



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: 12 September 2012

Case No. 306/09

Bahri HOXHA and Ismet HOXHA

against

UNMIK

The Human Rights Advisory Panel, on 12 September 2012,
with the following members taking part:

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, including through electronic means, in accordance with Rule 13 § 2 of its Rules of Procedure, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 30 July 2009 and registered on 4 August 2009.
2. On 19 November 2009, the Panel communicated the complaint to the Special Representative of the Secretary General (SRSG) for UNMIK's comments on the admissibility and the merits of the case. On 21 December 2009, the SRSG provided UNMIK's response.
3. On 25 January 2010, the Panel communicated UNMIK's comments to the complainants, and invited them to comment on them. The complainants responded by a letter dated 10

June 2010, which the Panel did not receive at that time. They responded again on 9 December 2010.

4. On 6 June 2011, the Panel communicated the comments of the complainants to the SRSG for UNMIK's additional comments. On 28 June 2011, the SRSG provided UNMIK's response.

II. THE FACTS

5. On 19 September 2005 the first complainant, Mr Bahri Hoxha, purchased premises located in Prishtinë/Priština from Beogradska banka, Kosovsko Metohijska banka AD. The sales contract was registered at the Municipal Court in Zubin Potok.
6. On 31 March 2006, the second complainant, Mr Ismet Hoxha, purchased these premises from the first complainant.
7. The complainants allege that these premises were leased to UNMIK, as part of its former headquarters. According to the complainants, UNMIK failed to pay any rent.
8. On 22 May 2009, the complainants wrote to UNMIK to request backdated rent payments covering the period from 1 April 2006 until a date to be agreed by way of negotiation.
9. On 13 August 2009, UNMIK replied. It disputed the claim and requested the complainants to provide documentary evidence relating to their alleged ownership of the premises so that this claim could be further reviewed.
10. To date no further documentary evidence has been forthcoming. The Panel is unaware of any final determination that may have been made by UNMIK regarding the request of the complainants for payment of outstanding rent.

III. THE COMPLAINT

11. The complainants complain about a violation of their human and property rights. The Panel considers that they may be deemed to invoke a violation of their right to the peaceful enjoyment of their possessions, guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR).

IV. THE LAW

12. 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. Objection based on the lack of proof of ownership rights

13. In his first and second comments, the SRSG raises an objection to the admissibility of the complaint, based on the fact that the alleged violations cannot be established because the complainants have not provided any credible documentary evidence showing that they have ownership rights over the premises in question. The SRSG refers to a letter sent by the UNMIK Chief of Mission Support to the representative of the complainants, dated 13 August 2009, in which UNMIK explained that it considers that the property is registered

in the name of a Socially Owned Enterprise and that UNMIK is unaware of any sale or exchange of that property to a private owner.

14. The complainants reply that the acquisition of the property has been the object of legally concluded purchase contracts, certified by the competent courts. They specifically submit a copy of a purchase contract concluded on 19 September 2005 between the Beogradska banka, Kosovsko Metohijska banka AD as seller and the first complainant as buyer. This contract has been certified by the Municipal Court of Zubin Potok on the same day.
15. The Panel considers that this purchase contract is *prima facie* evidence of the transfer of the property to the first complainant.
16. The complainants further state that the first complainant subsequently sold the property to the second complainant. They refer to a sale contract dated 31 March 2006. While the complainants do not produce a copy of that contract, the Panel has no reason to doubt the complainants' claim.
17. The Panel therefore concludes that the complainants can *prima facie* invoke property rights with respect to the property that is the object of the complaint. The objection is therefore dismissed.

B. Objection based on the non-exhaustion of available remedies and the availability of the UN Third Party Claims Process

18. In his second comments, the SRSG raises another objection to the admissibility of the complaint, based on the failure to exhaust all available avenues for review. The SRSG argues that the case is still under review by UNMIK, pending submission of the clarification of the ownership situation by the complainants.
19. The SRSG specifically argues that the complainants' claim falls under the UN Third Party Claims Process.
20. 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".
21. Section 2.2 of UNMIK Administrative Direction No. 2009/1 provides that any complaint "that is or may become in the future" the subject of the UN Third Party Claims Process, made applicable to UNMIK by Section 7 of Regulation No. 2000/47, "shall be deemed inadmissible", for reasons that this process is considered an available avenue in the sense of Section 3.1 of Regulation No. 2006/12.
22. 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 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; HRAP, *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, European Court of Human Rights (ECtHR) (Grand Chamber), *Paksas v. Lithuania*, no. 34932/04, judgment of 6 January 2011, § 75). It would normally be for the Panel to satisfy itself that the UN Third Party Claims Process, like any other avenue that may be advanced by UNMIK, "was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of

providing redress in respect of the (complainant's complaint) and offered reasonable prospects of success" (HRAP, *Balaj and Others*, § 45, and *N.M. and Others*, § 35, referring to ECtHR, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions*, 1996-IV, p. 1211, § 68).

