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DECISION

Date of adoption: 10 June 2012

Case No. 26/08

N.M and Others

against

UNMIK

The Human Rights Advisory Panel, sitting on 10 June 2012,
with the following members present:

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

Assisted by
Mr Andrey ANTONOV, 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 4 July 2008 and registered on the same date. During the proceedings before the Panel, the complainants have been represented by Ms Dianne Post, a lawyer from the United States.

2. With respect to the proceedings up to the Panel's decision of 31 March 2010, the Panel refers to the procedural steps listed in that decision (§§ 10-19). In what follows only the most relevant steps are reiterated, as well as an account given of the procedural steps taken since the above mentioned decision.

3. By a decision of 5 June 2009, the Panel declared the complaint admissible in part and inadmissible in part.

4. On 23 October 2009, the Panel, having noted that Administrative Direction No. 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel had been issued by the SRSG on 17 October 2009, invited UNMIK to submit comments in relation to the effect of that Administrative Direction on the present case. On 30 October 2009, the Panel invited the complainants to submit comments on the same Administrative Direction.

5. On 18 January 2010, the Panel received the SRSG's reply to its letter of 30 October and on 16 March 2010, the Panel received further information from the complainants.

6. On 31 March 2010, the Panel declared the complaint inadmissible, having regard to Administrative Direction No. 2009/1 (see §§ 20-22 below). The Panel found, in particular, that the substantive parts of the complaint fell *prima facie* within the ambit of the United Nations Third Party Claims Process (see § 23 below) and were therefore deemed inadmissible. It further noted that the substantive and procedural parts of the complaint were so interlinked that it would be artificial to separate them. For that reason, it deemed the entire complaint inadmissible.

7. In its decision, the Panel applied Rule 49 of its Rules of Procedure, which provides that questions not governed by these Rules shall be settled by the Panel. It decided that once the UN Third Party Claims Process had been concluded, the complainants could request the Panel to reopen the proceedings. The Panel indicated that it would then decide, on the basis of the information available to it, whether or not to accept such a request.

8. On 7 October 2011, the complainants informed the Panel of the completion of the UN Third Party Claims Process by a decision that declared their claims non-receivable. In the same communication, the complainants requested the Panel to re-open its proceedings.

9. On 10 November 2011, the Panel communicated the complainants' request to re-open the proceedings to the SRSG.

10. On 31 January 2012, the SRSG provided UNMIK's comments on the complainants' request to re-open the proceedings.

11. On 9 February 2012, the Panel requested the complainants to comment on UNMIK's response of 31 January 2012. On 13 February 2012, the complainants sent their response.

12. On 15 February 2012, the Panel communicated the complainants' response to UNMIK for the SRSG to provide further comments on the matter.

13. On 30 March 2012, UNMIK provided its further comments.

14. On 8 May 2012, the Panel requested further information from UNMIK. On 4 June 2012, UNMIK sent its response.

15. On 9 May 2012, the Panel communicated UNMIK's comments of 30 March 2012 to the complainants. On 14 May 2012, the complainants submitted their response.

II. THE FACTS

16. The complainants are 143 members of the Roma, Ashkali and Egyptian communities in Kosovo who are, or have been, resident in five UNMIK administered camps for internally displaced persons (IDPs) throughout northern Mitrovica/Mitrovicë. All complainants claim to have suffered lead poisoning and other health problems on account of the soil contamination in the camp sites due to the proximity of the camps to the Trepça/Trepča smelter and mining complex and/or on account of the generally poor hygiene and living conditions in the camps.

17. For a brief overview of the facts relating to these events and the subsequent investigation, the Panel refers to its decisions of 5 June 2009 (§§ 1-13) and 31 March 2010 (§§ 1-7).

18. On 10 February 2006, the complainants filed claims for compensation in the framework of the UN Third Party Claims Process (see § 27 below).

19. On 25 July 2011, the UN Under-Secretary-General for Legal Affairs informed the complainants of her decision to declare the claims non-receivable. She stated that under Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations (see § 27 below) the UN Third Party Claims Process provided for compensation only with respect to "claims of a private law character", whereas the complainants' claims concerned "alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo".

20. It should be noted that similar claims were lodged on 9 October 2009 by some 864 members of the Roma, Ashkali and Egyptian community, all represented by Leigh Day & Co, a law firm in the United Kingdom.

21. On 25 July 2011, the UN Under-Secretary-General for Legal Affairs sent a letter to Leigh Day with the same content as her letter of the same day to the complainants (see § 19 above).

22. On 16 November 2011, Leigh Day sent a "legal opinion" to the UN Under-Secretary-General, criticising the grounds of her decision and requesting an examination of their clients' claims on the merits. The Panel is not aware of the UN's reaction to this legal opinion (see also § 31 below).

