



OPINION

Date of adoption: 13 January 2013

Case No. 194/09

Petra KOSTIĆ

against

UNMIK

The Human Rights Advisory Panel, sitting on 13 January 2013,
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 complaints, 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, makes the following findings and recommendations:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 30 April 2009 and was registered on the same day.
2. On 23 December 2009, 22 June 2011 and 29 March 2012, the Panel asked the complainant to submit additional information and documentation. On 6 September 2011, some information was received by telephone.
3. On 24 August 2011, the Panel requested additional information from the Court Liaison Office (CLO) of the, Kosovo Ministry of Justice of Kosovo. The CLO responded on 2 September 2011.

4. By decision of 26 September 2012, the Panel declared the complaint admissible in part.
5. On 15 October 2012, the Panel communicated the decision on admissibility to the Special Representative of the Secretary-General (SRSG), inviting UNMIK's observations on the merits of the case.
6. On 11 December 2012 the SRSG submitted UNMIK's comments on the merits of the complaint.

II. THE FACTS

7. The complainant is a former resident of Kosovo, currently residing in Serbia proper.
8. The complainant states that she is the owner of a property located in the village of Retimlë/Retimlje, Municipality of Rahovec/Orahovac. The complainant retained use of the property until July 1999 when due to security reasons and following the abduction of her son she moved to Serbia proper. She states that the property was subsequently usurped, damaged, looted and eventually torn down by unknown perpetrators.
9. On 15 June 2004, the complainant lodged a claim with the Municipal Court of Rahovec/Orahovac against the Municipality of Rahovec/Orahovac and the Provisional Institutions of Self-Government (PISG), seeking compensation for the damage caused to her property, in the amount of 280,000 euros.
10. Approximately 17,000 compensation claims were lodged in 2004 before Kosovo courts, the vast majority of which by Kosovo Serbs who, because of hostilities, had left their homes in Kosovo in 1999 and whose property was later damaged or destroyed. With a view to meeting the statutory five-year time-limit for submitting civil compensation claims, these claimants lodged their claims around the same time in 2004. The claims were generally directed against some combination of UNMIK, KFOR, the PISG and the relevant municipality (see Human Rights Advisory Panel (HRAP), *Milogorić and Others*, cases nos. 38/08, 58/08, 61/08, 63/08 and 69/08, opinion of 24 March 2010, at § 1; for the legal basis upon which the claimants based their claim, see the same opinion, at § 5).
11. With respect to these cases the Director of the UNMIK Department of Justice (DOJ) sent a letter to all municipal and district court presidents and to the President of the Supreme Court of Kosovo on 26 August 2004. In the letter, the Director of DOJ mentioned that "over 14,000" such claims had been lodged. He referred to "the problems that such a huge influx of claims will pose for the courts", and asked that "no [such] case be scheduled until such time as we have jointly determined how best to effect the processing of these cases" (for the full text of the letter, see the *Milogorić and Others* opinion, cited in § 10 above, at § 6).
12. On 15 November 2005, the DOJ called on the Kosovo courts to begin processing claims for damages caused by identified natural persons and for damages caused after October 2000, considering that the "obstacles to the efficient processing of these cases" did not exist any longer. Claims related to events arising before October 2000 were not affected by this letter.
13. On 28 September 2008, the Director of the DOJ advised the courts that cases which had not been scheduled according to the 26 August 2004 request should now be processed.

14. On 9 December 2008, UNMIK's responsibility with regard to the judiciary in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo.
15. As of the present time, the Municipal Court of Rahovec/Orahovac has not contacted the complainant and no hearings have been scheduled concerning the abovementioned lawsuit.

III. THE COMPLAINT

16. Insofar as the complaint has been declared admissible, the complainant in substance alleges that the proceedings concerning her claim for damages for the destroyed property were stayed, thus making it impossible for her to obtain the determination of her claim, in breach of her right of access to a court under Article 6 § 1 of the European Convention on Human Rights (ECHR). She also complains that, as a result of the stay, the proceedings have not been concluded within a reasonable time, in breach of Article 6 § 1 of the ECHR. Finally, she alleges that for the same reason her right to an effective remedy under Article 13 of the ECHR has been violated as well.

