



The Human Rights Advisory Panel

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DECISION

Date of adoption: 13 May 2011

Case no. 45/08, LINDA, LLC

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, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was lodged with the Panel on 12 November 2008 and registered on the same date.
2. On 16 December 2008 and on 2 February 2009, the Panel requested the complainant to provide additional information and documents.
3. A response from the complainant was received on 17 February 2009.

4. On 3 June 2009, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility and merits of the case.
5. The SRSG provided comments by a letter dated 24 June 2009.
6. On 12 August 2009 the Panel sent a letter to the complainant inviting him to submit his comments on the UNMIK observations.
7. On 19 November 2009 the Panel re-communicated the case to the SRSG for UNMIK's comments on the admissibility of the case, in light of Administrative Direction no. 2009/1 of 17 October 2009 on Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel.
8. The SRSG provided comments by a letter dated 10 December 2009.
9. On 25 January 2010 the Panel sent a letter to the complainant inviting him to submit his comments on the UNMIK observations.
10. The complainant's responses to UNMIK's observations were received on 26 January 2010 and 22 February 2010.
11. On 20 September 2010 and 14 February 2011 the Panel sent letters to the District Commercial Court of Prishtinë/Priština, requesting information on its decisions taken in the matter.
12. Responses from the District Commercial Court of Prishtinë/Priština were received by the Panel on 13 December 2010, 18 February 2011 and 15 March 2011.

II. THE FACTS

13. The construction company "Linda" is a limited liability company. All of its shares are held by Mr Milaim Berisha, who is also the director of the company.
14. On 26 June 2006 "Linda" concluded a contract with the Kosovo Protection Corps (KPC) Command Zone (ZK/TMK), for the construction of premises at Bardhi i Vogël/Mali Belacevac. According to the complainant, whilst the work was performed and technically accepted, 10% of the contract price has been withheld by the KPC.
15. On 25 August 2006 the complainant company concluded a second contract with the Command Zone of the KPC Cantonment "Adem Jashari", for the construction of the military premises of the 50th Battalion. It is alleged by the complainant that the KPC has paid only a part of the contract price and that it has unjustifiably withheld certain payments to the complainant.
16. Both contracts were signed on UNMIK letterhead.
17. The chief administrator of the KPC claimed that the deductions were withheld due to delays in the construction activities. "Linda" disputed that the contracts permitted any such deductions and stated that the only basis for temporarily withholding any payments would be that 10% of the purchase price could be

withheld as a guarantee on construction works, for up to one year. It argued that any delays during the construction period were reasonable and justifiable and that the works had been technically accepted as satisfactory.

18. "Linda" filed two requests for execution of the contracts with the District Commercial Court of Prishtinë/Priština, cases E. no. 10/08 and E. no. 11/08. The requests indicated the KPC Coordinator's Office as the debtor. Both requests were granted on 28 January 2008, and the execution formula, containing the text of the decision, was affixed to them.

19. Upon receipt of the two requests for execution from the District Commercial Court, the UNMIK Office of Legal Affairs (OLA) wrote a letter to the President of the Court on 8 February 2008. The letter contained the following statement:

"The Kosovo Protection Corps (KPC) is an organisation operating under the control and authority of the SRSG. Consequently these cases involve matters that concern the privileges and immunities of UNMIK and the United Nations that the courts of Kosovo do not have jurisdiction to adjudicate. UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo provides that UNMIK shall be immune from any legal process in Kosovo. In these circumstances, I request that the District (Commercial) Court declare it has no jurisdiction in these matters and remove the proposals for execution from the court register."

20. On 17 July 2008, "Linda" sent a letter to the District Commercial Court, noting that the debtor had submitted no objection. It accordingly requested the Court to deliver the execution decisions in cases E. no. 10/08 and E. no. 11/08 to the competent bank so that the respective amounts could be transferred to its account.

21. On 26 January 2009, "Linda" sent another letter to the District Commercial Court. It stated that, since the competences of the KPC Coordinator's Office had been transferred to the Ministry for the Kosovo Security Force, and since the KPC as a defence force had now been dissolved and the Kosovo Security Force established, the legal successor of the KPC Coordinator's Office was the Ministry for the Kosovo Security Force in Prishtinë/Priština. As a result, the Court notified the two requests for execution of the contract, provided with the execution formula, to the Kosovo Ministry of Justice on 20 February 2009.

