



## OPINION

**Date of adoption: 12 September 2012**

**Case no. 13/08**

**Gani THAÇI**

**against**

**UNMIK**

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

Mr Paul LEMMENS, Presiding Member  
Ms Christine CHINKIN

Assisted by  
Mr Andrey ANTONOV, Executive Officer

Having noted Mr Marek Nowicki's withdrawal from sitting in the case, pursuant to Rule 12 of the Rules of Procedure,

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, makes the following findings and recommendations:

### **I. PROCEEDINGS BEFORE THE PANEL**

1. The complaint was introduced on 2 June 2008 and registered on the same date. On 17 June 2008, the complainant further developed his complaint.

2. On 9 September 2010, the Panel declared inadmissible part of the complaint. It also decided to adjourn the examination of the rest of the complaint.
3. On 10 June 2011, the Panel declared admissible the remaining part of the complaint.
4. On 19 August 2011, the Special Representative of the Secretary-General (SRSG) SRSG submitted UNMIK's comments on the merits of the complaint.

## **II. THE FACTS**

5. The facts, insofar as relevant at this stage of the proceedings, may be summarised as follows. For a more detailed description of the facts, the Panel refers to its decision of 10 June 2011 on the admissibility of the complaint, §§ 10-25.
6. The complainant was formerly commander of a sheltering command in the Kosovo Protection Corps (KPC). He was demoted in 2000 and subsequently suspended in 2001 for major acts of non-compliance with the KPC Disciplinary Code of 2001, specifically for making unauthorised statements to the media about the KPC and for an unauthorised absence from work. On an unspecified date in 2001, he was dismissed by the Joint Security Executive Committee (JSEC), at that time the highest body for security coordination between UNMIK and KFOR.
7. However, on 28 January 2005, the UNMIK Coordinator for the KPC informed the complainant that, because of certain procedural irregularities, the decision to dismiss him had never been approved by the SRSG, and that therefore his case would have to be reconsidered by the JSEC. On 8 February 2005, referring to this letter of the UNMIK Coordinator for the KPC, the KFOR Inspectorate for KPC Issues invited the KPC Commander to reconsider the disciplinary case.
8. On 10 February 2005, the KPC Legal Office sent a memo containing the charges against the complainant to the Deputy Commander of the KPC Protection Zone 2. The complainant received this information on 16 February 2005. On 17 February 2005 he submitted a statement to the KPC Protection Zone 2, containing his comments on the charges made against him. This statement was to be sent to the JSEC. It is unclear whether this statement actually reached its destination. According to the complainant, it did not.
9. In April 2005, the JSEC recommended to the SRSG to dismiss the complainant, because of the above-mentioned unauthorised statements (report 685/05). The SRSG agreed on an unspecified date. The Panel has not been furnished with a copy of the decision, but the SRSG does not contest the fact that such a decision has been taken. The decision allegedly indicated that, in accordance with the Disciplinary Code, the complainant could submit an appeal to the JSEC, through the KPC Commander, within 21 days from the time he received written notice of the decision.
10. A notification form was signed by the Chief of the KPC Legal Office on 24 June 2005. The complainant signed this form on 5 July 2005.

11. According to the complainant, he filed an appeal against his dismissal on 15 July 2005. He states that he sent his appeal, consisting of a memo (of which the complainant has submitted a copy to the Panel) and eleven pages of documents, to the Deputy Commander of the KPC Protection Zone 2, in Prizren, with a request to forward it, through the KPC General Headquarters, to the JSEC, being the competent authority. According to a statement by the Post Office in Prizren dated 25 January 2006, a letter from the complainant was delivered to the Deputy Commander of the KPC Protection Zone 2 on 16 July 2005.
12. There appears to be also a document which the complainant on 18 July 2005 sent to the “Joint Implementation Committee – JSEC” at the KFOR headquarters. According to a statement by the Post Office in Prizren dated 13 April 2006, a letter from the complainant was delivered in Prishtinë/Priština on 22 July 2005. This could be a complaint dated 18 July 2005 (of which the complainant has submitted a copy to the Panel), accompanied by the above mentioned 11 pages of documents.
13. There was no reaction to the complainant’s appeal. After the complainant had enquired about the state of the proceedings and checked with the Post Office in Prizren whether his appeal had been dispatched (see § 11 above), the then UNMIK Coordinator for the KPC sent him a letter on 14 March 2006, which reads as follows:

“I refer to my predecessor’s memo dated 1 November 2005 and my Legal Officer’s memo dated 19 January 2006.

