

**OPINION**

**Date of adoption: 30 May 2014**

**Case No. 319/09**

**Nevenka RISTIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 30 May 2014,

with the following members present:

Marek Nowicki, Presiding Member

Christine Chinkin

Françoise Tulkens

Assisted by

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, makes the following findings and recommendations:

1. **PROCEEDINGS BEFORE THE PANEL**
2. The complaint was introduced on 23 March 2009 and registered on 12 November 2009.
3. On 9 July 2011, the Panel requested information concerning the complaint from the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related Matters (the Special Chamber). A response was received from the Special Chamber on 9 August 2011.
4. On 11 August 2011, the Panel requested additional information from the Special Chamber. The Special Chamber responded on 18 August 2011.
5. On 5 October 2011, the Panel requested the complainant to submit additional information. The complainant’s response was received on 8 December 2011.
6. On 26 September 2012, the Panel declared the complaint admissible.
7. On 16 October 2012, the Panel forwarded the decision on admissibility to the SRSG, inviting UNMIK’s observations on the merits of the case. On 14 November 2012, the SRSG provided UNMIK’s response.
8. On 20 November 2013, the Panel requested additional information from the complainant. On the same day, the complainant provided her response.
9. On 3 December 2013, the Panel gathered further information on the case from the Special Chamber.
10. On 18 December 2013, the Panel, in light of the additional information received, requested the SRSG to provide additional comments on the merits of the case. The SRSG provided UNMIK’s response on 16 January 2014.
11. On 20 February 2014, the Panel re-communicated the complaint to the SRSG inviting UNMIK’s comments on the admissibility and merits of the case. The SRSG submitted UNMIK’s response on 1 April 2014.

**II. THE FACTS**

1. The complainant is a former resident of Kosovo currently residing in Montenegro. She states that she was employed by the socially-owned enterprise “Eximkos”, Prishtinë/Priština from December 1975 until 1999, when she left Kosovo for security reasons and became a displaced person in Montenegro. She further states that she formally retained the status of employee of “Eximkos” until she was “pensioned off” in the year 2000.
2. The complainant states that, on 31 May 2007, she filed a request with the Kosovo Trust Agency (KTA) seeking the right to her share of the proceeds from the privatisation of the enterprise “Eximkos”. On 21 October 2007, the KTA published the list of eligible employees entitled to a share of the proceeds of privatisation, which included the name of the complainant.
3. According to the information received by the Panel from the Special Chamber on 3 December 2013, a group of employees of “Eximkos” filed a claim, dated 15 May 2008, against the inclusion of 35 persons, among them the complainant, in the KTA list of eligible employees. It is stated in this clain that the complainant’s employment with “Eximkos” had been terminated by a decision of the company No. 426, dated 29 November 2000, that her name did not “figure in the personal incomings for the year 1999” and that she did not have “a worker’s book”. The claim further states that the management of “Eximkos” had decided to terminate the working relationship of those employees, such as the complainant, who had not shown up at work within one year from 29 August 1999. The claim also states that in their opinion none of the employees concerned had been discriminated against “because the same persons for months have been in Prishtina” until they had heard that the company was being privatised and until they “had sold their apartments that were given to them by “Eximkos”.
4. On 20 November 2007, the KTA submitted to the Special Chamber its response to the abovementioned claim challenging its list of employees eligible to a share of the privatisation proceeds. The KTA stated that the objection against the complainant’s inclusion in the list was unfounded. According to the KTA the complainant did provide a copy of her workbook, “still open”, which showed her employment with the enterprise. Further, the complainant had alleged circumstances, namely her failure to report to work at the enterprise after 1999 due to the unsafe situation, from which discrimination could be presumed. In this respect the KTA recalled the reasoning of the Special Chamber in the cases of *Termosistem* (SCEL-04-001, judgment of 9 July 2004) and *Progress* (SCEL-05-002, judgment of 20 January 2006) establishing that the tensions along ethnic lines in Kosovo, including in Prishtinë/Priština were “well documented” and thus, a matter of “common knowledge”, which did not need to be proved, and that failure of the authorities to take into account the situation of different ethnic groups during the privatisation process amounted to indirect discrimination. The KTA also submitted that those employees challenging the complainant’s inclusion in the list had not proved that discrimination did not exist in that specific case.
5. The documents received from the Special Chamber show that, on 18 June 2008, the complainant made written submissions in response to the claim challenging her inclusion in the list (§ 13). The complainant argued that the allegations made against her were tendentious and not supported by evidence. In particular, she stated that she had not been informed by the “Eximkos” management that employees should report to work within one year or that her employment had been terminated in November 2000. She also stated that it was “not true” that she did not have a workbook to prove her employment with “Eximkos”. In fact, her workbook had been kept at the enterprise until she had managed to retrieve it through an Albanian friend in 2001. Subsequently, it had been submitted to the KTA “along with all other documents”. The complainant also stated that she had briefly received information about the claim against her inclusion in the list over the telephone and, while waiting to receive a copy of it, she was writing to the Special Chamber to request that the claim should be supported by evidence, which was not the case.
6. It also appears from the file of the Special Chamber that on an unspecified date, after receiving by fax a copy of the claim against her, the complainant submitted further comments to the Special Chamber. She stated that she was re-submitting copies of the documents, including her workbook, proving her employment with “Eximkos”. She also stated that the claim against her had been lodged solely on the basis of “discrimination against non-Albanian employees”. Further, as she was living as a displaced person in Montenegro and did not have any income at that time, she was not able to go and attend a hearing in Kosovo; however she hoped that all the documents she was sending would be sufficient to “prove the complainants wrong”. Attached to the complainant’s submission to the Special Chamber is a certified copy of her workbook (pages 1, 2, 3 , 6 and 7) which states that she had been employed with “Eximkos” in Prishtinë/Priština since 1975 and does not indicate any date of termination for that employment (and is therefore “still open”). She also attached a copy of her health insurance card, also stating that she was employed at “Eximkos” in Prishtinë/Priština and indicating February 1999 as the last date of renewal.
7. On 23 October 2008, the Special Chamber issued a judgment on the matter (SCEL-08-002) excluding the complainant from the list of eligible employees. The judgment stated that it was “final, legally binding and not appealable”. According to the reasoning of the Special Chamber the complainant

