



The Human Rights Advisory Panel

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DECISION

Date of adoption: 6 June 2013

Case No. 08/10

Tomë KRASNIQI

against

UNMIK

The Human Rights Advisory Panel, sitting on 6 June 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 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 8 March 2010 and registered on the same day.
2. On 15 March 2010 and 11 May 2010, the complainant provided additional information to the Panel.
3. On 11 April 2012, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG), for UNMIK's comments on the admissibility of the complaint.

4. On 12 April 2012, the complainant submitted additional documentation to the Panel. This additional documentation was subsequently communicated to the SRSG on 14 May 2012.
5. On 31 May 2012, the SRSG submitted UNMIK's response.
6. On 26 September 2012, the Panel forwarded the SRSG's comments to the complainant inviting him to provide further comments if he so wished.
7. The complainant provided his response to the SRSG in a letter dated 2 October 2012.

II. THE FACTS

8. The complainant is a resident of Kosovo residing in the municipality of Pejë/Pec. Born in 1938, the complainant had paid into a state Federal Republic of Yugoslavia pension fund entitled the "Fund of Pensioners and Disabled People", accruing the right to a pension as of 3 May 1998. He states that he received a pension of a value of approximately 180 euros per month from that date until 1 December 1998. After this date, this pension was terminated without any prior notification or explanation being provided to the complainant.
9. Up until 1989, the Autonomous Province of Kosovo had an autonomous pension fund that collected contributions and paid benefits. The system, at that time, was a generation solidarity system, known as the 'pay-as-you-go' system, through which active workers paid contributions to fund the benefits of current pensioners. The pensions were administered by the Fund for Pension and Disability Insurance which was centralised in Belgrade in 1989.
10. The complainant states that following the establishment of UNMIK pursuant to UN Security Council Resolution 1244 (1999) he, along with other Kosovo Albanians, were prevented from obtaining this pension. The complaint contends that Kosovo Serbians continued to receive this pension.
11. Subsequent to the suspension of the complainant's Yugoslav pension, by Regulation No. 2001/35 on Pensions in Kosovo of 22 December 2001 and Regulation No. 2005/20 of 19 April 2005 amending Regulation No. 2001/35, UNMIK established an alternative pension scheme providing for "basic" (old age, non-contributory) and "savings" (contributory) pensions in Kosovo.
12. From the documentation presented to the Panel, it appears that, on 11 April 2007, the complainant addressed a complaint to the Department of Administration of Pensions in Kosovo (DAPK) of the Kosovo Ministry of Labour and Social Welfare requesting the payment of the pension accrued under the former Yugoslav system. On 13 April 2007, the DAPK sent a written response to the complainant stating that the non-payment of the pension accrued through contributions was due to the "stolen funds by the Serbian occupants" which constituted an "unsolved political problem" and informing the complainant of the on-going pension schemes administered by the DAPK.
13. It appears that on 30 April 2007, following a complaint submitted by the applicant on 16 April 2007, the DAPK issued a decision recognising the complainant's right to an old age/basic pension, "gained through contributions to the fund of invalids and

pensioners from December of the year 1998 and further”. The complainant states that under this system, as of an unspecified date, he has been in receipt of a pension from the DAPK of approximately 45 euros per month.

14. On 4 May 2007, the complainant commenced legal proceedings in the Municipal Court of Prishtinë/Priština against the Kosovo Government Ministry of Labour and Social Welfare, seeking the “reinstatement of his status as a contributory pensioner”, the backdated payments of sums that he claimed were owed to him following the suspension of payment of his pension and compensation for damage incurred due to this suspension.
15. By the end of 2008, the Municipal Court of Prishtinë/Priština had not contacted the complainant and no hearings had been scheduled concerning the aforementioned lawsuit.

III. THE COMPLAINT

16. The complainant complains first that from 12 December 1998 until April 2007 he has not been able to receive his pension based on his years of contribution to the former Yugoslav Fund of Pensioners and Disabled People. He blames UNMIK for not finding a solution to this problem, so that he could continue to receive a pension as “contributory pensioner”. He alleges that this is in violation of his right to peaceful enjoyment of possessions pursuant to Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR).
17. Secondly, the complainant complains in essence that, because of the non-payment of his “contributory” pension during the period from 1999 to 2007, and because of the inadequacy of the old age pension granted to him thereafter, he was left without the financial means to sustain himself. In this regard, the Panel considers that the complainant may be deemed to invoke a violation of his right to be free from inhuman and degrading treatment as guaranteed by Article 3 of the ECHR, as well as a violation of his right to social security and to an adequate standard of living as guaranteed by Articles 9 and 11 respectively of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
18. Thirdly, the complainant complains about the duration of the proceedings relating to his claim before the Municipal Court of Prishtinë/Priština. In this respect he can be deemed to invoke a violation of the right to a decision by a court within a reasonable time, in the sense of Article 6 § 1 of the European Convention on Human Rights (ECHR).
19. Finally, the complaint relates to the alleged discrimination of treatment between Kosovo Serbian and Kosovo Albanian pensioners residing in Kosovo, in violation of Article 14 of the ECHR.