As previously indicated, your appeal of JSEC Report 685/05 was not received by my office, the KPC or [the KFOR Inspectorate for KPC Issues]. Under the Disciplinary Code, appeals have to be made through [the KPC Commander] within 21 days. You were asked to re-send your appeal via the proper channels and provide proof of postage of the appeal previously sent, which has not been done. Although you have sent proof of postage of a number of letters, you have failed to provide proof of postage of the letter dated 18 July 2005 which contains your actual appeal.

Since your appeal was not received by [the KPC Commander] or any of the other concerned offices, and you cannot show that you did send it within the 21-day limit for appeals, I regret to inform you that this case is now closed.”
14. On 10 April 2006, the complainant sent a memo to the Deputy Commander of the KPC Protection Zone 2, asking him for an explanation about what he had done with his appeal, sent to him on 15 July 2005 (see § 11 above). The Panel is not aware of any reaction to that memo.
15. On 13 July 2006 the complainant was received by the KPC Commander. He handed over a memo in which he complained about the fact that his statement of 17 February 2005 and his appeal of 15 July 2005 had not been forwarded by the Deputy

Commander of the KPC Protection Zone 2 to the required destination. He requested an examination of his appeal. It seems that no further action was taken on this memo.

16. In the meantime, on 29 June 2006, the complainant had initiated an administrative dispute with the Supreme Court against the inaction of the JSEC and the KPC Protection Zone 2.
17. On 14 May 2008, the Supreme Court declared the petition inadmissible, having regard to the immunity afforded to UNMIK and KFOR. The reasons for the decision are as follows:

“UNMIK Regulation No. 2001/9 of 15 May 2001 On a Constitutional Framework for Provisional Self-Government in Kosovo provides in Section 7 that the Kosovo Protection Corps (KPC) is a civilian emergency organisation, established under the law, which carries out in Kosovo rapid disaster response tasks for public safety in times of emergency and humanitarian assistance. By the provisions of Section 8.1, item k, of the mentioned Regulation, it is provided that the KPC shall act under the control and authority of the Special Representative of the Secretary-General of the United Nations (SRSG).

Section 3 of UNMIK Regulation No. 1999/8 On the Establishment of the Kosovo Protection Corps provides that the Kosovo Protection Corps shall operate under the authority of the SRSG.

Article 30, paragraph 1, point 5, of the Law on Administrative Disputes provides that no administrative dispute can be initiated in matters for which the possibility of initiating an administrative dispute is excluded by an explicit legal provision.

Due to the fact that Section 3.2 (*sic*) of UNMIK Regulation No. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo provides that KFOR personnel shall be immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo, no administrative dispute can be initiated against the Joint Security Executive Committee within the KFOR General Headquarters seated in Prishtinë/Priština and against the KPC Second Protection Zone seated in Prishtinë/Priština (*sic*).

For the reasons mentioned above and pursuant to Article 30, paragraph 2, of the [Law on Contested Procedure], the Court decided as in the enacting clause of the present judgment.”

18. On 24 June 2008, the complainant filed a criminal complaint against the judge of the Supreme Court who presided over the chamber that handed down the judgment of 14 May 2008. The Panel has not been informed of any further developments with respect to that complaint.

### **III. THE COMPLAINT**

19. Insofar as the complaint has been declared admissible, the complainant complains in the first place about the fact that his comments, dated 17 February 2005, on the disciplinary charges brought against him in 2005 were not effectively examined by the JSEC before it took the decision to recommend his dismissal.
20. He further complains about the fact that his appeal against the decision to dismiss him (decision notified to the complainant on 5 July 2005), was in fact never examined by the body with which he filed the appeal, *i.e.* the JSEC. He argues that this is due to the fact that the Deputy Commander of the KPC Protection Zone 2 in Prizren, to whom the complainant had sent his appeal on 15 July 2005, did not forward the appeal to the competent body.
21. He finally complains about the judgment of the Supreme Court of 14 May 2008 declaring inadmissible the administrative dispute filed by him, relating to the failure by the JSEC and the KPC to act on his appeal against the decision to dismiss him.
22. As indicated in the Panel's decision of 10 June 2011, the first complaint can be considered from the point of view of the right of access to public service, guaranteed by Article 25 c) of the International Covenant on Civil and Political Rights (ICCPR), while the second and the third complaints can be considered from the point of view of the right to an effective remedy against alleged violations of a person's human rights (Article 2 § 3 of the ICCPR, read in combination with Article 25 c) of the ICCPR).