“did not submit certified proof issued by a competent body to show that her workbook was open; but she submitted only the first page of the workbook which does not show that she was employed with the SOE “Eximkos” based in Prishtina. This proof cannot verify the fact that she had the status of employee until the date of privatisation. Also she did not submit any other relevant proof as provided by law to verify the fact that she was an employee until the date of privatisation. Likewise, she did not prove that she was discriminated. Therefore she was unjustly qualified as an elegible employee pursuant to Article 10.4 of the Regulation 20003/13”.

1. In her submission to the Panel, the complainant states that, as “no lawsuit, complaint, notification or the like” was received at her address in Montenegro, and since she was confident of her entitlement, in December 2008 she went along with her colleagues to “Kasabank” to collect her share of the proceeds, only to find out that she had not in fact a right to receive any money from the privatisation of the enterprise “Eximkos”. She states that only after contacting the Special Chamber by telephone was she informed of the judgment issued on 23 October 2008. On an unspecified date in December 2008 and upon her request, a copy of the judgment was delivered to her. The complainant states that the judgment relied on an erroneous evaluation of the facts since she did provide the Special Chamber with certified copies of her employment record proving that she had started working at “Eximkos” Prishtinë/Priština in 1975, as well as copies of other documents (such as her health insurance card) proving that her employment was on-going in 1999. She further states that she left Kosovo and her employment after 24 years against her will and as a result of discrimination, which is “something that does not need to be proved since it is a well-known fact”.

**III. THE COMPLAINT**

1. The complainant complains generally about the fairness of the proceedings before the Special Chamber relating to her eligibility for a share of the proceeds of the privatisation of “Eximkos”. She claims that she was on the payroll of “Eximkos” for 24 years before, due to the security situation in Kosovo, she had left to become a displaced person in Montenegro. She claims that she was entitled to an appropriate share of the proceeds from its privatisation. However the Special Chamber unfairly disregarded the evidence and submissions presented by her in this respect. She also claims that the Special Chamber did not inform her about the complaint lodged against her inclusion in the list and did not give her timely notification of its decision to remove her from the list. She claims that, for these reasons, her right to a fair trial, guaranteed by Article 6 of the European Convention on Human Rights (ECHR) has been violated.
2. Further, the complainant complains that the Special Chamber ignored the indirect discrimination against persons from the Serbian minority. She states that she was unable to continue to work in the enterprise because, as a Serbian employee, she had to leave Kosovo for security reasons. As a consequence she was *de facto* eliminated from the privatisation process. In this respect, she invokes a violation of Article 14 of the ECHR, read in conjuction with Article 6 of the ECHR.

**IV. THE LAW**

**A. The Parties’ Submissions**

*The complainant’s submissions*

1. The complainant claims that she was unfairly excluded by the Special Chamber from the list of employees eligible to receive a share of the proceeds of the privatisation of the enterprise "Eximkos". She claims that she had been employed with the enterprise since 1975 and that in 1999 she had to leave Kosovo due to discrimination and threats to her security. Therefore she met the criteria established by law to be included in the list of eligible employees.
2. The complainant argues that the proceedings before the Special Chamber were not fair and thus in violation of Article 6 of the ECHR on a number of points. She complains that the Court did not properly notify her of the proceedings in which her right to a share of the proceedings was challenged and forwarded her a copy of its final judgment only in December 2008, when she requested it. She also states that the Special Chamber’s findings relied exclusively on the untrue statements made by other employees and ignored the submissions and evidence presented by her. In particular, the complainant states that the Special Chamber disregarded the documenting evidence, namely a certified copy of her workbook, proving her employment with “Eximkos” since 1975, as well as her submission that she had been discriminated against due to her Serbian ethnicity. Indeed, according to the complainant, “the manifest existence of indirect discrimination against the persons of Serbian and other minority nationalities” is a “well-known fact” which “does not need to be proved on a separate basis”.
3. The complainant further complains that the Special Chamber ignored the indirect discrimination of persons of Serbian ethnicity and other ethnic minorities in violation of Article 14 of the ECHR. Because of the security situation in Kosovo, as a Serbian employee she was “unable to enter the enterprise” and perform her work activites. She states that “had the circumstances allowed for the continuation of life and work to the persons of Serbian and other minority nationalities on the territory of Kosovo”, she “would have continued being on the eligible workers’ list” according to the criteria set at Article 10.4 of UNMIK Regulation No. 2003/13. In light of these circumstances, a narrow interpretation of the aforementioned provision “would bring into an unjustifiably unfavourable position a number of persons belonging to the endangered minority nationalities, who would be thus objectively denied their shares from the proceeds of privatisation of the enterprise, contrary to Article 14”.

