood that the Special Chamber can also sit with fewer than five judges in a given case. Under that interpretation the rule sets an absolute minimum number of judges required for the adoption of any decision in a given case, regardless of the number of judges dealing with the case.

36. In the light of the ambiguity of the wording of Section 3.1 of UNMIK Regulation No. 2002/13, the Panel considers that a particular weight should be attached to the way this provision has been interpreted by the authorities competent to apply it. There is in the first place the SRSG himself, who did not see in Section 3.1 an obstacle to the adoption of "rules for the conduct of proceedings", in the form of an administrative direction, which provided for panels within the Special Chamber of less than five judges. Moreover, the present case shows that the Special Chamber also considers that a case can be examined by a panel composed of less than the full membership of the Special Chamber. The interpretation of Section 3.1 by the Special Chamber is of particular importance, since, as indicated above, it is exactly the Special Chamber's role to interpret the law.

37. Finally, regard should be had to the practical aspects of the functioning of a judicial organ, in particular where it is composed partly of international judges, partly of local judges. To require that such organ would in all cases sit in its full composition would lead to situations where that organ, *e.g.* because of a vacancy or a temporary absence of one or more of its members, would in effect be unable to perform its judicial functions for a longer or a shorter period of time.

38. Having regard to the foregoing, the Panel concludes that Section 3.1 of UNMIK Regulation No. 2002/13 should be interpreted so as to refer to the composition of the Special Chamber as a whole, not to the composition of panels that can be set up to adjudicate individual cases. Accordingly, Section 13.3 of UNMIK Administrative Direction No. 2006/17, which allows for the assignment of claims to panels composed of three judges, *i.e.* panels composed of less than all five judges of the Special Chamber, is not incompatible with Section 3.1 of UNMIK Regulation No. 2002/13.

39. It remains to be seen whether, notwithstanding the wording of Section 13.3 of UNMIK Administrative Direction No. 2006/17, a panel of the Special Chamber can be composed of four, not three, nor five, judges.

40. The Panel considers that, unlike Section 3.1 of UNMIK Regulation No. 2002/13, Section 13.3 of UNMIK Administrative Direction No. 2006/17 does not leave room for any ambiguity. The first sentence of Section 13.3 allows for "panels composed of three judges", not of a minimum of three judges. This strict reading is corroborated by the fact that the second sentence continues by specifying that "such panel of three judges" shall be composed of the Presiding Judge of the Special Chamber or his designee, an International Judge and a Judge who is resident of Kosovo. Nothing is provided about the composition of a four-judge panel.

41. The conclusion is that a case before the Special Chamber could be heard either by the full Chamber, composed of five judges, or by a panel of three judges reflecting the mixed composition of the Special Chamber (a majority of international judges and a minority of local judges), but not by a panel of four judges. If a case was assigned to a panel of three judges, decisions had to be adopted by consensus; if one judge could not join his or her two colleagues, the case had to be referred to the full Chamber of five judges.

42. There may have been situations where, as indicated above, the full Chamber was unable to sit with five judges (see § 37). It would be perfectly understandable if the applicable regulatory framework would have allowed the Presiding Judge to derogate under certain conditions from the generally applicable rules and to refer certain cases to a panel of four judges. However, there was nothing in that framework that explicitly allowed the Presiding Judge to do so. Even assuming that the Presiding Judge was implicitly empowered to find *ad hoc* solutions in cases of necessity, the law did not set any criteria in this respect. The resulting legal uncertainty and lack of transparency are in themselves incompatible with the requirement that a tribunal should be "established by law", *i.e.* that its composition should be determined according to clear rules, so that any appearance

of arbitrariness in the assignment of particular cases to judges can be avoided (see ECtHR, *Iwańczuk v. Poland*, no. 39279/05, decision of 17 November 2009; ECtHR, *DMD Group A.S. v. Slovakia*, no. 19334/03, judgment of 5 October 2010, § 66).

43. Accordingly, the Special Chamber, sitting in the complainant's case with four judges, could not be regarded as a tribunal "established by law".

44. The subsequent appeal and request for review were not capable of repairing this irregularity, even though they were both examined by the full Special Chamber composed of all five judges. The appeal was declared inadmissible, and the request for review was rejected on the ground that the complainant did not raise any new and decisive fact that could affect the decision of 5 February 2008.

45. The Panel therefore concludes that Article 6 § 1 of the ECHR has been violated.

V. RECOMMENDATIONS

46. Having regard to the nature of the violation of Article 6 § 1 of the ECHR, the Panel cannot speculate as to whether the outcome of the proceedings would have been different if no such violation had taken place. Therefore, it does not recommend any reparation for pecuniary damage.

47. Nevertheless, the fact remains that the proceedings relating to the complainant's request for reconsideration were, in the Panel's opinion, not conducted entirely in conformity with the ECHR.

48. The Panel considers that the recognition by UNMIK that a violation has occurred would constitute an adequate form of redress for any non-pecuniary damage that may have been sustained by the complainant.

FOR THESE REASONS,

The Panel, unanimously,

1. FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;

2. RECOMMENDS THAT THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON BEHALF OF UNMIK RECOGNISE THAT THERE HAS BEEN A VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.

Anila PREMTI
Acting Executive Officer

Marek NOWICKI
Presiding Member