### **IV. THE LAW**

#### **A. Admissibility of the complaint**

23. In his comments on the admissibility of the complaint, the SRSG argued that the complaint was inadmissible because it was filed outside the six-month time-limit provided by Section 3.1 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel. Insofar as relevant at that stage of the proceedings, the SRSG assumed that the then SRSG approved the recommendation to dismiss the complainant on 5 July 2005. The complainant was informed by the UNMIK Coordinator for the KPC on 14 March 2006 that his appeal against the decision of the SRSG was never received by the JSEC and could not be located in any of the files. That notification by the UNMIK Coordinator for the KPC could be considered as the day of final notification of the complainant's dismissal from the KPC. The complaint was filed with the Panel only on 2 June 2008. On that date, according to the SRSG, the six-month time-limit for the submission of a complaint to the Panel had clearly lapsed.
24. According to Section 3.1 of UNMIK Regulation No. 2006/12, the Panel may only deal with a matter after it determines that the matter has been submitted "within a period of six months from the date on which the final decision was taken".

25. In its admissibility decision of 10 June 2011, the Panel considered the objection raised by the SRSG in the following way:

“37. The six-month time-limit imposed by Section 3.1 of UNMIK Regulation No. 2006/12 requires complainants to lodge their complaints within six months of the final decision in the process of exhaustion of available remedies. For the purpose of calculating the six-month period only remedies that are normal and effective can be taken into account as a complainant cannot extend the strict time-limit imposed under the Regulation by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue under the Regulation (see, with respect to the six-month time-limit imposed by Article 35 § 1 of the European Convention on Human Rights (ECHR): European Court of Human Rights (ECtHR), *Fernie v. United Kingdom*, no. 14881/04, decision of 5 January 2006; ECtHR, *Svenska Flygföretagens Riksförbund and Skyways Express AB v. Sweden*, no. 32535/02, decision of 12 December 2006; ECtHR, *Sobczynski v. Poland*, nos. 355/04 and 358/04, decision of 25 September 2007; ECtHR, *Hysi v. Albania*, no. 38349/05, decision of 26 February 2008).

38. The Panel notes that the SRSG accepts that, for the purposes of the examination of the admissibility of the present complaint, the letter of the UNMIK Coordinator for the KPC of 14 March 2006 informing the complainant that his appeal was not received and that the case was “closed”, can be considered as the day of final notification of the decision allegedly taken on 5 July 2005, dismissing the complainant from the KPC.

39. After having received that notification, the complainant initiated an administrative dispute with the Supreme Court against the alleged failure by the JESC and the KPC to take action on his appeal against the decision dismissing him. Such a petition to the Supreme Court is a remedy that could offer effective redress, as an administrative dispute can be lodged with the Supreme Court against the failure by an administrative authority to decide on an appeal (Article 26 of the Law on Administrative Disputes).

40. It is true that the jurisdiction of the Supreme Court can be excluded by law (Article 30, paragraph 1, point 5, of the Law on Administrative Disputes). In the present case, the Supreme Court found that its jurisdiction was excluded by virtue of the immunity granted to UNMIK and KFOR personnel. While the Supreme Court referred only to Section 3.2 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, it is clear from the context of the relevant reasoning that it in fact relied on Sections 2.4 and 3.2 of the said Regulation, which guarantee immunity from jurisdiction before courts in Kosovo to KFOR personnel *viz.* the SRSG, the Principal Deputy SRSG and the Deputy SRSG’s, the Police Commissioner and other high-ranking officials as may be decided from time to time by the SRSG. The lack of jurisdiction of the Supreme Court should normally lead to the conclusion that a petition to the

Supreme Court was not one to be exhausted, and that it therefore was not to be taken in account for the purpose of calculating the six-month period.