*The SRSG’s submissions*

1. In rejecting the possibility that the complainant may invoke a violation of Article 6 § 1 of the ECHR, the SRSG makes the following arguments. First, the SRSG states that the complainant “had, at all times, access to legal remedies” and that, had the complainant sought these remedies, “the Special Chamber would have been in a position to review the lawfulness of its decision, to ensure correct application of the law and observation of the right procedures”. The SRSG recalls the case-law of the European Court of Human Rights that “in considering whether Article 6, ECHR has been complied with at any particular stage, account has to be taken of the entirety of proceedings in the domestic legal order and that deficiencies at one stage may be compensated for at another stage”.
2. With respect to the remedies available to the complainant in the present case, the SRSG states that Section 7 of UNMIK Regulation No. 2008/4*, Amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters* concerning the Rules of Procedure before the Special Chamber “by implication provided for judicial review”. This provision enables the SRSG to promulgate Rules of Procedure for the proceedings before the Special Chamber which “shall provide a party with a meaningful opportunity to have his claim adjudicated, including a judicial review of such adjudication … in accordance with norms established under the European Convention on Human Rights and having regard to generally accepted international standards. In cases that are not clearly or expressly covered by such Rules the Special Chamber shall have authority to issue additional Rules of Procedure consistent with these principles.”
3. Moreover, the SRSG argues that, “when the complainant became aware of the decision of the Special Chamber in December 2008, she had every right to appeal against the decision of the Trial Panel in accordance with Section 67.12 of the *UNMIK Administrative Direction No. 6 of 2008 on the Establishment of the Special Chamber of the Supreme Court on Kosovo Trust Agency Matters*, which became law applicable on 31 December 2008.”
4. In response to the complainant’s argument that the Special Chamber had disregarded the evidence presented to it, the SRSG, in his initial comments on the merits, dated 28 March 2012, stated that there was no evidence that the Special Chamber had assessed the evidence provided by the complainant in an inaccurate way. In particular, the SRSG noted that, according to the Special Chamber, the complainant had not submitted the required documentation to prove that she was employed with the enterprise “Eximkos” nor had proved that she had been discriminated against. However, in his comments dated 16 January 2014, following the receipt from the Panel of additional documents from the Special Chamber’s file, in particular a copy of the complainant’s certified workbook and health insurance card as part of the Special Chamber’s file (see § 16 above), the SRSG stated that “UNMIK does not dispute that documents may have been presented to the Special Chamber by the complainant”. However, according to the SRSG “there is no evidence that the Special Chamber has assessed the evidence provided by the complainant in an inaccurate manner in arriving at its reasoned decision of 23 October 2008”. In this respect, the SRSG argues that the Panel “may not substitute itself for the appeal panel in so far as undertaking deliberations and/or forming conclusions on the substance of a decision considered and adjudicated upon by a lawfully established court having the appropriate jurisdiction regarding the observance of procedural issues, evidentiary assessment or establishment of proof”. For these reasons, the SRSG concluded that there is no violation of Article 6 that can be invoked by the complainant.
5. With respect to the complainant’s allegations under Article 14 of the ECHR (prohibition of discrimination), in his comments on the admissibility and merits of the complaint, the SRSG states at the outset that this provision of the Convention does not apply to the case. According to the SRSG, “only those equality issues that are related to a substantive provision in the Convention or one of its Protocols can be addressed in the context of Article 14. Due to its accessory nature, Article 14 specifically cannot be invoked in employment related matters. With regard to its application in connection with Article 6 of the ECHR, since there was no violation of Article 6 in the instant matter, Article 14 is not applicable and therefore cannot be invoked by the complainant”.
6. The SRSG further argues that the Special Chamber in its judgment has come to the conclusion that there was no discrimination against the complainant. According to the SRSG “as a consequence, and unless the assessment of the evidence by the Special Chamber is manifestly inaccurate, the judicial process is to be presumed as fair and accurate and the decision of the Special Chamber not rendered on the basis of discrimination”. The SRSG also states that “it is not within HRAP’s perview to assess the legality and accuracy of decisions made by competent judicial institutions, unless there is evidence that such decisions have been rendered in an obviously unfair and unaccurate way”. Further, the SRSG argues that in the legal reasoning of its judgment the Special Chamber has referred to the applicable law, namely Article 8.1 of the Anti-Discrimination Law promulgated by UNMIK Regulation No. 2004/32, deeming that the complainant did not substantiate her allegation that she had been discriminated against, as required by the aforementioned law. In addition, the SRSG reiterates his argument that the complainant could have appealed the Special Chamber’s judgment pursuant to Section 4.4 of UNMIK Regulation No. 2008/4 Amending UNMIK Regulation No. 2003/13 on the *Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters*, which entered into force in December 2008, supposedly around the same time when the complainant became aware of the Special Chamber’s judgment SCEL-08-002.
7. Therefore, according to the SRSG, a violation of Article 14 of the ECHR, in conjunction with Article 6 of the ECHR, cannot be invoked by the complainant.
8. **The Panel’s Assessment**
9. **Applicable domestic law**
10. The Panel notes that the complainant’s claim to be included in the list of employees eligible to receive a share of the proceedings from the privatisation of “Eximkos” was examined by the Special Chamber in the light of Section 10 of UNMIK Regulation No. 2003/13, as amended by UNMIK Regulation No. 2004/45 of 19 November 2004, which sets out the legal procedures for challenge to the employee lists as issued by the KTA.
11. Section 10.1 of the Regulation recognises the “special status” of employees of socially-owned enterprises and the impact that privatisation has on their status. According to this provision, 20% of the proceeds from the sale of shares of a privatised socially-owned enterprise are reserved for the employees of the company who meet certain conditions. An employee is considered eligible to a share if he/she is registered as an employee with the socially-owned enterprise at the time of the privatisation and is established to have been in the payroll of the enterprise for not less than three years (Section 10.4).
12. Section 10.2 and 10.3 of Regulation No. 2003/13 set out the procedure to be followed by the KTA when establishing a list of eligible employees. Taking into account the particular context in which privatisation is taking place in Kosovo, Section 10.2 of the Regulation provides that, initially, the list of employees shall be formulated on a non-discriminatory basis by the representative body of employees in the enterprise concerned, in cooperation with the Federation of Independent Trade Unions of Kosovo and then transmitted to the KTA. The Board of the KTA shall review the list and make adjustments as necessary to ensure equitable access by all eligible employees to the funds to be distributed. The official list is then made public by the KTA, together with a notice informing any aggrieved party of their right to file a complaint against the list (Section 10.3).
13. While setting up the criteria which an employee must meet in order to be eligible for inclusion in the list, Section 10.4 of the Regulation states that failure to meet such criteria is not a bar to inclusion in the list once it can be proved that the employee would have been eligible for inclusion if she/he had not been subject to discrimination. Such an aggrived individual can submit a complaint to the Special Chamber pursuant to Section 10.6.
14. Section 10.6 (b) of the Regulation concerns the evidence to be presented to the Special Chamber by former employees seeking to be included in the list: “Any complaint filed with the Special Chamber on the grounds of discrimination as reason for being excluded from the list of eligible employees has to be accompanied by documentary evidence of the alleged discrimination.”
15. In its judgment of 15 June 2006 the Special Chamber held that Section 10.6 (b) of Regulation 2003/13 had been superseded by Article 8.1 of the Anti-Discrimination Law (Law No. 2004/3), adopted by the Assembly of Kosovo on 19 February 2004 and promulgated by the SRSG on 20 August 2004 (UNMIK Regulation No. 2004/32 on the Promulgation of the Anti-Discrimination Law adopted by the Assembly of Kosovo).
16. The Anti-Discrimination Law was adopted in order to prevent discrimination and to promote and put into effect the principle of equal treatment of the citizens of Kosovo. Its relevant provisions read as follows:

