The Human Rights Advisory Panel
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DECISION

Date of adoption: 9 June 2011

Case No. 47/08

Fillim GUGA

against

UNMIK

The Human Rights Advisory Panel on 9 June 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 introduced on 3 November 2008 and registered on 13 November 2008. On 19 March 2009, the complainant submitted additional information. The complaint was represented before the Panel by Mr Teki Bokshi, a lawyer from Gjakovë/Đakovica.

2. On 8 April 2009, the Panel requested information from the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters.

3. On 27 July 2009, the Panel sent an additional request to the Special Chamber. On 30 July 2009, the Special Chamber provided its response.

4. On 17 September 2009, the Panel requested information from the Special Representative of the Secretary-General (SRSG) in his capacity as representative of the Kosovo Trust Agency (KTA).

5. On 25 November 2009, the Panel repeated its request to the SRSG for information. On 4 December 2009, the SRSG provided his response.

6. On 13 January 2010, the Panel requested further information from the complainant. On 24 January 2010, the complainant provided an interim response and on 5 February 2010, he provided his full response.

7. On 29 April 2010, the Panel communicated the complaint to the SRSG for comments on the admissibility of the complaint. On 26 May 2010, the SRSG provided his response.

8. On 9 June 2010, the SRSG's comments were forwarded to the complainant for response. The complainant provided his response on 19 July 2010.

II. THE FACTS

9. The socially owned enterprise (SOE) KNI "Dukagjini" OTHPB-BP IMN Tjegulltorja ("IMN") initially hired the complainant as a casual labourer on 16 April 1979, a job he held until 31 August 1979. IMN re-hired the complainant as a labourer on a permanent basis on 20 June 1980. He worked for IMN for approximately 20 years. His workbook states 23 March 1999 as the last day of his employment at IMN. However, according to IMN's decision No. 185 of 24 August 2000 terminating his employment (see below, § 11), his last day of employment was 17 June 1999.

10. On or about 1 July 1999 the complainant's father went missing. Together with members of his family, the complainant then fled to Montenegro fearing for his safety. Later, the complainant's home was burned down and his father was found shot dead.

11. IMN terminated the complainant's employment through its decision No. 185 of 24 August 2000 for failure to appear at work for a prolonged period without justification. The decision terminated the employment of 27 IMN employees, including the complainant. While some of the affected employees provided justifications for their absence (which were rejected for various reasons), the complainant was among a group of employees who were presumed to be abroad and thus could not be contacted by IMN in relation to the proceedings. The decision also stated: "Taking into account the circumstances that prevailed in Kosovo, the IMN did not undertake any disciplinary hearings until one year after the war, but since the aforementioned employees did not show up at all, [they] basically did not declare themselves that they want to continue working, and the enterprise has to continue to function regularly, and thus they have to be replaced with new employees." The decision was posted on the notice board at the factory.

12. Upon the complainant's return to Kosovo in 2001, he visited IMN and requested that he be allowed to resume working. This request was rejected. The complainant formally requested to return to work in writing on 8 April 2002 and again on 12 March 2003. Both requests were again rejected. Thereafter, the complainant filed a claim before the Municipal Court of Gjakovë/Đakovica seeking reinstatement to his previous job with IMN. On 16 February 2004, the municipal court rejected his request, holding that the procedure leading to the complainant's termination was done in accordance with the law. The complainant appealed this judgment but on 28 June 2006 the District Court of

Pejë/Peć rejected his appeal, concurred with the reasoning of the first instance court and certified the lower court's judgment. The complainant then appealed to the Supreme Court of Kosovo. On 11 October 2007, the Supreme Court of Kosovo rejected his appeal and upheld the judgment of the District Court. The Supreme Court held that according to the law in force at the time, formal termination proceedings were not required for unauthorised lengthy absences from work.

13. In the meantime, IMN was privatised on 31 July 2006. On 10 April 2007 the Kosovo Trust Agency (KTA) published the provisional list of staff qualified for a share of the proceeds of the privatisation. The complainant was not included in that list.