41. However, the Panel notes that precisely the lack of jurisdiction of the Supreme Court is the object of one of the complaints. A finding by the Panel that the Supreme Court, by declaring itself without jurisdiction, had violated the human rights of the complainant, would imply that lack of jurisdiction was not a valid reason to hold against the complainant for denying him access to the Supreme Court. Nor would it be possible in these circumstances to consider that, for the purpose of calculating the six-month period, the administrative dispute raised with the Supreme Court was a remedy bound to fail. As a result, the decision of the Supreme Court declaring the complainant's petition inadmissible would have to be considered the final decision in this case (compare ECtHR, *Remli v. France*, judgment of 23 April 1996, *Reports of judgments and decisions*, 1996-II, p. 572, § 42). The complaint, submitted to the Panel on 2 June 2008, initially directed against the failure by the Supreme Court to act on his petition and on 17 June 2008 extended to the Supreme Court's judgment of 14 May 2008, would then have to be considered as being filed within the six-month time-limit. (...)"

26. The Panel found that the decision on the objection to admissibility thus appeared to depend on the outcome of the examination of the merits of the complaint, and therefore joined the admissibility issue to the merits, pursuant to Rule 31*bis* of the Panel's Rules of Procedure (§ 42).
27. The Panel confirms that the question of whether or not the six-month time-limit has been complied with, at least with respect to the first and the second part of the complaint, depends on whether or not the administrative dispute before the Supreme Court was a remedy the complainant could reasonably consider to be an effective one. The complainant has indeed only complied with the six-month time-limit, with respect to these two parts of the complaint, in so far as the starting point is the decision of the Supreme Court of 14 May 2008. With respect to the third part of the complaint, no issue arises, as the decision of the Supreme Court obviously is the starting point for a complaint specifically directed against that decision.
28. As recalled in the Panel's decision on admissibility, the Supreme Court declared the complainant's petition inadmissible because of the immunity from jurisdiction granted to KFOR and UNMIK, and consequently also to the JESC and the KPC. The question to be resolved at this stage is whether that decision must lead to the conclusion that the remedy sought by the complainant was "inappropriate" (see the case law of the ECtHR referred to in the Panel's decision on admissibility, quoted above, at § 37; see also ECtHR, *Pavlenko v. Russia*, no. 42371/02, judgment of 1 April 2010, § 74).
29. The Panel, upon further reflection, considers that the administrative dispute raised by the complainant cannot be considered an inappropriate remedy, for the purpose of the requirement of exhaustion of available avenues. It could not be said at the time that that remedy did not have any prospect of success. It is true that the Supreme Court

came to the conclusion that it had no jurisdiction to deal with petitions directed against the JSEC and the KPC, but this was not a conclusion flowing directly from the text of the Law on Administrative Disputes. Rather, it was a conclusion based on a combination of legal norms. The complainant could not reasonably be expected to foresee such an outcome.

30. The Panel concludes that the fact that the complainant attempted to obtain redress through the Supreme Court should not be held against him.
31. The objection of the SRSG is therefore dismissed, and the complaint is declared admissible.
32. This conclusion does not prejudice the question whether the decision of the Supreme Court is compatible with the complainant's human rights. That is a question relating to the merits of the third part of the complaint, which will be examined below (see §§ 62-76).

## **B. Merits of the complaint**

### **1. The fairness of the disciplinary proceedings before the JSEC**

#### *a) Submissions of the parties*

33. The complainant argues that the decision to dismiss him has been taken without due consideration of his comments on the disciplinary charges brought against him. The complainant believes that his comments, dated 17 February 2005, have not been forwarded by the Deputy Commander of the KPC Protection Zone 2 in Prizren to the JSEC.
34. The SRSG states that he is not in a position to authoritatively determine the validity of the copy of the decision of the then SRSG, allegedly taken on 5 July 2005, which copy is submitted by the complainant. That copy has no signatures, in particular not a signature by the SRSG, and bears only a handwritten date (5 July 2005). The original decision could not be located in the UNMIK archives. In these circumstances, the SRSG states that he is not in a position to comment on the validity of the dismissal decision against the complainant.

#### *b) The Panel's assessment*

35. As indicated above, the Panel considers that the complainant can be deemed to invoke a violation of his right of access to public service, guaranteed by Article 25 c) of the ICCPR.
36. The right of access to public service includes the right not to be arbitrarily dismissed from public service (Human Rights Committee (HRCttee), *Bandaranayake v. Sri Lanka*, no. 1376/2005, views adopted on 24 July 2008, § 6.4).