Article 8

Burden of proof

8.1. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

8.2. Paragraph 8.1 shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a complainant may establish or defend their case of discrimination by any means, including on the basis of statistical evidence.”

Article 11

11.1. When this law comes into effect it supersedes all previous applicable laws of this scope.

11.2. The provisions of the legislation introduced or into force for the protection of the principle of equal treatment are still valid and should be applied if they are more favourable than provisions in this Law.

1. **Admissibility**
2. **As to the date of introduction of the complaint**
3. At the outset, the Panel notes that, in its admissibility decision of 26 September 2012, it considered that the complaint had been introduced on 22 November 2009. The Panel, however, notes that the complainant first forwarded her complaint to the Panel through the UNMIK Office in Belgrade on 23 March 2009, as proved by the delivery slip bearing this date also presented to the Panel.
4. Therefore, in accordance with its consistent practice and with the practice of the European Court of Human Rights, to consider as decisive the date on which a complaint has been mailed to the Panel and not the date on which a complaint is received or registered (see, *mutatis mutandis*, European Court of Human Rights (ECtHR), *Kipritci v. Turkey*, no. 14294/04, decision of 3 June 2008, § 18; see also Human Rights Advisory Panel (HRAP, B.K., no. 85/10, decision of 22 August 2012, § 15), the Panel considers that the complaint was introduced on 23 March 2009.
5. **Alleged violation of Article 6 of the ECHR**
6. The Panel recalls that by its admissibility decision, dated 26 September 2012, it declared admissible the complaint under Article 6 of the ECHR (right to a fair trial) the complaint that the Special Chamber allegedly failed to notify the complainant of the judicial proceedings brought against her before the Special Chamber. However, upon review of the additional documents subsequently received from the Special Chamber (see §§ 8, 15-16 above), the Panel has to re-assess the admissibility of this part of the complaint under Article 6.
7. As stated above (§ 15-16), the documents received from the Special Chamber include two written submissions from the complainant to the Special Chamber which unequivocally show, contrary to her statements, that the complainant had been informed of the proceedings against her and had indeed participated in them. For this reason, the Panel considers that this part of the complaint is inadmissible as manifestly ill-founded pursuant to Section 3.3 of UNMIK Regulation No. 2006/12 *On the Establishment of the Human Rights Advisory Panel*.
8. Concerning the complainant’s complaint about the fairness of the proceedings before the Special Chamber, the Panel notes the SRSG’s arguments that the requirement of fairness covers the proceedings as a whole and not only one aspect or instance of them and deficiencies at one stage may be compensated for at another. The complainant had available to her accessible remedies against the lawfulness of the judgment of the Special Chamber – a judicial review pursuant to Section 7 of UNMIK Regulation No. 2008/4 and an appeal pursuant to Section 67.12 of the UNMIK Administrative Direction No. 2008/06 *Amending and Replacing UNMIK* Administrative DirectionNo. 2006/17*, Implementing UNMIK Regulation No. 2002/13 On the Establishment of the Special Chamber of the Supreme Court on Kosovo Trust Agency Matters*. In this respect, the Panel deems that this argument is strictly linked to the issue as to whether the complainant had exhausted all available remedies, which it has already addressed in its admissibility decision (HRAP, *Ristić*, no. 319/09, decision of 26 September 2012, §§ 9-13).
9. In its decision the Panel held that there were no effective remedies available to the complainant against the Special Chamber’s judgment. Concerning the SRSG’s argument that the complainant could have appealed the judgment to an appellate body in accordance with Section 67.12 of the UNMIK Administrative Direction No. 6/2008 *On the* Establishment *of the Special Chamber of the Supreme Court on Kosovo Trust Agency Matters*, the Panel has stated that the UNMIK Administrative Direction mentioned above entered into force only on 31 December 2008. Therefore, at the time of the issuance of the Special Chamber judgment on 25 October 2008, as well as at the time when the complainant became aware of the judgment at some time in December 2008, no appeal was possible from a judgment of the Special Chamber (see HRAP, *Ristić*, cited above, §§ 12-13; see also HRAP, *Todorović*, no. 33/08, decision of 17 April 2009, § 35).