23. Section 2.2 of Administrative Direction No. 2009/1 removes this jurisdiction from the Panel. That provision has the effect of obliging the Panel to consider the UN Third Party Claims Process as an accessible and sufficient avenue.
24. This does not imply, however, that the mere fact of UNMIK raising an objection based on Section 2.2 of Administrative Direction No. 2009/1 inevitably and without more leads to the conclusion that the complaint is deemed inadmissible. The Panel considers that, when such an objection is raised, it must ascertain whether the object of the complaint before the Panel is of such a nature that it can reasonably give rise to a claim that can be dealt with in the UN Third Party Claims Process. It will declare a complaint inadmissible only when it is satisfied that the claim is one that falls *prima facie* within the ambit of the UN Third Party Claims Process. By contrast, it is precluded from examining whether the outcome of the process is capable of providing sufficient redress in respect of the complaint before the Panel, or whether the process offers reasonable prospects of success to the complainants.
25. The procedure set forth in the United Nations General Assembly resolution 52/247 of 17 July 1998 on "Third-party liability: temporal and financial limitations" (A/RES/52/247) and in Section 7 of UNMIK Regulation No. 2000/47 of 18 August 2000 on the Status, Privileges and Immunities of UNMIK and KFOR and their Personnel in Kosovo, referred to in Section 2.2. of UNMIK Administrative Direction No. 2009/1, allows the United Nations, at its discretion, to provide compensation for claims for personal injury, illness or death as well as for property loss or damage arising from acts of UNMIK which were not taken out of operational necessity. Therefore, complaints about violations of human rights attributable to UNMIK will be deemed inadmissible under Section 2.2 of UNMIK Administrative Direction No. 2009/1 to the extent that they have resulted either in personal injury, illness or death or in property loss or damage. Complaints about violations of human rights that have not resulted in damage of such nature will normally not run counter to the requirement of exhaustion of the UN Third Party Claims Process.
26. Turning to the objection raised by UNMIK in the present case, the Panel recalls that the complaint concerns the non-fulfillment by UNMIK of its contractual obligations.
27. The alleged non-fulfillment by UNMIK of its contractual obligations resulted in property loss or damage. The Panel considers that the complaint falls *prima facie* within the ambit of the UN Third Party Claims Process (see HRAP, *Linda, limited liability company*, no. 45/08, decision of 22 August 2012, § 42).
28. Without having to express an opinion on whether review of the complainants' claim by UNMIK generally constitutes an avenue to be pursued, as suggested by the SRSG, the Panel concludes that because of the availability of the UN Third Party Claims Process the complaint is deemed inadmissible.

C. Effects of the determination that the complaint is deemed inadmissible

29. The Panel considers it useful to explain the effects of its decision holding that the complaint is deemed inadmissible.

30. Requirements of exhaustion of available avenues are by their very nature only temporary restrictions on admissibility. 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.
31. However, if the complainants are required to re-file a complaint after the conclusion of the UN Third Party Claims Process, they would be estopped from filing this complaint beyond the Panel's deadline for the submission of new complaints, which was 31 March 2010 (see Section 5 of UNMIK Administrative Direction No. 2009/1). 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 their complaint has not been found inadmissible under the regulatory framework applicable when it was filed. Such a result would offend basic notions of justice.
32. In similar cases the Panel has decided that a "special procedure" must be available, in order to allow for the timely resubmission by the complainant to the Panel after completion of the processing of his or her related claim under the UN Third Party Claims process (see HRAP, *Balaj and Others*, no. 04/07, mentioned in § 22 above, at §§ 55-61; HRAP, *N.M. and Others*, no. 26/08, mentioned in § 22 above, at §§ 45-51; HRAP, *Linda limited liability company*, no. 45/08, mentioned in § 27 above, at §§ 47-50). The Panel adopts the same approach in the present case.
33. The Panel accordingly decides, in accordance with Rule 49 of the Panel's Rules of Procedure, which provides that questions not governed by these Rules shall be settled by the Panel, that once the UN Third Party Claims Process has been concluded, the complainant can request the Panel to reopen the present proceedings. The Panel will decide, on the basis of the information then available to it, whether or not to accept such a request.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT INADMISSIBLE.

Andrey ANTONOV
Executive Officer

Marek NOWICKI
Presiding Member