



# *The Human Rights Advisory Panel*

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## **DECISION**

**Date of adoption: 6 December 2012**

**Case No. 311/09**

**NTP BUJARI (AS PETROL)**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 6 December 2012,  
with the following members present:

Mr Marek NOWICKI, Presiding Member  
Ms Christine CHINKIN  
Ms Françoise TULKENS

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 lodged on 18 September 2009 and registered on the same date.
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 of the case.
3. The SRSG provided comments by letter dated 10 December 2009.
4. On 16 January 2010, the complainant sent an additional document to the Panel.

5. On 26 January 2010 the Panel forwarded the comments of the SRSG to the complainant for comments. The complainant did not avail itself of the opportunity to send comments.
6. On 26 January 2010 and on 24 February 2011, the Panel requested additional documents from the complainant.
7. The complainant's response was received on 28 February 2011.
8. On 18 March 2011, the Panel declared the complaint admissible.
9. On 18 April 2011, the Panel informed the SRSG of its decision and requested UNMIK's comments on the merits of the complaint.
10. On 9 May 2011, the SRSG requested additional information from the Panel regarding the case. On 30 May 2011, the Panel provided the SRSG with additional documentation. On 2 August 2011, the SRSG provided UNMIK's response.
11. On 30 September 2011, the Panel forwarded the SRSG's comments to the the complainant and invited him to submit further comments, if he so wished. On 1 November 2011, the Panel received the comments of the complainant.
12. On 29 March 2012, the Panel forwarded the complainant's response of 31 October 2011 to UNMIK and invited UNMIK to amend its response related to comments on the merits of the case.
13. On 2 May 2012, the SRSG provided UNMIK's amended response.
14. On 31 October 2012, the Panel requested additional information from the SRSG. On 26 November 2012, the SRSG provided UNMIK's response.
15. On 5 December 2012, the SRSG provided further clarification to UNMIK's response.

## **II. THE FACTS**

16. The complainant NTP Bujari is a company that supplied the Kosovo Protection Corps (KPC) with fuel in 2005. According to the complainant, about 75 % of the bills have been paid. An outstanding debt of 1,055 euros remains unpaid.
17. On 21 August 2008, the complainant company filed a claim against the Kosovo Protection Force (KPC) – Ferizaj/Uroševac region before the District Commercial Court of Prishtinë/Priština, for an outstanding debt of 1,055 euros. It claimed that according to the terms of its agreement with the KPC, it had regularly provided fuel to the KPC. By judgment of 25 September 2008 the Court dismissed the claim. It held that the KPC acted under the authority of UNMIK, which enjoyed immunity from the courts in Kosovo under UNMIK Regulation No. 2000/47 of 18 August 2000 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo. Moreover, according to Article 77 § 1 of the Law on Contested Procedure, only physical and legal persons could be parties to court proceedings. Since the KPC was neither a physical nor a legal person, it did not meet the requirements to acquire the status of a party to the proceedings.

18. On 3 October 2008, the complainant company appealed against this judgment to the Supreme Court, maintaining that the fuel was provided to the KPC, and that the payment of the fuel was guaranteed by UNMIK. By judgment of 16 July 2009 the Supreme Court rejected the appeal. It found that the first instance court had not violated the law by deciding that the Office of the KPC Coordinator (OKPCC) could not appear as a defendant in proceedings before a court. The Supreme Court held that it resulted from the relevant UNMIK regulation (UNMIK Regulation No. 1999/8 of 20 September 1999 on the Establishment of the Kosovo Protection Corps) that the KPC operated under the authority of the SRSG and did not have the capacity of a legal person, in the sense of Article 77 § 1 of the Law on Contested Procedure.
19. On 21 January 2009, the Kosovo Security Force was launched, rendering the KPC non-operational. As a consequence, UNMIK abolished the post of KPC Coordinator with effect from 30 January 2009 (Report of the United Nations Secretary-General on the United Nations Interim Administration Mission in Kosovo, 17 March 2009, S/2009/149, §§ 10-11).