10. Concerning the SRSG’s argument that an additional remedy was available to the complainant pursuant to Section 7 of UNMIK Regulation No. 2008/4, the Panel notes that this provision envisages the SRSG’s power to promulgate by Administrative Direction the Rules of Procedures for proceedings before the Special Chamber to “provide a party with a meaningful opportunity to have his claim adjudicated, including a judicial review” in accordance with the principles established by the ECHR and provides the Special Chamber, in case of gaps, with the authority to issue additional Rules of Procedure consistent with these principles. The Panel notes that the judgment of the Special Chamber states its decision to be “final, legally binding and not appealable.” In light of such an express statement, it is not reasonable to expect the complainant to seek a remedy which, by the SRSG’s own admission, is available only “by implication.” The Panel further considers that, insofar as the SRSG suggests that the complainant should have addressed the Special Chamber requesting the issuance of additional Rules of Procedure granting her a right to judicial review, this can in no way be considered an effective remedy established by law, as required by ECHR, Article 6 § 1 (compare, e.g., ECtHR, *Horvat v. Croatia*, no. 51585/99, judgment of 26 July 2001, ECHR, 2001-VIII, § 47; ECtHR Grand Chamber [GC], *Sürmeli v. Germany*, no. 75529/01, judgment of 8 June 2006, ECHR, 2006-VII, § 109; ECtHR, *Belevitskiy v. Russia*, no. 72967/01, judgment of 1 March 2007, § 60).
11. Therefore the Panel rejects the SRSG’s objections and declares admissible the complaint under Article 6 of the ECHR that proceedings were unfair.
12. **Alleged Violation of Article 14 of the ECHR, read in conjunction with Article 6 of the ECHR**
13. In his comments related to the admissibility and merits of the complaint under Article 14 of the ECHR, in conjunction with Article 6 of the ECHR, the SRSG firstly states that Article 14 would not apply *ratione materiae* to the present case based on the arguments that Article 14, in his view, applies only in the case that a violation of a substantive provision of the Convention (in this case Article 6) has been found and that Article 14 does not applyto employment-related cases.
14. First, the Panel recalls that from as early as 1968, in the *Belgian Linguistics Case*, the European Court of Human Rights consistently stated that while it is true that the guarantee of non-discrimination under Article 14 has no independent existence as it relates solely to rights and freedoms set forth in the Convention, there can still be a breach of Article 14 even when the substantive right referred to has not been violated, provided that the facts in issue fall within the ambit of one or more of the Convention’s provisions (see ECtHR, *Case “Relating to Certain Aspects of the Laws on the Use of Languages in Belgium”v. Belgium,* no. 1474/62 and others, judgment of 23 July 1968, § 9; see also ECtHR, *Van Raalte v. the Netherlands*, no. 20060/92, judgment of 21 February 1997, § 33; ECtHR, *Petrovic v. Austria*, no. 156/1996/775/976, judgment of March 1998, § 22; ECtHR, Grand Chamber [GC], *Stec and Others v. the United Kingdom*, no. 65731/01 and 65900/01, judgment of 12 April 2006, § 51; ECtHR, *Zarb Adami v. Malta*, no. 17209/02, judgment of 20 June 2006, § 42; ECtHR [GC], *Konstantin Markin v. Russia*, no. 30078/06, judgment of 22 March 2012, § 124; ECtHR [GC], *Fabris v. France*, no. 16574/08, judgment of 7 February 2013, § 47).
15. Further, the European Court has affirmed the applicability of Article 14 to employment cases (see, for example, ECtHR, *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, judgment of 27 July 2004). In instances of indirect discrimination, there is no requirement to prove a discriminatory intent (see ECtHR [GC], *D.H. and Others v. Czech Republic*, no. 57325/00, judgment of 13 November 2007, § 194; and ECtHR, *Horváth and Kiss v. Hungary,* no. 11146/11, judgment of 29 January 2013 § 106).
16. The Panel notes that in the present case the complainant alleges that she was discriminated against by the proceedings before the Special Chamber. Such proceedings constitute a determination of the complainant’s civil rights and obligations and thus bring the subject matter of the complaint within the scope of Article 6 of the ECHR. In the Panel’s view, this is sufficient to make Article 14 applicable (see also HRAP, *Guga,* no. 47/08, opinion of 24 January 2014, §§ 58-60). The Panel therefore rejects the SRSG objection in this respect.
17. Secondly, the Panel notes that the SRSG, also with respect to the admissibility of the complaint under Article 14 of the ECHR, in conjunction with Article 6 of the ECHR, reiterates his argument that the complainant could have appealed the Special Chamber’s judgment. As the Panel considers that, with this argument, the SRSG suggests that not all available remedies have been exhausted by the complainant, the Panel refers to its reasoning on the admissibility of the complaint under Article 6 (see §§ 42-45 above) that, in fact, no effective remedy was available to the complainant against the Special Chamber’s judgment. The Panel therefore rejects the SRSG’s objection in this respect and declares this part of the complaint admissible.

**2. Merits**

1. **Alleged Violation of Article 6 of the ECHR**
2. Insofar as the complaint under Article 6 of the ECHR has been declared admissible, the complainant complains about two aspects of the proceedings before the Special Chamber: the Special Chamber’s failure to take into account the evidence and submissions presented in support of her inclusion in the list of eligible employees and the delay in the notification to her of the Special Chamber’s judgment.