14. The complainant submitted a claim to the KTA, which was received on 5 March 2007, arguing that he should have been included in the provisional list. He stated that in 1999 he was afraid to remain in Gjakovë/Đakovica. He noted that his house had been burned down and that after he returned to Kosovo in 2001, his house was rebuilt by an NGO. The complainant also stated: "I was a refugee in Montenegro and stayed in Kotor wherefrom I could not report to work after which the employer had expelled me from work." He stated that he reported to work upon his return, but that IMN refused to reinstate him. He specifically stated: "I had tried to realise my rights through court procedure but without any success since they said that I had shown up at work too late. I feel like I am discriminated against since I belong to [the] Egyptian minority."

15. On 26 March 2008 KTA published the final list of employees entitled to a portion of the proceeds from IMN, as approved by the Board of Directors of the KTA.[1] The complainant was not on the published list.

16. On 11 April 2008, the complainant filed a petition with the Special Chamber of the Supreme Court of Kosovo against the final decision of KTA's Board of Directors. He alleged that his labour contract was terminated in his absence because of discrimination against him as a member of a minority community. He claimed that ethnic Serbs who had failed to appear at work after 10 June 1999 for security reasons were still included on the final list of employees entitled to a portion of the proceeds of the privatisation. He therefore claimed that he was discriminated against in comparison to his ethnic Serbian colleagues. He asked the Special Chamber to reverse the KTA's exclusion of him from the final list of staff entitled to a share of the proceeds from the privatisation. He did not indicate that he had filed a claim in the regular courts seeking his reinstatement at work.

17. On 29 April 2008, the Special Chamber forwarded the KTA's response to the complainant's claim to him. In that response, the KTA specifically stated that there was no indication that the complainant had lodged any claim against the decision to terminate his employment, or that he had attempted to return to his previous position. The KTA also stated that there was no evidence that the complainant had suffered any discrimination within the meaning of Section 10.4 of UNMIK Regulation No. 2003/13 of 9 May 2003 on the Transformation of the Right of Use to Socially-Owned Immovable Property.

18. In his response of 12 May 2008, the complainant identified himself as a political refugee who had fled to Montenegro to escape persecution by some groups in Kosovo. In particular, he stated the following: "My father did not come with me and he stayed in Kosovo and was killed by unknown persons after which his remains were brought to Montenegro. This could have happened to me as well if I would not have left Kosovo."

[1] KTA had published an earlier "Final List" that was annulled by the Special Chamber on 22 January 2008, because that list had not been approved by the KTA Board of Directors.

The complainant did not indicate that he had filed a claim in the regular courts to be reinstated at work.

19. In its 10 June 2008 response, the KTA noted that many of the workers at IMN were of non-Albanian ethnicity, which included members of the Roma/Ashkali/Egyptian communities. It therefore argued that although the complainant may have fled to Montenegro for a time, there did not appear to be reasonable grounds to presume discrimination.

20. On 17 June 2008, the Special Chamber issued its judgment, rejecting as ungrounded the claim and declaring that the complainant did not qualify to be on the compensation list. The judgment states in relevant part:

> [The Special] Chamber complies with the legal standards provided in the Anti-Discrimination Law [Assembly of Kosovo Law No. 2004/3 promulgated by UNMIK Regulation No. 2004/32 of 20 August 2004]. 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 [UNMIK] Regulation 2003/13.
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> The complainants claiming discrimination are required to submit facts from which it may be presumed that there has been direct or indirect discrimination, pursuant to Section 8.1 of the Anti-Discrimination Law. In addition, once the complainant presents a *prima facie* case of direct or indirect discrimination, the respondent is obliged to disprove discrimination.
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> …
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> [The complainant] worked with the SOE [IMN] from 1979 until June 1999. He confirmed that after June 1999 he stayed in Montenegro for a long time due to security concerns and after his return to Kosovo he tried to get employed but he was rejected on discrimination grounds.
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> The respondent objects to the complaint of the complainant reasoning that the employment of the complainant was [terminated by] decision no 185/00 dated 24.08.2000. He initiated no legal action against this decision to be reinstated to work.
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> …
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> The Special Chamber has reviewed all the evidence and agrees with the analysis of the Respondent [the KTA]. Thus, the Special Chamber rejects the complainant's request to be included in the list of eligible employees.