IV. THE LAW

20. Before considering the case on its merits, the Panel has to decide whether to accept the case, taking into account the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.

A) Alleged Violation of Article 1 of Protocol No. 1 to the ECHR

1. *The Parties' Submissions*

21. The complainant complains that he has not received the contributory pension accrued within the legal framework in force at the time of the "ex-Yugoslavia", for the period 1999-2007.
22. He states that, following the establishment of UNMIK, he and other Kosovo Albanian pensioners were prevented from obtaining their contributory pensions, he submits that the funds accumulated from employees' contributions within that system "have disappeared" and that "no other funds have been created for Albanian pensioners". In this regard, the complainant claims that "UNMIK authorities immediately after the war in 1999 should have helped" him to receive his pension on a regular basis" and states that UNMIK shall be held responsible of "mismanagement" for not doing so.
23. With the regard to the alleged violation of the complainant's property rights, the SRSG states that, in order to be protected under Article 1 of Protocol No. 1 of the ECHR, the possessions concerned must be "adequately definable". Consequently, pension rights may qualify as "possessions" for the purpose of the ECHR where, by payment of contributions, an individual share in a fund is created, the amount of which can be determined at each particular moment". The SRSG argues that as UNMIK does not have "the full particulars of the scheme or details contributions made by the complainant", it is not in a position to comment on the applicability of Article 1 of Protocol No. 1 to the ECHR and reserves the right to provide its comments on this issue at a later stage.
24. The SRSG also states that the alleged violation complained of concerns pension rights accrued through pension contributions made to the state pension funds of the former Yugoslavia and/or FRY and that such funds are administered "by authorities in Belgrade". The SRSG also states that a violation of Article 1 of Protocol No. 1 to the ECHR requires, for the state's responsibility to be engaged, that the facts complained of are the results of an exercise of state authority. According to the SRSG, UNMIK was under "no legal obligation to pay pensions to persons who have accrued pension rights through other institutions". Therefore, insofar as the complainant complains against the deprivation of the complainant's possessions, this violation shall be attributed to the FRY or Serbia and, as such, shall be declared by the Panel outside of its jurisdiction *ratione personae*.
25. Further, the SRSG states that UNMIK has no obligation under Article 1 Protocol No. 1 to "find a solution" to the pension issue in Kosovo, which, in his view, is a political matter that shall be settled "between Pristina and Belgrade with the support of international stakeholders". According to the SRSG, even though Security Council Resolution No. 1244 (1999) provides that UNMIK's responsibilities shall include facilitating a political process designed to determine Kosovo's future status, this responsibility cannot be interpreted as an obligation "to find a solution" to the pension problem.
26. Finally, the SRSG argues that the complainant did not provide any evidence that he took steps to obtain payment of his pension from the Serbian authorities; in particular he did not file a claim against Serbia to the European Court of Human Rights which, according to the SRSG, would constitute an effective remedy, having considered that

Serbia is a party to the ECHR since 2004. For this reason, this part of the complaint shall be declared inadmissible pursuant to Section 3 of UNMIK Regulation No. 2006/12 for non-exhaustion of remedies.