*Examination of evidence and submissions by the Special Chamber*

1. The complainant in essence complains that the Special Chamber’s findings in her case were arbitrary, in violation of Article 6 of the ECHR. She states that she did provide the Special Chamber with a certified copy of her workbook as well as a copy of her health insurance card, proving her employment with “Eximkos” from 1975 until 1999. She also made a submission to the Special Chamber that she could not continue to work at the enterprise beyond June 1999 because of discrimination due to her Serbian ethnicity which is a “well known” circumstance. She therefore met the criteria established by law to receive a share of the privatisation proceeds. Nevertheless, in its judgment, the Special Chamber decided to exclude her from the list of eligible employees.
2. The Panel agrees with the SRSG that it is not within its jurisdiction to replace its own assessment of the facts for that of the national judicial authorities, in the present case of the Special Chamber. The Panel refers to its own jurisprudence and to the jurisprudence of the European Court of Human Rights that, as a general rule, it is for the competent courts to assess the evidence before them, establish the facts and interpret domestic laws. The Panel will, in principle, not interfere with such an assessment unless the decisions reached by the competent courts appear arbitrary or manifestly unreasonable (see ECtHR, *I.J.L. and Others v. United Kingdom*, nos. 29522/95, 30056/96 and 30574/96, judgment of 19 September 2000, § 99, *ECHR*, 2000‑IX; ECtHR, *Khamidov v. Russia*, no. *72118/01*, judgment of 15 November 2007, § 170; see also HRAP, *Parlić*, no. 01/07, opinion of 18 June 2010, § 35). The Panel's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was assessed, were fair (ECtHR, *Ebanks v. United Kingdom*, no. 36822/06, judgment of 26 January 2010, § 74; ECtHR, *Khamidov v. Russia*, cited above, § 170; HRAP, *Parlić*, cited above, § 35).
3. The Panel notes that the complainant had been initially included by the KTA in the list of eligible employees and that a claim was lodged against her with the Special Chamber by a group of employees of “Eximkos” claiming that she did not “figure in the personal incomings as from the year 1999” and that she did not “have a worker’s book”.
4. The file of the Special Chamber shows that, in support of her claim to be included in the list of eligible employees, the complainant stated that she had been working for the enterprise since 1975, that in March 1999 because of the security situation in Kosovo she became a displaced person in Montenegro; however, her employment with the enterprise had not been officially terminated until she retired in 2010. In support of her claim she submitted to the Special Chamber a certified copy of pages 1, 2, 3, 6 and 7 of her workbook proving her employment with “Eximkos” in Prishtinë/Priština since 1975 (workbook “open”) and a copy of her health insurance card as employee of “Eximkos” in Prishtinë/Priština, renewed for the last time in February 1999. In support of the complainant’s inclusion in the list, the KTA had made its own submissions to the Special Chamber, confirming that she had provided a copy of her workbook, “still open”, showing employment with the enterprise. The KTA had also stated that the complainant and other employees belonging to Serbian and other ethnic minorities had failed to attend the enterprise after 1999 due to the unsafe security situation and not because they were “voluntarily absent” from the workplace. She had thus put forward circumstances that indicate discrimination.
5. The Special Chamber decided that the complainant did not meet the criteria to receive a share of the privatisation proceeds based on the following grounds: “she did not submit certified proof issued by a competent body to show that her workbook was open”; “she only submitted the first page of the workbook which does not show that she was employed with the SOE based in Prishtina”; she did not submit evidence that “she had the status of employee until the date of privatisation”; “she did not prove that she was discriminated”.
6. The Panel is disturbed that the Special Chamber ignored the fact, as confirmed by the KTA, that the complainant did submit a copy of the workbook, duly certified and “still open”, as well as a copy of her health insurance card, both proving her employment with the enterprise in Prishtinë/Priština from 1975 until at least February 1999, without justifying why the documents presented could not be considered authentic or accurate evidence. Concerning the element of the complainant’s employment at the time of the privatisation, the Panel notes that according to Section 10.4 of UNMIK Regulation No. 2003/13 failure to meet such criteria is not a bar against inclusion in the list for those employees who claim that they would have been still employed with the enterprise if they had they not been subjected to discrimination - which is exactly the statement put forward by the complainant.
7. In this regard, the Panel recalls that according to Section 8 of the Kosovo Anti-Discrimination Law, it is for the employee who is no longer working for the enterprise to establish facts from which it may be presumed that there has been direct or indirect discrimination, while it is for the opponent party to rebut the presumption by proving that there has been no discrimination in the specific case. The Panel also notes the KTA’s submission that in other cases of privatisation, the same Special Chamber had found that the discrimination against Serbian and other ethnic minorities in the aftermath of the conflict in Kosovo is a “a matter of common knowledge” that does not need to be proved (see § 14 above; see also HRAP, *Guga*, cited in § 49 above, at §§ 70-71). The Panel finds therefore surprising that, notwithstanding the facts established by the complainant – that she had to leave Kosovo in March 1999 fearing for her safety – the Special Chamber was satisfied by the general rebuttal statement made by those challenging her inclusion in the list that there had been “no discrimination because the same persons have been in Prishtina” until they had heard that the company was being privatised” and until they “had sold their apartments that were given to them by “Eximkos”.
8. Therefore, the Panel finds that, by not taking into account the evidence submitted by the complainant proving her employment status with the enterprise until 1999 and by not taking into proper consideration her submission that she had been discriminated against, the Special Chamber did not assure her a fair trial. The Panel therefore considers that there was a violation of Article 6 of the ECHR in this respect.