21. On 3 July 2008, the complainant filed an appeal against this judgment, relying on UNMIK Regulation No. 2008/4 of 5 February 2008 amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, which included a possibility to appeal Special Chamber judgments to a different panel of the Special Chamber. In his appeal he argued that UNMIK Regulation No. 2008/4 came into force on 31 May 2008, while the Special Chamber issued its judgment in his case on 17 June 2008. He therefore claimed to be entitled to an appeal.

22. The Special Chamber issued its second decision on 10 September 2008, rejecting the complainant's appeal. It found that UNMIK Regulation No. 2008/4 was subsequently amended by regulations postponing its coming into force until 31 October 2008. Therefore no appeal was possible against the judgment of 17 June 2008.

III. THE COMPLAINT

23. The complainant complains that he was improperly excluded from the employees' list during the privatisation of IMN due to his Egyptian ethnicity. He specifically claims that his employer discriminated against him in not allowing him to return to work, that the Kosovo courts discriminated against him in their failure to uphold his claim to return to work, and that the KTA and the Special Chamber discriminated against him in the proceedings to claim a share of the privatisation of an enterprise he had previously worked for by treating him differently from ethnic Serbs who sought inclusion in similar factual circumstances. He also complains that the Special Chamber failed to apply the provisions of the Anti-Discrimination Law (Assembly of Kosovo Law No. 2004/3 promulgated by UNMIK Regulation No. 2004/32 of 20 August 2004).

24. The complainant argues that there has been a violation of Article 14 of the European Convention of Human Rights (ECHR), read in combination with Article 6 § 1 of the ECHR (right to a fair trial) and Article 1 of Protocol No. 1 to the ECHR (right to peaceful enjoyment of possessions). The Panel considers that the complaint may also raise issues under Article 1 of Protocol No. 12 to the ECHR.

25. He also complains that he was denied access to courts established by law because he was not able to file an appeal against the decision of the Special Chamber under UNMIK Regulation No. 2008/4 amending 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 amended, in violation of Article 6 § 1 of the ECHR.

IV. THE LAW

26. Before considering the case on its merits, the Panel must first decide whether to accept the case, considering the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.

A. Termination of the complainant's employment by KNI "Dukagjini" OTHPB-BP IMN Tjegulltorja ("IMN") and subsequent proceedings

27. The complainant argues that he was discriminated against by his former employer IMN in that he was not permitted to return to work after his return to Kosovo. He further argues that he was discriminated against in the subsequent proceedings seeking his reinstatement.

28. The Panel recalls that, according to Section 2 of UNMIK Regulation No. 2006/12, it has jurisdiction only over "complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights". The Panel notes that any alleged discriminatory acts that may have occurred on the part of IMN when the complainant attempted to be reinstated by visiting IMN in person in 2001 or through his written requests of 8 April 2002 and 12 March 2003 are instantaneous acts, which do not give rise to a continuing violation (see Human Rights Advisory Panel

(HRAP), *Lajović*, no. 09/08, decision of 16 July 2008, § 7). It follows that this part of the complaints lies outside the Panel's jurisdiction *ratione temporis*.

29. With respect to the subsequent proceedings before the Supreme Court, it is true that the final judgment of the Supreme Court was issued on 11 October 2007. Insofar as the Court proceedings are referred to from the point of view of the discrimination which the complainant was allegedly subjected to by IMN, these proceedings cannot be detached from the acts upon which the claim before the Supreme Court was based. The Panel refers in this respect to the case-law of the European Court of Human Rights with respect to its jurisdiction under the ECHR:

> "… the Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing this interference cannot bring it within the Court's temporal jurisdiction" (ECtHR (Grand Chamber), *Blečič v. Croatia*, no. 59532/00, judgment of 8 March 2006, § 77, ECHR, 2006-III).

30. It follows that this part of the complaint also lies outside the Panel's jurisdiction *ratione temporis* (see HRAP, *Gojković*, no. 63/08, decision of 4 June 2009, §§ 24-25 and *Petrović and Others*, HRAP nos. 59/08 and others, decision of 9 September 2010, §§21-23.)