37. The Panel notes that according to section 5.7.4 of the KPC Disciplinary Code of 2001, the KPC member who is the object of disciplinary proceedings “shall be given notice at the earliest available opportunity that disciplinary action is being considered and shall be given an opportunity to submit a statement and evidence on his or her behalf”.
38. The complainant presents to the Panel a copy of a letter sent to the Deputy Commander of the KPC Protection Zone 2 on 17 February 2005, containing detailed comments on the charges of unjustified absence from work and unauthorised statements to a newspaper. He also presents a certificate of dispatch of a letter to the Deputy Commander of the KPC Protection Zone 2, stamped by the Postal Office on 17 February 2005.
39. The Panel accepts, on the basis of the elements presented to it, that the complainant has effectively sent his comments on the charges to the Deputy Commander of the KPC Protection Zone 2.
40. These comments mention that they are sent to the KPC Protection Zone 2, for the JSEC at the KPC General Headquarters. The Panel considers that the complainant acted correctly by sending his comments through the chain of command, starting with the Deputy Commander of the protection zone to which he belonged.
41. It is unclear what happened to the complainant’s comments. In criminal proceedings brought by the complainant against the person who was Deputy Commander of the KPC Protection Zone 2 (see the Panel’s decision on admissibility of 10 June 2011, §§ 26-28), the Municipal Court of Prizren found that it was not established that the complainant’s comments had been delivered to the Deputy Commander personally (judgment of 18 September 2008). It is not the Panel’s task to pronounce itself on the individual responsibility of office holders. This is all the more the case, since the Panel declared inadmissible *ratione personae* the part of the complaint relating to the said criminal proceedings (see decision on admissibility of 9 September 2010, §§ 44-48).
42. The fact remains, however, that a disciplinary sanction was imposed on the complainant without any apparent indication that attention had been paid to his comments on the charges.
43. The Panel recalls that according to the Human Rights Committee, to ensure access to public service on general terms of equality, as guaranteed by Article 25 c) of the ICCPR, not only the criteria but also the procedures for appointment, promotion, suspension and dismissal must be objective and reasonable (HRCttee, General Comment No. 25 (57) of 12 July 1996 on Article 25 of the ICCPR, § 23, ICCPR/C/21/Rev. 1/ Add. 7; HRCttee, *Hinostrroza Solís v. Peru*, no. 1016/2001, views adopted on 27 March 2006, § 6.2). A procedure is not objective or reasonable if it does not respect the requirements of basic procedural fairness (HRCttee, *Bandaranayake v. Sri Lanka*, mentioned in § 36 above, at § 7.1).

44. The Panel considers that the right of the complainant to defend himself in the disciplinary proceedings, explicitly guaranteed by Section 5.7.4 of the KPC Disciplinary Code of 2001, has not been respected.
45. Having regard to the importance of the right to defend oneself for a person who is the object of disciplinary charges, the Panel considers that the disciplinary proceedings, leading to the dismissal of the complainant from the KPC, did not respect the requirements of basic procedural fairness. It follows that these proceedings failed to respect the complainant's fundamental right of access to public service.
46. The Panel is therefore of the opinion that Article 25 c) of the ICCPR has been violated.

## **2. The alleged lack of action with respect to the appeal against the disciplinary decision**

### *a) Submissions of the parties*

47. The complainant complains about the fact that his appeal against the decision to dismiss him was in fact never examined by the body with which he filed the appeal, namely the JSEC. He refers to the letter sent to him on 14 March 2006 by the UNMIK Coordinator for the KPC, according to which his appeal has not been received by the KPC Commander nor by any of the other offices concerned and there is no evidence that he effectively sent an appeal. The complainant argues that this situation is due to the fact that the Deputy Commander of the KPC Protection Zone 2 in Prizren, to whom he had sent his appeal on 15 July 2005, did not forward it to the competent body.
48. The SRSG states that, since the complainant has not submitted a certified copy of the dismissal decision of the SRSG, allegedly taken on 5 July 2005, and since the original decision could not be located in the UNMIK archives, he is not in a position to comment on the complaint relating to the complainant's appeal against his dismissal.
49. The SRSG further argues that the complainant in any event did not comply with the procedures in place for submitting appeals against a final disciplinary decision of the SRSG, since he submitted his appeal only to a branch of the KPC in Prizren (KPC Protection Zone 2) and not directly to the JSEC, as required by the Disciplinary Code. Since UNMIK had no control or authority over the KPC Protection Zone 2, it cannot be held responsible for the fact that the appeal actually never reached the JSEC.