22. On 23 February 2009, the Ministry of Justice of Kosovo submitted two objections to the District Commercial Court, directed respectively against the above-mentioned execution decisions in the cases nos. E. 10/08 and E. 11/08. The Ministry of Justice argued that the Security Force of Kosovo was not the legal successor of the KPC, but a newly established institution. These objections were registered respectively under nos. C. 62/2009 and C. 61/2009.

23. The District Commercial Court handed down two decisions: a first one on 26 February 2009, in case no. C. 62/2009, and another one on 27 February 2009, in case no. C. 61/2009. The Court held in both cases that, having regard to the request made by the claimant (presumably referring to "Linda"'s letter of 26 January 2009), the respondent was the Ministry for the Kosovo Security Force. The Court further held that the Ministry for the Kosovo Security Force was an administrative State body, which lacked the capacity of a legal person. According

to Article 73.1 of the Law on Contested Procedure, only natural and legal persons could be parties to the proceedings. Article 73.2 of this law provided that special provisions could determine who else could be a party to the proceedings, in addition to natural and legal persons. The respondent was neither a natural nor a legal person, nor was it determined as a party to the proceedings by any special provision. For these reasons, the Court revoked its decisions in cases E. no. 10/08 and E. no. 11/08 and declared the original requests inadmissible, insofar as they were re-directed against the Ministry for the Kosovo Security Force.

24. On 8 March 2009, "Linda" appealed against the decisions in cases nos. C. 61/2009 and C. 62/2009. These appeals were registered by the Supreme Court respectively under nos. Ae. 153/2009 and Ae. 59/2009. On respectively 30 June 2009 and 21 September 2010, the Supreme Court rejected the appeals as unfounded. According to the Supreme Court, the District Commercial Court had rightly decided that the respondent, the Ministry for the Kosovo Security Force, lacked the capacity of a legal person and could also not on the basis of any special provision be a party to the proceedings.

III. THE COMPLAINT

25. The complainant complains about the non-fulfilment by KPC of its contractual obligations, for which execution requests have been granted by the District Commercial Court on 28 January 2008. It also results from the complaint that the complainant complains about the immunity granted to the KPC and the lack of jurisdiction of the Kosovo courts over it.
26. The Panel considers that the complainant may be deemed to invoke a violation of the right of access to a court, guaranteed in particular by Article 6 § 1 of the European Convention on Human Rights (ECHR). It may also be deemed to invoke a violation of the right to an effective remedy (Art. 13 of the ECHR), in combination with the right of property (Art. 1 of Protocol No. 1 to the ECHR).

IV. THE LAW

27. 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 on the Establishment of the Human Rights Advisory Panel.
28. The SRSG raises two objections to the admissibility of the complaint. He argues in the first place that, although Mr. Berisha signed the complaint, he cannot be considered as the complainant. He signed the complaint for and on behalf of the company "Linda". The alleged violations indeed concern solely the commercial activities of "Linda". As a legal person, "Linda" cannot file a complaint with the Panel. The SRSG argues, secondly, that the complainant has not exhausted all available remedies. More particularly, he argues that the complainant should have filed a complaint with the SRSG, under whose authority the KPC operated, for the administrative review of the KPC's decision not to effectuate a full payment of all the bills.