III. THE REQUEST FOR REOPENING OF THE PANEL PROCEEDINGS

23. The complainants request the reopening of the Panel proceedings, so that the Panel can resume its examination of the merits of their complaint.

IV. RELEVANT NORMATIVE FRAMEWORK

24. Sections 2.1, 2.2 and 2.3 of Administrative Direction No. 2009/1 of 17 October 2009 Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel read as follows:

> "2.1. At any stage of the proceedings of a human rights complaint before it, the Advisory Panel shall examine all issues of admissibility of the complaint before examining the merits.
>
> 2.2. Any complaint that is or may become in the future the subject of the UN Third Party Claims process or proceedings under section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their personnel in Kosovo of 18 August 2000, as amended, shall be deemed inadmissible for reasons that the UN Third Party Claims Process and the procedure under section 7 of Regulation No. 2000/47 are available avenues pursuant to Section 3.1 of (Regulation No. 2006/12).
>
> 2.3 Comments on the merits of an alleged human rights violation shall only be submitted after the Advisory Panel has completed its deliberation on and determined the admissibility of such complaint. If issues of admissibility of a complaint are addressed at any time after the Advisory Panel has made a determination on admissibility of a complaint and commenced its considerations of the merits, the Advisory Panel shall suspend its deliberations on the merits until such time as the admissibility of the complaint is fully re-assessed and determined anew."

25. Section 5 of Administrative Direction No. 2009/1 provides that no complaint to the Panel shall be admissible "if received by the Secretariat of the Advisory Panel later than 31 March 2010".

26. Section 6 provides that Administrative Direction No. 2009/1 shall enter into force on 17 October 2009, that is the date of its issuance, and that it "shall be applicable (to) all complaints submitted to the Advisory Panel including such that are currently pending before the Advisory Panel".

27. The UN Third Party Claims Process referred to in Section 2.2 forms the object of United Nations General Assembly resolution 52/247 of 17 July 1998 on "Third-party liability: temporal and financial limitations" (A/RES/52/247). This resolution gives effect to Section 29 of the Convention on the Privileges and Immunities of the United Nations, adopted by the UN General Assembly on 13 February 1946, which reads as follows:

> "Section 29. The United Nations shall make provisions for appropriate modes of settlement of:
> *(a)* Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
> (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General."

28. Section 7 of UNMIK Regulation No. 2000/47 of 18 August 2000 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, referred to in Section 2.2 of Administrative Direction No. 2009/1, states:

> "Third Party claims for property loss or damage and for personal injury, illness, or death arising from or directly attributed to KFOR, UNMIK, or their respective personnel and which do not arise from "operational necessity" of either presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for."

V. THE LAW

A. Whether the UN Third Party Claims Process has been completed

a) Submissions of the parties

29. In his comments of 31 January 2012, the SRSG notes that the complainants contest the decision of the Under-Secretary-General of 25 July 2011, and that some of them, who are also represented by Leigh Day & Co, have even filed a submission to that effect. The SRSG argues that the complainants thus do not appear to have exhausted all available avenues to contest the decision declaring their claims non-receivable.

30. In his comments of 30 March 2012, the SRSG indicates that there may be at least 24 complainants in the present case who are at the same time represented in separate UN Third Party Claims Process proceedings by Leigh Day & Co. The SRSG argues that because Leigh Day was still, as of 16 November 2011, negotiating with the UN Under-Secretary-General concerning this matter, the complainants' request for re-opening of the proceedings cannot proceed, for reasons of non-exhaustion, at least as it relates to these 24 individuals who appear to be represented in both cases.

31. In his comments of 4 June 2012, the SRSG states that he is not aware of any response by the United Nations to Leigh Day's legal opinion of 16 November 2011.

32. The complainants argue that the Third Party Claims Process has come to an end with the decision of the Under-Secretary-General of 25 July 2011, declaring their claims non-receivable.

b) The Panel's assessment

33. According to Section 2.2 of Administrative Direction No. 2009/1, any complaint "that is or may become in the future" the subject of the UN Third Party Claims process or proceedings under section 7 of UNMIK Regulation No. 2000/47 shall be deemed inadmissible.

34. This provision does not preclude the examination of a complaint that has been the subject of the UN Third Party Claims Process, once that process has come to an end.

35. It is not disputed that the UN Under-Secretary-General, in her decision of 25 July 2011, has declared the claims of the complainants non-receivable. The Panel considers that such a decision puts an end to the UN Third Party Claims Process, which therefore must be considered completed.

36. It is true that some of the complainants, who are also represented by Leigh Day & Co in the Third Party Claims Process, have contested the decision of the UN Under-Secretary-General. However, the SRSG has not indicated that any action has been taken on that submission. For UNMIK to be able to argue successfully that the Third Party Claims Process has not yet come to an end, it should show that there is at least a chance that the written submissions of the 24 complainants (and other claimants) could lead to a reversal of the decision of 25 July 2011. The Panel is of the opinion that UNMIK has not shown that the Third Party Claims Process could be reopened, let alone that the decision of 25 July 2011 could be reversed. The submissions by the clients of Leigh Day & Co therefore do not affect the conclusion that the Third Party Claims Process has come to an end.