### *b) The Panel's assessment*

50. As indicated above, the Panel considers that the complainant can be deemed to invoke a violation of his right to an effective remedy against the alleged violation of his right of access to public service (Article 2 § 3 of the ICCPR, read in combination with Article 25 c) of the ICCPR).

51. Article 2 § 3 of the ICCPR requires that in addition to effective protection of Covenant rights, States must ensure that individuals also have accessible and effective remedies to vindicate those rights (HRCttee, General Comment No. 31 (80) of 29 March 2004 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, § 15, ICCPR/C/21/Rev. 1/ Add. 13).
52. The Panel notes that according to Section 5.8.1 of the KPC Disciplinary Code of 2001 KPC members may appeal disciplinary action decisions. The appeal authority with respect to decisions taken by the JSEC on the basis of major acts of non-compliance is, according to Section 5.8.1.2, the JSEC. The latter section provides that “the appeal must be sent through (the KPC Commander), who will provide comments and forward the request for appeal to (the) JSEC”. Section 5.8.2 provides that an appeal shall be submitted to the appeal authority “within 21 days from the time the member receives written notice of the decision”. Section 5.8.7 provides that appeals and their outcomes shall be recorded in the discipline register maintained by the competent Regional Task Group commander and the KPC Commander.
53. The complainant presents to the Panel a copy of a letter sent to the KPC Protection Zone 2 on 15 July 2005, containing an appeal against his dismissal. He also presents a statement by the Postal Office, dated 25 January 2006, according to which a letter sent by the complainant to the Deputy Commander of the KPC Protection Zone 2 has been delivered on 16 July 2005 (see § 11, above).
54. The Panel accepts, on the basis of the elements presented to it, that the complainant has effectively sent an appeal to the Deputy Commander of the KPC Protection Zone 2. The Panel considers that there is no need to examine whether an additional complaint or appeal, allegedly sent to the “Joint Implementation Committee – JSEC”, at the KFOR headquarters, on 18 July 2005 (see § 12, above), also reached the JSEC.
55. This appeal of 15 July 2005 mentions that it is sent to the KPC Protection Zone 2, for the KPC General Headquarters and for the JSEC. The Panel considers that the complainant acted correctly by sending his appeal through the chain of command, starting with the Deputy Commander of the protection zone to which he belonged.
56. It is unclear what happened with the complainant’s appeal. In the above mentioned criminal proceedings brought by the complainant against the person who was Deputy Commander of the KPC Protection Zone 2 (see § 41, above), the Municipal Court of Prizren found that it was not established that the complainant’s appeal had been delivered to the Deputy Commander personally (judgment of 18 September 2008). As already indicated above, it is not the Panel’s task to pronounce itself on the individual responsibility of office holders. This is even more the case, since the Panel declared inadmissible *ratione personae* the part of the complaint relating to the said criminal proceedings (see § 41, above).
57. The fact remains, however, that the UNMIK Coordinator for the KPC stated on 14 March 2006 that the complainant’s appeal has never been examined by the JSEC, as the JSEC never received any appeal (see § 13, above).

58. The Panel considers that the right of the complainant to appeal against his dismissal, explicitly guaranteed by Section 5.8.1 of the KPC Disciplinary Code of 2001, has not been respected.
59. The effect of 2 § 3 of the ICCPR is to require the provision of a remedy to deal with the substance of an arguable complaint under the Covenant and to grant appropriate relief (see, with respect to the corresponding provision of Article 13 of the European Convention on Human Rights (ECHR), European Court of Human Rights (ECtHR) (Grand Chamber), *Kudła v. Poland*, no. 30210/96, judgment of 26 October 2000, § 157, *ECHR*, 2000-XI). While the effectiveness of a remedy within the meaning of Article 2 § 3 of the ICCPR does not depend on the certainty of a favourable outcome for the complainant, the right to an effective remedy guarantees at least that the complaint relating to an alleged violation of the complainant's human rights is examined and that a decision is taken.
60. In the present case a right to appeal against the dismissal was open in theory, and the complainant made use of that right, but his appeal did not lead to a fresh examination of the charges against him. Having regard to the fact that during the disciplinary proceedings the complainant was not able to present his views on the charges (see § 42, above), the Panel considers that the lack of action on his appeal amounted to a failure to respect his fundamental right to an effective remedy for the violation of his right not to be arbitrarily dismissed from public service.
61. The Panel is therefore of the opinion that Article 2 § 3 of the ICCPR, read in combination with Article 25 c) of the ICCPR, has been violated.