IV. THE LAW

Alleged violations of Article 6 § 1 of the ECHR

17. The Panel notes that the case of this complainant raises issues the substance of which has already been submitted to the Panel by other complainants. The Panel recalls that in, for instance, the joined cases of *Milogorić and Others* (cited in § 11 above), it examined complaints by five complainants who were also owners of real property in Kosovo. In 1999, fearing hostilities, they too left their homes in Kosovo. Their property was damaged or destroyed during the second half of 1999, after the entry into Kosovo of UNMIK and KFOR. These complainants also filed claims in 2004 before the competent municipal courts against UNMIK, KFOR, the PISG and the relevant municipalities, seeking compensation for the damage caused to their property. They too had not been contacted by the courts and no hearings had been scheduled, due to the above mentioned intervention by the DOJ which halted the judicial proceedings from August 2004 to September 2008. In these cases, the Panel concluded that the complainants' right to have their claim determined by the courts had been violated.
18. In his response the SRSG provides detailed arguments, based on the jurisprudence of the European Court of Human Rights. The SRSG argues among other things that UNMIK's request that the proceedings be stayed must be considered to have had a legitimate aim, and that in the circumstances of post-conflict Kosovo and its burgeoning judicial system, the temporary stay was the only way for UNMIK to deal with the exceptional situation with which the Kosovo judicial system was faced, caused by the influx of compensation claims. The SRSG also argues that there was a reasonable proportionality between the means employed and the aim sought to be achieved, because a fair balance was struck between the demands of the general interest of society and the requirements for the

protection of the individuals' fundamental rights. According to the SRSG, the reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, and the European Court applies three criteria in particular: the conduct of the judicial authorities, the complexity of the case, and the conduct of the applicant. Only delays attributable to the State cause a violation of the reasonable time requirement. The SRSG analyses in detail the application of the above three criteria in the context of Kosovo and as they relate to the complainant.

19. As regards the conduct of the complainant, the SRSG argues that she has not presented any evidence to show that she in any way ever enquired as to the progress of her case, or complained that her case was not progressing and should progress within either the local courts in Kosovo, or the DOJ or any other UNMIK or PISG organ, including the Court Liaison Offices. Nor has the complainant complained to EULEX subsequent to its deployment in Kosovo in December 2008.
20. The Panel recalls that it already considered and rejected all of these arguments in *Milogorić and Others* (cited in § 11 above), in *Berisha and Others* (HRAP, cases nos. 27/08 and others, opinion of 23 February 2011, § 24), *Lalić and Others* (HRAP, cases nos. 30/08 and others, opinion of 13 May 2011, § 21), *Felegi and others* (HRAP, cases nos. 32/08 and others, opinion of 17 August 2012) and *Stanišić* (HRAP, case no. 34/08, opinion of 22 August 2012). Concerning the argument that the circumstances in Kosovo must be taken into account, the Panel found that it is true that UNMIK's interim character and related difficulties must be duly taken into account with regard to a number of situations, but under no circumstances could these elements be taken as a justification for diminishing standards of respect for human rights, which were duly incorporated into UNMIK's mandate (*Milogorić and Others*, § 44; *Berisha and Others*, § 25; *Lalić and Others*, § 22; *Felegi and Others*, § 24).
21. The Panel sees no reason to depart from these findings.
22. The Panel now reflects on the argument presented by the SRSG regarding the complexity of this issue. In his comments on the merits, the SRSG refers to HRAP's case of *Stanišić*. In particular, he highlights the Panel's reference to the fact that such claims filed in the municipal courts presented certain legal complexities, relating to issues such as immunity which contributed to delay in proceedings (*Stanišić*, cited in § 20 above). The SRSG makes reference to ECtHR and specifically the case of *Süßmann v. Germany* (no. 20024/92, judgment 16 September 1996). He argues that when considering whether or not there has been an unreasonable delay in proceedings, consideration must also be given to the fact that decisions in such cases, where the impact has implications beyond the current matter under consideration, necessitate more time before rendering a final decision. As a result, the claim as filed by the complainant required additional time before a determination could be made.
23. The Panel, however, draws a distinction between the argument raised by the SRSG in relation to complexity and to the complainant's complaint. The reason given for the moratorium by the DOJ related not to the legal complexity of the cases but to the sheer of number of complaints that were filed at the municipal courts (see letter from DOJ, cited in § 11 above). It was the delay rather than any other apparent complexities in the case that resulted in a possible breach of UNMIK's obligations under Article 6.
24. This distinction is further highlighted by the case of *Stanišić*. In this matter the case had already been heard and the arguments aired. In the current complaint no such procedural

activity had been recorded and the case had simply been frozen pending a further decision by the DOJ in 2008. It is this moratorium rather than any apparent additional complexities in the case which the Panel is focusing on when considering the issue of delay. As a result, the ECtHR case of *Süßmann v. Germany* (cited above) does not reflect in any way a justified reason for the delay in considering the complainant's case.