*Delay in the notification of the judgment*

1. The complainant complains that she was not notified until December 2008 of the Special Chamber’s judgment, which was issued on 23 October 2008. In its admissibility decision, the Panel decided that this part of the complaint shall be examined in the light of the right to a judicial decision within a reasonable time, guaranteed by Article 6 of the ECHR.
2. The Panel notes that the proceedings before the Special Chamber started on 15 May 2008, when a group of employees filed a claim against the complainant’s inclusion of the complainant in the list prepared by the KTA and ended on 23 October 2008, with the issuance of the abovementioned judgment. The complainant limits her complaint to the period between the issuance of the judgment on 23 October 2008 and its notification to her, at some time in December 2008.
3. The Panel also notes that Section 45.4 of Administrative Direction No. 2006/17 of 6 December 2006 provides that “each party shall be served with a copy of the judgment within thirty days of its adoption”. Therefore, the Panel considers that the maximum period to be taken into consideration as a period of “delay” in the service of the judgment lasted one month - from 23 November 2008, when the judgment should have been served according to the stipulated one month deadline, to December 2008, when the complainant became aware of it.
4. The Panel notes that the SRSG does not offer any comments clarifying the reasons for this delay. However, having regard to the circumstances of the case, including the fact that the complainant is living as a displaced person in Montenegro where she has been receiving correspondence from the Special Chamber, the Panel does not consider this delay to be excessive.
5. Therefore the Panel finds that, there has been no violation of the complainant’s rights, as far as the notification of the judgment is concerned.
6. **Alleged Violation of Article 14 of the ECHR, read in conjunction with Article 6 of the ECHR**
7. The complainant states that the Special Chamber failed to take into account her situation as a member of an ethnic minority who had to leave Kosovo in 1999 fearing for her security.
8. The Panel notes the complainant’s allegation that, by excluding her from the list of eligible employees, the Special Chamber failed to take account of the existence of an indirect discrimination towards her as a member of the Serbian minority raises an issue under Article 14 of the ECHR, in conjunction with Article 6 of the ECHR. The complainant argues that she did not leave Kosovo and her workplace willingly but due to the existence of security threats against her as a member of the Serbian minority. Had the security situation allowed persons of Serbian and other minority ethnic communities to stay in Kosovo, she would have remained on the payroll of the enterprise, and thus would have been fully entitled to a share of the proceeds deriving from its privatisation. The Panel considers that the complainant in substance complains about the failure by the Special Chamber to correct an existing discrimination of which the complainant and other employees in her same situation were the victims.
9. The SRSG, in his comments on this part of the complaint states that the Special Chamber came to the conclusion, in light of the applicable law, that there was no discrimination against the complainant. The SRSG argues that it is not the Panel’s task to assess the accuracy of this assessment, unless there is “evidence that such decisions have been rendered in an obviously unfair and unaccurate way” . Further, the SRSG agrees with the assessment of the Special Chamber that the complainant did not substantiate the allegations that she was discriminated against as a member of a minority community.
10. As for the SRSG’s objection concerning the scope and limits of the Panel’s review under Article 14 of the ECHR, in conjunction with Article 6 of the ECHR, the Panel reiterates the reasoning developed with respect to Article 6 taken alone (see § 53).
11. While referring the relevant case-law of the European Court on Article 14, the Panel has already held that “a generally applicable rule, although apparently neutral, may have the effect of treating people differently, including on the ground of their ethnic origin. Where a group of persons is, because of its ethnic origin, in a vulnerable position compared to persons of another origin, the competent authorities are obliged to give special consideration to the specific needs of that particular group. This special consideration is required both in the relevant regulatory framework and in the decisions in particular cases” (see, with respect to the situation of the Roma in a number of Central and Eastern European countries, ECtHR [GC], *D.H. and Others v. Czech Republic*, cited in § 59 above, § 181; ECtHR [GC], *Oršuš v. Croatia*, cited in § 64 above, § 148; see also HRAP, *Parlić*, no. 01/07, cited in § 53 above, § 57; and *Guga*, cited in § 49 above, § 79).
12. The Panel notes the situation of vulnerability in which displaced minorities found themselves in the aftermath of the Kosovo conflict. In accordance with the Panel’s earlier expressed views, their situation required the adoption of positive protection measures by the authorities to give special consideration to ensure their fundamental rights, including within the process of privatisation of the Kosovo socially-owned enterprises (see HRAP, *Parlić,* cited above, § 55; and HRAP, *Guga*, cited above, § 80).
13. The Panel notes that at the level of the legal framework, Section 10.4 of UNMIK Regulation No. 2003/13 as complemented by the provisions of the Anti-Discrimination Law on the burden of proof, provided adequate protection insofar as it provided the right of former employees who had been the victim of direct or indirect discrimination to a share of the privatisation proceeds. However, the Panel considers that the Special Chamber applied those provisions in the present case without taking into consideration the particular situation of the complainant as a member of an ethnic minority, whose persecution in the aftermath of the conflict was a matter of “common knowledge” not requiring further proof (in this respect see HRAP, *Guga*, cited above, §§ 70-71). This was accepted by the KTA (at § 14 above) and was held by the Special Chamber in other privatisation cases.

1. The Panel notes with appreciation that UNMIK Regulation No. 2003/13 and the Kosovo Anti-Discrimination Law were adopted not only to prevent discrimination but also to ensure that court proceedings would make legal guarantees of non-discrimination effective. Accordingly, Article 8.1 of the Law states that when the person alleging discrimination establishes facts from which discrimination may be presumed, it is for the respondent to disprove discrimination.
2. The Panel notes that, in support of her allegation, the complainant submitted facts as well as documentary evidence to the KTA and the Special Chamber that she had worked at the enterprise for approximately 24 years until March 1999; that, when hostilities broke out in Kosovo in 1999, fearing persecution due to her ethnicity, she fled as a displaced person to Montenegro and thus could no longer work for the enterprise. The Panel notes that the complainant also made a submission to the Special Chamber that the claim filed against her inclusion in the list was ethnically motivated.
3. In light of the above, the Panel considers that the complainant had stated sufficient facts to make a *prima facie* case of discrimination before the Special Chamber which, according to the law, triggered the obligation on the respondents, the employees challenging the complainant’s inclusion in the list, to prove that the complainant had not, in fact, been the victim of a discriminatory treatment. In the Panel’s view, to require a more detailed showing of discrimination, based on concrete circumstances, would place an unjustified burden on a great number of members of minority communities.