### **3. The dismissal by the Supreme Court of the administrative dispute raised by the complainant**

#### *a) Submissions of the parties*

62. The complainant complains about the judgment of the Supreme Court of 14 May 2008 declaring inadmissible the administrative dispute filed by him, relating to the failure by the JSEC and the KPC to act on his appeal against the decision to dismiss him.
63. The SRSG argues that the complainant had at all times access to legal remedies provided for in the various stages of the proceedings. He actually made use of administrative and judicial remedies, and was not denied access to them. In particular with respect to the administrative dispute raised before the Supreme Court, the SRSG notes that the Court declared the complainant's petition inadmissible because no administrative dispute could be initiated against the JSEC within KFOR or against the KPC Protection Zone 2. It does not fall within the Panel's competence to act as a "court of appeal" over the Supreme Court. According to the SRSG, the Supreme Court has duly and correctly examined the submissions made by the parties, and the mere fact that a party subject to judicial proceedings is dissatisfied with the outcome of such proceedings, cannot of itself raise an issue with regard to the right to a fair trial and to an effective remedy.

*b) The Panel's assessment*

64. As indicated above, the Panel considers that the complainant can be deemed to invoke a violation of his right to an effective remedy against the alleged violation of his right of access to public service (Article 2 § 3 of the ICCPR, read in combination with Article 25 c) of the ICCPR).
65. The complainant did have access to the Supreme Court, only to be told that his complaint was inadmissible because of the immunity of the JSEC and the KPC from the courts (see § 17, above). To this extent, he thus had access to a remedy that existed within the Kosovo judicial system.
66. However, this of itself does not necessarily exhaust the requirements of Article 2 § 3 of the ICCPR. It must still be established that the degree of access afforded under the relevant regulations was sufficient to secure the complainant's right to an effective remedy (compare ECtHR, *Ashingdane v. United Kingdom*, judgment of 28 May 1985, *Publications of the Court*, Series A, vol. 93, §§ 56-57).
67. The Panel recalls that the right of access to the courts, where applicable, is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals". Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, "a limitation will not be compatible with (the relevant treaty text, such as Article 6 § 1 of the ECHR) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (ECtHR, *Ashingdane v. United Kingdom*, mentioned above, at § 57).
68. The Panel considers that the same reasoning can be applied to the right to an effective remedy, guaranteed by Article 2 § 3 of the ICCPR.
69. With respect to the immunity from jurisdiction of the Kosovo courts, granted to both the JSEC and the KPC, the Panel considers that this immunity is of a *sui generis* nature. On the one hand, this immunity is part of the immunity generally granted to the United Nations as an international organisation. On the other hand, it is an immunity granted to bodies that operate only within the Kosovo context and that perform functions that would normally be performed by national authorities. The Panel nevertheless considers that the acceptability of the immunity has to be considered from the point of view of UNMIK as a subsidiary organ of the United Nations, that is as part of the immunity generally granted to the United Nations, pursuant to Article 105 of the Charter of the United Nations of 24 October 1945.
70. The Panel recalls that with respect to the immunity of international organisations, the European Court of Human Rights has held that "where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of

activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights” (ECtHR (Grand Chamber), *Waite and Kennedy v. Germany*, no. 26083/94, judgment of 18 February 1999, § 67, *ECHR*, 1999-I; ECtHR (Grand Chamber), *Beer and Regan v. Germany*, no. 28934/95, judgment of 18 February 1999, § 57; ECtHR (Grand Chamber), *Prince Hans-Adam II of Liechtenstein v. Germany*, no. 42527/98, judgment of 12 July 2001, § 48, *ECHR*, 2001-VIII).