25. Concerning the argument of the SRSG that the complainant did not enquire about the progress of her case with the Municipal Court of Rahovec/Orahovac, either before EULEX's deployment in December 2008 or thereafter, the Panel has already rejected these arguments in *Lalić and Others* (cited § 20 above). It found that the complainants could not be blamed for not having enquired with the relevant courts as to the progress of their cases (*Lalić and Others*, § 25). Moreover, as to the argument that the complainant did not enquire with EULEX about the progress of her case, the Panel has found that this issue was irrelevant for the examination of the complaint, since the situation after December 2008 falls in any event outside UNMIK's responsibility (see § 15 above; *Lalić and Others*, § 26).
26. The Panel sees no reason to depart from these findings either.
27. In the light of the foregoing, the Panel finds that there has been a violation of Article 6 § 1 of the ECHR in respect of the inability of the complainant to have her claim determined by the courts, and that it is not necessary to examine the issue of the length of the proceedings.

Alleged violation of Article 13 of the ECHR

28. The Panel finds that the complaint under Article 13 of the ECHR (right to an effective remedy) concern essentially the same issues as those discussed under Article 6 § 1. In these circumstances, it finds that no separate issues arise under Article 13 of the ECHR (HRAP, *Milogorić and Others*, cited in § 11 above, at § 49).

V. RECOMMENDATIONS

29. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
30. It would normally be for UNMIK to take the appropriate measures in order to put an end to the violation noted and to redress as far as possible the effects thereof. However, as the Panel noted above (see § 15) UNMIK's responsibility with regard to the judiciary in Kosovo ended on 9 December 2008, with EULEX assuming full operational control in the area of rule of law. UNMIK therefore is no longer in a position to take measures that will have a direct impact on proceedings pending before the municipal courts.
31. The Panel considers that this factual situation does not relieve UNMIK from its obligation to redress as far as possible the effects of the violations for which it is responsible. In line with the case law of the European Court of Human Rights on situations of reduced State jurisdiction, the Panel is of the opinion that UNMIK must endeavour, with all the diplomatic means available to it *vis-à-vis* the Kosovo authorities, to obtain assurances that the cases filed by the complainant will be duly processed (see HRAP, *Milogorić and Others* § 49, and *Lalić and Others* § 32, cited above; compare European Court of Human Rights (ECtHR) (Grand Chamber), *Ilaşcu and Others v.*

Moldova and Russia, no. 48787/99, judgment of 8 July 2004, *ECHR*, 2004-VII, § 333; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171).

32. The Panel further considers that UNMIK should take appropriate steps towards adequate compensation for the complainant for non-pecuniary damage suffered as a result of the prolonged stay of the proceedings instituted by her.

FOR THESE REASONS,

The Panel, unanimously,

- 1. FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN RESPECT OF THE INABILITY OF THE COMPLAINANT TO HAVE HER CLAIM DETERMINED BY THE COURTS;**
- 2. FINDS THAT THERE IS NO NEED TO EXAMINE THE COMPLAINT UNDER ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS TO THE LENGTH OF THE PROCEEDINGS;**
- 3. FINDS THAT THERE IS NO NEED TO EXAMINE THE COMPLAINT UNDER ARTICLE 13 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 4. RECOMMENDS THAT UNMIK:**
 - a. URGE THE COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ASSURE THAT THE COMPLAINANT'S CASE WILL BE DECIDED WITHOUT ANY FURTHER DELAY;**
 - b. TAKE APPROPRIATE STEPS TOWARDS ADEQUATE COMPENSATION FOR THE COMPLAINANT FOR NON-PECUNIARY DAMAGE;**
 - c. TAKE IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND INFORM THE COMPLAINANT AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Andrey ANTONOV
Executive Officer

Marek NOWICKI
Presiding Member