2. *The Panel's Assessment*

27. With respect to the SRSG's objection that the protection afforded by Article 1 of Protocol No. 1 applies only to "definable" possessions and, as far as pensions are concerned, only to those cases where "by payment of contributions, an individual share in a fund is created, the amount of which can be determined at each particular moment", the Panel refers to the case law of the European Court of Human Rights (ECHR) on the obligations of states under Article 1 of Protocol No.1 with regard to its applicability to pensions. The Court has stated that this provision does not guarantee the right to acquire a pension (see ECtHR, Grand Chamber [GC], *Andrejeva v. Latvia*, no. 55707/00, judgment of 18 February 2009, § 77; ECtHR [GC], *Stummer v. Austria*, no. 37452/02, judgment 7 July 2011, § 82; ECtHR [GC], *Slivenko v. Latvia*, no. 48321/99, § 121, ECHR 2002-II; ECtHR [GC], *Kopecký v. Slovakia*, no. 44912/98, § 35(b), ECHR 2004-IX), or any right to a particular amount of pension payment (ECtHR, *Maggio and Others v. Italy*, no. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, judgment 31 May 2011, § 55). However, the Court has also held that where there is in force legislation providing for the payment as a right of a pension, that legislation has to be regarded as "generating proprietary interest" falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements and that the reduction or discontinuance of a pension may therefore constitute an interference with the peaceful enjoyment of possessions (see ECtHR [GC], *Carson and Others v. the United Kingdom*, no. 42184/05, § 64, ECHR 2010; ECtHR, *Rasmussen v. Poland*, no. 38886/05, 28 April 2009, § 71; ECtHR, *Grudić v. Serbia*, no. 31925/08, 17 April 2012, § 72).
28. The Panel therefore considers that this part of the complaint falls within the jurisdiction of the Panel *ratione materiae* and rejects the SRSG's objection in this regard.
29. With respect to the SRSG's argument that, as far as the complaint concerns the discontinuance of the payments by the Belgrade-based "Fund of Pensioners and Disabled People", it shall be declared inadmissible *ratione personae*, the Panel notes that the present complaint is expressly directed against UNMIK and that the complainant complains that UNMIK as the interim administration in Kosovo did not take the appropriate measures which were in its power to take in order to ensure the regular payment of his pension. Indeed, the Panel considers that the complainant alleges a violation of UNMIK's obligations stemming from Article 1 of Protocol No. 1 read in conjunction with Article 1 of the ECHR, which requires states to "secure to everyone within their jurisdiction" the enjoyment of the rights guaranteed by the ECHR. In this regard, the Panel refers to the case law of the European Court stating that the effective exercise of the right protected by Article 1 of Protocol No. 1 "does not depend merely on the State's duty not to interfere, but may require the adoption of positive measures of protection", "particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions" (see ECtHR *Öneryıldız v. Turkey*, no. 48939/99, judgment of 30 November 2004, § 134).
30. The Panel is mindful that, as a general rule, the notion of "jurisdiction" within the meaning of Article 1 of the ECHR must be considered as reflecting the position of the

state or authority concerned under public international law and that this notion normally includes area under its “overall control” (see ECtHR, *Loizidou v. Turkey*, no. 15318/89, judgment of 18 December 1996, § 56). The Panel notes that, in the circumstances of the present case, and pursuant to the United Nations Security Council Resolution 1244 (1999), UNMIK was mandated, “pending a final settlement”, with the interim administration of Kosovo without prejudice to “the sovereignty and territorial integrity of the Federal Republic of Yugoslavia”. In this regard, the Panel refers to the case law of the European Court that, in the presence of a factual situation which reduces the scope of jurisdiction of the authority concerned - in this case UNMIK *vis-à-vis* the Belgrade authorities – “the state in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign states and international organisations, to continue to guarantee the enjoyments of the rights and freedoms guaranteed by the Convention” (see ECtHR [GC], *Ilaşcu and Others v. Moldova and Russia*, judgment of 8 July 2004, § 333).

31. For these reasons, the Panel considers that the complaint under Article 1 of Protocol No. 1 to the ECHR falls within the jurisdiction *ratione personae* of the Panel pursuant to Section 1.2 of UNMIK Regulation No. 2006/12 and dismisses the SRSG’s objection in this regard.
32. The Panel therefore considers that this part of the complaint raises issues of fact and law, the determination of which shall depend on an examination of the merits. The Panel concludes therefore that this complaint is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.
33. The Panel does not see any other ground for declaring this part of the complaint inadmissible. The Panel therefore declares admissible the complaint under Article 1 of Protocol No. 1 to the ECHR.

B) Alleged violation of Article 3 ECHR

34. The complainant states that the failure to resolve his pension rights has led to him receiving inadequate assistance from UNMIK. Specifically, the payments provided under the alternative pension scheme have resulted in him being unable to enjoy an adequate standard of living.
35. The SRSG argues in essence that this part of the complaint is inadmissible *ratione personae*. The SRSG states that, insofar as the complaint concerns the inadequacy of the old age pension received by the complainant under the Kosovo pension scheme, it shall be intended as directed against the Kosovo authorities. According to the SRSG “the administration of the pension scheme in Kosovo by the Ministry of Labour and Social Welfare, is a transferred power and outside the direct responsibility of UNMIK”.
36. In this regard, the Panel notes that UNMIK Regulation No. 2001/35 on *Pensions in Kosovo* establishing the new Kosovo pension scheme stated, at Section 2.3, that “the setting of economic policy with respect to pension, as part of budgetary and fiscal policy, remains under the direct supervision of the SRSG”. Further, the Panel has already determined the responsibility of UNMIK, from a human rights perspective, for the actions imputable to a Provisional Institution for Self-Government in Kosovo (see, Human Rights Advisory Panel (HRAP), *Spahiu*, no. 02/08, partial opinion of 20 March 2009, § 29), including the Kosovo Ministry of Labour and Social Welfare. The Panel has also held, as a general rule, that UNMIK retained this responsibility until the entry

into force of the Kosovo Constitution on 15 June 2008 (see HRAP, *Kolë Krasniqi*, case no. 48/08, decision of 13 March 2010). The Panel therefore rejects the objection of the SRSG.