B. Denial of entitlement to proceeds of the privatisation of IMN

1. Alleged discrimination

31. The complainant also argues that he was discriminated against during the proceedings before the KTA and the Special Chamber since ethnic Serb claimants in the same position as he were granted a share of the proceeds of privatisation. He states that if he had remained in Kosovo after 10 June 1999, he would have been killed, as his father was, and that he therefore fled. He contends that the KTA recognised the rights of ethnic Serbs to a share of the proceeds even though such persons did not contest the termination of their employment through court proceedings due to the general security situation. He provides the names of four persons he alleges were able to obtain a share of the proceeds without having to contest their status through an appeal to the Special Chamber.

32. The complainant further argues that the Special Chamber discriminated against him when it decided his case by its failure to adhere to the relevant provisions of the Anti-Discrimination Law in the proceedings. Specifically, the complainant cites Article 8, which states in relevant part:

> 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.
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> 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.

33. The complainant in essence argues that he made out a *prima facie* case of discrimination, which was not rebutted by the KTA or discussed in the Special Chamber's judgment of 17

June 2008, thereby resulting in discriminatory treatment in violation of Article 14 of the ECHR read together with his right to a fair trial contained in Article 6 § 1 of the ECHR.

34. UNMIK responds that the complainant at no stage substantiated by relevant evidence that he was discriminated against in comparison to other employees of IMN. UNMIK argues that the complainant failed to provide the Special Chamber with notice that he had appealed his termination in the regular courts and that the complainant indicated that he purposefully omitted such information as he did not find it relevant in the context of his claim before the Special Chamber. UNMIK therefore concludes that the Special Chamber rendered a judgment based on a proper examination of the evidence before it and that the complainant's failure to provide relevant evidence in his possession cannot result in a violation of Article 14 of the ECHR read in combination with Article 6 of the ECHR or Article 1 of Protocol No. 12 to the ECHR. Based on the above, UNMIK argues that the complaint is manifestly ill-founded.

35. The Panel for its part notes that the complainant set forth the grounds upon which his claim was based before the Special Chamber. He specifically alleged that persons in a similar situation as his were treated differently based on their ethnicity and that as a result his right to a fair trial as well as his right to the peaceful enjoyment of his possessions in the form of a share of the proceeds of the privatisation were violated. Furthermore, he alleges that while the judgment of the Special Chamber of 17 June 2008 repeats the complainant's argument that he was not allowed to return to work based on discrimination, the subsequent reasoning of the Special Chamber on its face does not appear to apply the shift in the burden of proof as required by the Anti-Discrimination Law. Although the SRSG raises his objections during the admissibility stage of the proceedings, the Panel considers that the complaints 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.

36. The Panel does not see any other ground for declaring this part of the complaint inadmissible.

2. Inadmissibility of the complainant's appeal

37. The complainant states that the Special Chamber on 10 September 2008 declared his appeal against the judgment of 17 June 2008 inadmissible, although UNMIK Regulation No. 2008/4 of 5 February 2008 amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters had created a right of appeal against a judgment of a panel of the Special Chamber. The reason for not allowing the appeal was that UNMIK Regulation No. 2008/4 had not yet entered into force, taking into account the postponement of the date of entry into force by UNMIK Regulation No. 2008/19 of 31 March 2008, UNMIK Regulation No. 2008/29 of 31 May 2008, and UNMIK Regulation No. 2008/35 of 30 June 2008. The complainant considers that by postponing the entry into force of the Regulation that created the possibility of an appeal, UNMIK denied him his right of access to a court in violation of Article 6 § 1 of the ECHR.