B. Whether there is a legal obstacle to the reopening of the Panel proceedings

a) Submissions of the parties

37. In his submissions of 31 January 2012, the SRSG criticised the Panel's application of Rule 49 of its Rules of Procedure in the decision of 31 March 2010 in the present case (see § 6 above). The Panel considers that the SRSG may be deemed to argue that no new complaint can be filed with the Panel after 31 March 2010, the cut-off date for submission of complaints established by Section 5 of Administrative Direction No. 2009/1, and that it was not for the Panel to make it possible to request the reopening of the proceedings after that cut-off date. Rule 49 provides that questions not governed by the Rules of Procedure shall be settled by the Panel. The SRSG argues that mere rules of procedure cannot create a new procedure that is not foreseen by UNMIK Regulation No. 2006/12, which establishes the Panel. Section 18 of that Regulation provides that the Panel shall adopt rules of procedure. However, the SRSG argues that this provision can only be understood as empowering the Panel to adopt rules governing the procedure as established in the Regulation and subsidiary Administrative Directions. It does not allow for the creation of a new procedure that is inconsistent with the spirit and the intent of the Regulation or Administrative Directions issued thereunder. By allowing a request for reconsideration to be submitted after the cut-off date set by Administrative Direction No. 2009/1, the Panel took a position that is inconsistent with the Administrative Direction.

38. The complainants invite the Panel to follow its decision of 31 March 2010. They argue that there is no obstacle of inadmissibility or ineligibility preventing full examination of a case following the completion of the UN Third Party Claims Process.

b) The Panel's assessment

39. Section 5 of Administrative Direction No. 2009/1 provides that no complaint to the Panel shall be admissible "if received by the Secretariat of the Advisory Panel later than 31 March 2010".

40. This provision applies to new complaints. In the present case, the complainants are requesting the reopening of proceedings instituted in 2008.

41. As the Panel held in its decision of 31 March 2010, declaring the complaint inadmissible on the basis of Section 2.2 of Administrative Direction No. 2009/1, "the effect of a declaration of inadmissibility on account of non-exhaustion of an available remedy is in principle of a dilatory nature only, not of a peremptory nature. This means that a complainant may resubmit his or her complaint once all required processes have been concluded" (§ 51). The Panel further took into account the existence of the cut-off date for new complaints, and considered that a strict application of Section 5 of Administrative Direction No. 2009/1 in the case of the complainants would have unacceptable effects:

> "... if the complainants are required to re-file a complaint after the conclusion of the UN Third Party Claims Process, they would invariably run afoul of the 31 March 2010 deadline for the submission of new complaints. The requirement of going through the UN Third Party Claims Process would in that case in effect extinguish the complaint without the possibility of the complainants resubmitting it to the Panel, despite the fact that, as the Panel found on 4 June 2008, the complaint was admissible under the regulatory framework applicable when it was filed. Such a result would offend basic notions of justice" (§ 47).

42. The Panel confirms that point of view. It concludes that, since the UN Third Party Claims Process has come to an end, the complainants can request the Panel to reopen the proceedings instituted in 2008, without the cut-off deadline of 31 March 2010 being an obstacle to a continued examination of their complaint.

43. The objection of the SRSG is therefore rejected.

44. No other obstacle to the reopening of the proceedings has been established.

45. The Panel therefore grants the complainants' request.

C. Scope of the reopened proceedings

a) Submissions of the parties

46. The SRSG argues that, should the Panel be determined to reopen the proceedings, it should take into account the scope of its mandate. According to Section 1.2 of UNMIK Regulation No. 2006/12, it can only examine complaints relating to alleged human rights violations by UNMIK. Its mandate does not extend to the examination of acts, omissions or decisions by any other organ of the United Nations, including the General Assembly.

b) The Panel's assessment

47. The Panel acknowledges that its mandate is limited to the examination of complaints directed against UNMIK, about acts and omissions that are attributable to UNMIK. It finds that the complaint resides squarely within its mandate, as a complaint relating to alleged human rights violations by UNMIK.

48. The complainants have requested the Panel to re-open the complaint in its entirety; the Panel will therefore proceed with the examination of the merits of the whole complaint as initially presented to it.

FOR THESE REASONS,

The Panel, unanimously,

DECIDES TO REOPEN THE PROCEEDINGS AND TO PROCEED WITH THE EXAMINATION OF THE MERITS OF THE COMPLAINT.

Andrey ANTONOV
Executive Officer

Marek NOWICKI
Presiding Member