71. It is true that the Court has also held that “it would be incompatible with the object and purpose of the (ECHR), if the Contracting States were thereby absolved from their responsibility under the (ECHR) in relation to the field of activity covered by such attribution. In determining whether granting an international organisation immunity from national jurisdiction is permissible under the (ECHR), a material factor is whether reasonable alternative means were available to protect effectively the rights under the (ECHR)” (ECtHR (Grand Chamber), *Prince Hans-Adam II of Liechtenstein v. Germany*, § 48; in the same sense, ECtHR (Grand Chamber), *Waite and Kennedy v. Germany*, § 68; ECtHR (Grand Chamber), *Beer and Regan v. Germany*, § 58).
72. The Panel notes, however, that the European Court attaches a particular significance to the role of the United Nations with respect to the maintenance of international peace and security, in particular under Chapter VII of the United Nations Charter. In a case concerning acts and omissions of states parties to the ECHR, carried out on behalf of the United Nations in areas for which UNMIK and KFOR were responsible, the Court has held that “the (ECHR) cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by (United Nations Security Council) Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN’s key mission in this field including (...) with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a (United Nations Security Council) Resolution which were not provided for in the text of the Resolution itself” (ECtHR (Grand Chamber), *Behrami and Behrami v. France*, no. 71412/01, and *Saramati v. France, Germany and Norway*, no. 78166/01, decision of 2 May 2007, § 149; see also § 151 of that decision, where the Court refers to the United Nations as “an organisation of universal jurisdiction fulfilling its imperative collective security objective”).
73. The Panel concludes, like the Supreme Court of the Netherlands in a case concerning the United Nations’ alleged responsibility arising out of the events that took place in Srebrenica in 1995, that the United Nations “occupies a special place in the international legal community”, that, having regard to its missions under Chapter VII of the United Nations Charter, the immunity granted to it “is absolute”, and that respecting that immunity is an obligation that “(prevails) over conflicting obligations from another international treaty” (*Hoge Raad* (Supreme Court), 13 April 2012,

*Stichting “Mothers of Srebrenica” and Others v. State of the Netherlands and United Nations*, §§ 4.3.4 and 4.3.6).<sup>1</sup>

74. Turning in particular to the facts of the present case, the Panel notes that the immunity granted to UNMIK and KFOR relates to acts or omissions attributable to the JESC and the KPC. These are two organs directly concerned with the security issues for which UNMIK and KFOR were set up. There is therefore no room for any possible derogation from the principles relating to the immunity of the United Nations in security issues, indicated above.
75. Having regard to the special position of UNMIK and KFOR, the Panel finds that in giving effect to the immunity from jurisdiction of the Kosovo courts of the JESC and the KPC, the Supreme Court did not act in violation of the complainant’s right to an effective remedy.
76. The Panel is therefore of the opinion that Article 2 § 3 of the ICCPR, read in combination with Article 25 c) of the ICCPR, has not been violated.

## **V. RECOMMENDATION**

77. In his submissions on the merits, the complainant requests compensation corresponding to the rights of a person with the rank of major in the KPC, *i.e.* a salary up to 14 March 2006 and an old-age pension since that date.
78. Having regard to the nature of the violation of Articles 2 § 3 and 25 c) of the ICCPR, 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.
79. Nevertheless, the fact remains that the disciplinary proceedings against the complainant were, in the Panel’s opinion, not conducted entirely in conformity with the ICCPR. This resulted in a considerable degree of distress for the complainant. The Panel considers that UNMIK should take appropriate steps towards adequate compensation for the complainant for non-pecuniary damage suffered.

## **FOR THESE REASONS,**

The Panel, unanimously,

- 1. REJECTS THE OBJECTION TO THE ADMISSIBILITY OF THE COMPLAINT, AND DECLARES THE REMAINING PARTS OF THE COMPLAINT ADMISSIBLE;**

---

<sup>1</sup> The judgment is available at <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/Summaries-of-some-important-rulings-of-the-Supreme-Court/Pages/Ruling-Dutch-Supreme-Court-Mothers-of-Srebrenica.aspx>.

2. **FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 25 c) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS;**
3. **FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 2 § 3 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AS TO THE LACK OF ACTION WITH RESPECT TO THE COMPLAINANT'S APPEAL AGAINST HIS DISMISSAL;**
4. **FINDS THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 2 § 3 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AS TO THE DISMISSAL BY THE SUPREME COURT OF THE ADMINISTRATIVE DISPUTE RAISED BY THE COMPLAINANT;**
5. **RECOMMENDS THAT UNMIK:**
  - a. **TAKE APPROPRIATE STEPS TOWARDS ADEQUATE COMPENSATION FOR THE COMPLAINANT FOR NON-PECUNIARY DAMAGE;**
  - b. **TAKE IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATION OF THE PANEL AND INFORM THE COMPLAINANT AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**