38. It is true that UNMIK Regulation No. 2002/13 had been replaced, namely by UNMIK Regulation No. 2008/4 of 5 February 2008. According to the latter Regulation, the Special Chamber is composed of five panels of three judges, which can hear claims in the first instance (Section 3.2). There is also an appellate panel, presided over by the President of the Special Chamber and composed of five judges, competent to hear appeals (Section 3.3). Section 9.5 provides as follows:

> 9.5 A Judgement or Decision of a trial panel shall be served on the parties within thirty (30) days of adoption. Within thirty days from the receipt thereof, a party may appeal to the appellate panel for a review of such Judgement or Decision. Where a Decision, including a Judgement issued pursuant to section 4.3, is appealed the appellate panel shall first determine whether the Decision or Judgement so appealed merits a review. If the appellate panel decides not to review the Decision or Judgement issued pursuant to section 4.3 of the trial panel such Judgement or Decision becomes final. Where the appellate panel reviews a Judgement or Decision it may decide to confirm, revoke or alter the Judgement or Decision made by a trial panel.

39. Section 14 of UNMIK Regulation No. 2008/4 initially provided that the regulation would enter into force on 31 March 2008, "by which time the procedural rules promulgated under section 7 shall have been duly adjusted". However, this date was modified by UNMIK Regulation No. 2008/19 of 31 March 2008, "for the purpose of providing for additional time that is required for duly adjusting the procedural rules of the Special Chamber promulgated under section 7 of UNMIK Regulation No. 2002/13". The entry into force of UNMIK Regulation No. 2008/4 was thus postponed until 31 May 2008. The Panel notes that Section 14 was later modified by UNMIK Regulation No. 2008/29 of 31 May 2008, UNMIK Regulation No. 2008/35 of 30 June 2005 and UNMIK Regulation No. 2008/36 of 1 November 2008, each time "for the purpose of providing for additional time that is required to establish specialized first instance panels and an appeals panel at the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters". As a result, the entry into force of UNMIK Regulation No. 2008/4 was postponed successively until 30 June 2008, 31 October 2008 and finally 31 December 2008.

40. It is clear from the foregoing that the complainant could not rely on UNMIK Regulation No. 2008/4 when he appealed against the judgment of the Special Chamber of 17 June 2008. While the complainant filed his appeal on 3 July 2008, the Panel observes that, at the moment when that judgment was handed down (17 June 2008), UNMIK Regulation No. 2008/4 had not yet entered into force, its entry into force being envisaged for 30 June 2008 (see UNMIK Regulation No. 2008/29 of 31 May 2008). Therefore, by postponing the entry into force of UNMIK Regulation No. 2008/4, UNMIK has not deprived the complainant of any right of appeal, as such right had not yet been actually granted.

41. Moreover, as the European Court of Human Rights has held, Article 6 of the ECHR does not guarantee, as such, a right of appeal or a right to a second level of jurisdiction in civil matters (see, e.g., ECtHR, *Guérin v. France*, judgment of 29 July 1998, Reports of Judgments and Decisions 1998-V, § 44; ECtHR, *Marpa Zeeland b.v. and Metal Welding b.v. v. Netherlands*, no. 46300/99, judgment of 9 November 2004, § 48). The Panel does not see a provision in any of the other international human rights instruments mentioned in Section 1.2 of UNMIK Regulation No. 2006/12 which could be understood as guaranteeing such a right in cases other than criminal ones. By deferring the entry into force of UNMIK Regulation No. 2008/4, the SRSG cannot be said to have violated any fundamental right of the complainant.

42. The Panel concludes that this part of the complaint is incompatible with the human rights set forth in the international human rights instruments referred to in Section 1.2 of UNMIK Regulation No. 2006/12, or at least does not disclose any appearance of a violation of the rights and freedoms guaranteed by these instruments. It follows that this complaint must be rejected as being manifestly ill-founded within the meaning of Section

3.3 of the said Regulation (see HRAP, *Krasnići*, no. 20/08, decision of 12 September 2009, §§ 37-44).

FOR THESE REASONS,

The Panel, unanimously,

- **DECLARES ADMISSIBLE THE COMPLAINT RELATING TO THE ALLEGED DISCRIMINATION WITH RESPECT TO THE DISTRIBUTION OF THE PROCEEDS OF THE PRIVATISATION OF IMN;**

- **DECLARES INADMISSIBLE THE REMAINDER OF THE COMPLAINT.**

Anila PREMTI
Acting Executive Officer

Marek NOWICKI
Presiding Member