### **III. THE COMPLAINT**

20. The complainant does not specifically invoke any right. In essence, it complains about the non-fulfilment by the KPC of its contractual obligations, about the immunity granted to the KPC and the consequent lack of jurisdiction of the Kosovo courts over it.
21. As indicated in its decision on admissibility, the Panel considers that the complainant company may be deemed to invoke a violation of the right of access to a court, guaranteed by Article 6 § 1 of the European Convention on Human Rights (ECHR). It may also be deemed to invoke a violation of the right to an effective remedy, guaranteed by Article 13 of the ECHR, in combination with the right of property, guaranteed by Art. 1 of Protocol No. 1 to the ECHR.

### **IV. THE LAW**

22. The Panel considers that it should on its own motion raise a new objection to the admissibility of the complaint, based on the existence of the UN Third Party Claims Process (see further, §§ 24-33).
23. Before continuing with the consideration of the merits of the complaint, the Panel must first consider this new objection to admissibility, pursuant to Section 2.3 of UNMIK Administrative Direction No. 2009/1 of 17 October 2009 Implementing UNMIK Regulation No. 2006/12 On the Establishment of the Human Rights Advisory Panel.

#### **A. Availability of the UN Third Party Claims Process**

24. 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.

25. In the present case the SRSG does not raise any objection based on Section 2.2 of UNMIK Administrative Direction No. 2009/1. The SRSG did, however, state that the complainant is still entitled to file a claim with the UNMIK Local Claims Review Board, which is the first administrative body of review under the UN Third Party Claims Process. Therefore, the Panel considers that the present case is comparable to Human Rights Advisory Panel case no. 45/08, *Linda*. In the latter case, the SRSG did raise such an objection, and the Panel declared it well-founded (see Human Rights Advisory Panel (HRAP), decision of 22 August 2012, §§ 35-45). The Panel accordingly decides to apply the same reasoning to the present case.
26. 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 applicant’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).
27. 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.
28. 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.
29. Turning to the present case, the Panel recalls that the complaint as submitted is deemed to concern the non-fulfilment by the KPC of its contractual obligations, on the one hand, and the immunity granted to the KPC and the lack of jurisdiction of the Kosovo courts over it, on the other hand.

30. The part of the complaint relating to the non-fulfilment by the KPC of its contractual obligations resulted in property loss or damage. The Panel considers that this part of the complaint falls *prima facie* within the ambit of the UN Third Party Claims Process and therefore should be deemed inadmissible.
31. The other part of the complaint concerns acts, omissions or situations that clearly did not result in personal injury, illness or death, nor in property loss or damage. As such, these parts of the complaint are therefore not covered by the UN Third Party Claims Process.
32. The Panel considers, however, that both parts of the complaint pending before the Panel are so interlinked that it would be artificial to separate them, possibly resulting in the one complaint being dealt with in the UN Third Party Claims Process and the other one at the same time being dealt with by the Panel (see HRAP, *Balaj and Others*, no. 04/07, mentioned in § 26 above, at § 52; HRAP, *N.M. and Others*, no. 26/08, mentioned in § 26 above, at § 42; HRAP, *Linda*, no. 45/08, mentioned in § 25 above, at § 44).
33. The Panel therefore considers that the entire complaint is inadmissible.

#### **B. Effects of the determination that the complaint is deemed inadmissible**

34. The Panel considers it useful to explain the effects of its decision holding that the complaint is deemed inadmissible.
35. 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.
36. However, if the complainant is required to re-file a complaint after the conclusion of the UN Third Party Claims Process, it 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 complainant resubmitting it to the Panel, despite the fact that, as the Panel found on 18 March 2011, the complaint was admissible under the regulatory framework applicable when it was filed. Such a result would offend basic notions of justice.
37. 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 § 26 above, at §§ 55-61; HRAP, *N.M. and Others*, no. 26/08, mentioned in § 26 above, at §§ 45-51; HRAP, *Linda limited liability company*, no. 45/08, mentioned in § 25 above, at §§ 47-50). The Panel adopts the same approach in the present case.
38. 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