1. Nevertheless, the Special Chamber failed to give effect to Section 8.1 of the Anti-Discrimination Law; it asserted that the complainant “did not prove that she was discriminated” and thus did not require the employees challenging her inclusion in the list to rebut the complainant’s allegations of discrimination. Nor did the Special Chamber give any reason for this.
2. Therefore, the Panel considers that the Special Chamber acted in a discriminatory fashion through its failure to take into account the discrimination experienced by the complainant and through its failure to reverse the burden of proof as required by Article 8 of the Anti-Discrimination Law.
3. Having considered all the above, the Panel notes that the complainant has presented to it sufficient facts to establish that the Special Chamber did not treat her according to the principle of non-discrimination. The Panel considers that this constitutes a *prima facie* case of discrimination which the SRSG has not rebutted.
4. The Panel therefore concludes that there has been a violation of Article 14, taken in conjunction with Article 6 of the ECHR.

**V. CONCLUDING COMMENTS AND RECOMMENDATIONS**

1. The Panel recalls that it has found that the complainant’s right to a fair trial was violated. Further, the Panel has found that the complainant was victim of discrimination on the basis of her ethnicity in the proceedings before the Special Chamber.
2. The Panel also recalls that racial discrimination and discrimination on the basis of ethnic origin constitute a particularly invidious kind of discrimination which, in view of its consequences, requires from the authorities a “vigorous reaction” whenever an instance of direct or indirect discrimination has been identified (see § 69 above).
3. The Panel notes that in the present case, 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, the Panel has already noted in other cases brought before it (see, among many others, HRAP, *S.C*., no. 02/09, opinion of 6 December 2012; and *Lalić*, no. 31/08, opinion of 14 March 2013) that, following the declaration of independence by the Kosovo Provisional Institutions of Self-Government on 17 February 2008 and subsequently, the entry into force of the Kosovo Constitution on 15 June 2008, UNMIK ceased to perform executive functions in Kosovo, these facts limiting its ability to provide full and effective reparation of the violation committed. The Panel has also noted that UNMIK’s responsibility with regard to the judiciary in Kosovo ended on 9 December 2008 with the European Union Rule of Law Mission in Kosovo (EULEX) assuming operational control in the rule of law area.
4. 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.

**With respect to the complainant and the case the Panel considers it appropriate that UNMIK:**

* 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 means available to it *vis-à-vis* EULEX and other competent authorities in Kosovo (see ECtHR [GC], *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, § 333, ECHR 2004-VII; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171, ECHR 2010 (extracts); ECtHR [GC], *Catan and Others v. Republic of Moldova and Russia*, nos. 43370/04 and others, judgment of 19 October 2012, at § 109; see also HRAP, *Milogorić and Others,* no. 38/08 and others, opinion of 24 March 2010, at § 49) to ensure that steps are taken towards making possible the reopening by the Special Chamber of the the complainant’s case and its examination in accordance with the ECHR standards, if the complainant so wishes (see ECtHR [GC], *Sejdovic v. Italy*, no. 56581/00, judgment of 1 March 2006, at §§ 125-127; and ECtHR, *Paraskeva Todorova v. Bulgaria*, no. 37193/07, judgment of 25 March 2010, at § 52).
* Publicly acknowledges, within a reasonable time, responsibility with respect to the Special Chamber’s failure to adjudicate the complainant’s claim on a non-discriminatory basis, and makes a public apology to the complainant in this regard;
* Takes appropriate steps towards payment of adequate compensation to the complainant for the non-pecuniary damage suffered as a result of her being discriminated against in the proceedings before the Special Chamber.

**The Panel also considers it appropriate that UNMIK:**

* Takes appropriate steps with respect to the competent authorities in Kosovo to ensure the full implementation of the Kosovo Anti-Discrimination Law as a guarantee of non-repetition.

**FOR THESE REASONS,**

The Panel, unanimously,

1. **FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 6 OF THE ECHR;**
2. **FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 14 OF THE ECHR, IN CONJUNCTION WITH ARTICLE 6 OF THE ECHR;**
3. **RECOMMENDS THAT UNMIK:**
4. **URGES EULEX AND OTHER COMPETENT AUTHORITIES IN KOSOVO TO TAKE STEPS TOWARDS MAKING POSSIBLE THE REOPENING BY THE SPECIAL CHAMBER OF THE COMPLAINANT’S CASE AND ITS EXAMINATION IN ACCORDANCE WITH THE ECHR STANDARDS, IF THE COMPLAINANT SO WISHES;**
5. **MAKES A PUBLIC APOLOGY TO THE COMPLAINANT FOR THE SPECIAL CHAMBER’S FAILURE TO ADJUDICATE HER CLAIM ON A NON-DISCRIMINATORY BASIS;**
6. **TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION TO THE COMPLAINANT FOR THE NON-PECUNIARY DAMAGE SUFFERED AS A RESULT OF DISCRIMINATION;**
7. **LIAISES WITH COMPETENT AUTHORITIES IN KOSOVO TO ENSURE THE FULL IMPLEMENTATION OF THE KOSOVO ANTI-DISCRIMINATION LAW AS A GUARANTEE OF NON-REPETITION;**
8. **TAKES IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATION OF THE PANEL AND INFORM THE COMPLAINANT AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Andrey Antonov Marek Nowicki Executive Officer Presiding Member