Capacity of the complainant

29. Before examining the first objection raised by the SRSG, the Panel has to determine by whom the complaint has been lodged.
30. When submitting a complaint to the Panel the complainants are requested to fill out the model complaint form. As far as the identification of a complainant is concerned, that model form asks for data relating to individual persons (surname, given names, date of birth, occupation, etc.). The complaint form in the present case, dated 12 November 2008, is filled out in the name of Mr Berisha, director of the company “Linda”.
31. The Panel considers that the complaint must be deemed to be filed not by Mr Berisha, acting in his personal capacity, but by the company “Linda”. The allegedly unpaid bills are also in the name of “Linda”, and it is “Linda” that filed the claim with the District Commercial Court.
32. The SRSG argues that, as a legal person, “Linda” cannot file a complaint with the Panel.
33. According to Section 1.2 of UNMIK Regulation No. 2006/12 the Panel “shall examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of the human rights ...”.
34. The text of this provision does not exclude that legal entities, such as commercial companies, can bring complaints before the Panel. To the contrary, the word “person” can generally be understood to comprise not only natural persons, but also legal persons. Moreover, legal persons, like natural persons, can enjoy certain rights guaranteed by international human rights instruments (see, *e.g.*, European Court of Human Rights (ECtHR), *Autronic AG v. Switzerland*, judgment of 22 May 1990, *Publications of the Court*, Series A, vol. 178, p. 23, § 47; ECtHR, *Société Colas Est and Others v. France*, no. 37971/97, judgment of 16 April 2002, *ECHR*, 2002-III, § 41). This is true in particular of the right to protection of property. Indeed, Article 1 of Protocol No. 1 to the ECHR explicitly provides that “every natural or legal person is entitled to the peaceful enjoyment of his possessions”. It is perfectly in line with this capacity of legal entities to enjoy ECHR rights, to allow them also to complain about a violation of these rights.
35. The SRSG argues that the term “any person” should be interpreted in line with the term “group of individuals”, which immediately follows the former term in Section 1.2 of UNMIK Regulation No. 2006/12. According to the SRSG, it follows from the use of the term “group of individuals” that the term “any person” should be understood to mean “any individual”. The Panel disagrees. Clearly, the word “individuals” in the expression “group of individuals” refers to natural persons only. However, the fact that the expression “any person” is used, and not “any individual”, rather is an argument for interpreting the term “person” as referring not only to natural persons (“individuals”), but also to legal persons.
36. The Panel therefore concludes that legal persons such as the complainant in this case can bring a complaint before it (see Human Rights Advisory Panel (HRAP), *NTP Bujari (AS Petrol)*, no. 311/09, decision of 18 March 2011, §§ 19-24).
37. Accordingly, the first objection should be dismissed.

Exhaustion of available remedies

38. The SRSG further argues that the complainant company has not exhausted all available remedies. He argues, more precisely, that it should have filed a complaint with the SRSG, under whose authority the KPC operated, for an administrative review of the KPC's decision not to effectuate a full payment of all the bills.
39. Section 3.1 of UNMIK Regulation No. 2006/12 provides that the Panel may only deal with a matter after it determines that all other available avenues for review of the alleged violations have been pursued.
40. Section 3.1 of UNMIK Regulation No. 1999/8 of 20 September 1999 on the Establishment of the Kosovo Protection Corps, replaced by UNMIK Regulation No. 2006/3 of 24 January 2006, provided at the relevant time that "the Kosovo Protection Corps shall operate under the authority of the Special Representative of the Secretary-General". It is on the basis of this overall authority of the SRSG that the SRSG argues that a complaint could have been brought before him.
41. The SRSG does not refer to a specific complaint mechanism that would allow parties to a dispute with the KPC to bring that dispute before the SRSG.
42. Rather, what the SRSG refers to appears to be merely a hierarchical appeal. Such an appeal is not a formal appeal, and the person addressing himself or herself to the SRSG does not have a right to an effective exercise by the SRSG of his review powers. The Panel considers that the remedy mentioned by the SRSG is therefore not a remedy to be exhausted before the alleged victim can make use of the complaint mechanism explicitly provided for, in this case the complaint mechanism before the Panel (HRAP, *NTP Bujari (AS Petrol)*, mentioned above, §§ 26-30, referring to ECtHR, *Horvat v. Croatia*, no. 51585/99, judgment of 26 July 2001, *ECHR*, 2001-VIII, § 47; ECtHR (Grand Chamber), *Sürmeli v. Germany*, no. 75529/01, judgment of 8 June 2006, *ECHR*, 2006-VII, § 109; ECtHR, *Belevitskiy v. Russia*, no. 72967/01, judgment of 1 March 2007, § 60).
43. Accordingly, the second objection should also be dismissed.

Other grounds of inadmissibility

44. The Panel considers 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 this complaint is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.
45. No other ground for declaring the complaint inadmissible has been established.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT ADMISSIBLE.

Anila PREMTI
Acting Executive Officer

Marek NOWICKI
Presiding Member