37. Concerning the subject matter of the complaint, the Panel notes that in the instant case UNMIK by way of Regulation No. 2001/35 established a pension scheme in Kosovo whereby the complainant has been receiving 45 euros per month. The complainant states that the amount provided has not been sufficient to buy even the medications that he needs. The Panel recalls the case law of the European Court of Human Rights that a “complaint about a wholly insufficient amount of pension or other social benefits may, in principle, raise an issue under Article 3 of the ECHR which prohibits inhuman or degrading treatment” (see ECtHR, *Larioshina v. Russia*, no. 56869/00, decision of 23 April 2002, § 3). The Panel also notes that under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), states have an obligation to fulfil the right to social security ensuring that “the social security system will be adequate” (see Committee on Economic, Social and Cultural Rights, General Comment No. 19, The Right to Social Security, E/C.12/GC/19, 4 February 2008). Similarly, Article 11 of the ICESCR states the right to an adequate standard of living.
38. The Panel considers that this part of the complaint raises issues of fact and law, the determination of which shall depend on an examination of the merits. The Panel therefore concludes that this part of the complaint is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.

C) Alleged violation of Article 6 § 1

39. The complainant states that, as of 8 March 2010, the date of submission of his claim to the Panel, the Municipal Court of Prishtinë/Priština had not adjudicated his claim to obtain the reinstatement of his status as “contributory” pensioner and the backdated payments of his pension. The Panel considers that he relies on Article 6 of the ECHR.
40. The SRSG in his comments notes that the claim was filed at the Municipal Court of Prishtinë/Priština on 4 May 2007 and that UNMIK’s responsibility in the area of rule of law, including the functioning of the courts ceased on 9 December 2008. Consequently the period of time relating to this element of the claim was 20 months during which time UNMIK exercised responsibility. The SRSG concludes, therefore that “the 20 month period between the filing of the claim and the conclusion of UNMIK’s responsibilities in the rule of law area does not amount to an inordinate delay”.
41. The Panel is cognisant of the fact that 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. It follows, that from 9 December 2008, UNMIK can no longer be held responsible for acts or omissions of the Courts of Kosovo.
42. The Panel notes that the period between 4 May 2007 and 9 December 2008 represents approximately 20 months. The Panel does not consider that during that period there was a delay of such a length that it was unreasonable.
43. The Panel therefore holds this part of the complaint to be manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.

d) Alleged Discrimination under Article 14 ECHR

44. The complainant alleges discrimination with respect to payment of the pension. Specifically, that Kosovo Serbs retain regular receipt of pension funds whilst Kosovo Albanians stopped receiving any payments altogether.
45. In his comments, the SRSG highlights that UNMIK had no power or control with regard to Serb pensioners living in Kosovo receiving their pension on a regular basis from Belgrade. As such any alleged discriminatory practice in the selection of beneficiaries and the payment of pensions cannot be attributed to UNMIK and therefore the Panel lacks jurisdiction *ratione personae* over this part of the complaint.
46. The Panel notes that insofar as the complainant complains against the fact that the Belgrade-based Fund of Pensioners and Disabled People in Belgrade maintains the payment of pensions accrued within the former Yugoslavia pension system in favour of Kosovo Serbs, allegedly acting in a discriminatory manner, such actions are exclusively imputable to the Serbian authorities and do not engage in any way the responsibility of UNMIK. The Panel therefore holds this part of the complaint to be outside the jurisdiction *ratione personae* of the Panel within the meaning of Section 1.2 of UNMIK Regulation No. 2006/12.

FOR THESE REASONS,

The Panel, unanimously,

- **DECLARES ADMISSIBLE THE COMPLAINT UNDER ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- **DECLARES ADMISSIBLE THE COMPLAINT UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND UNDER ARTICLES 9 AND 11 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS;**
- **DECLARES INADMISSIBLE THE REMAINDER OF THE COMPLAINT**

Andrey ANTONOV
Executive Officer

Marek Nowicki
Presiding member