The Human Rights Advisory Panel
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DECISION

Date of adoption: 17 March 2011

Cases nos. 33/10, Miloš ŠEJAT and others ("Elektrokosmet"); 34/10, Tomislav MILIĆEVIĆ and others ("Sindikat JPPK Kosovo Obilić"); and 35/10 Radojko GAJIĆ and others ("JP Termoelektrane Obilić")

against

UNMIK

The Human Rights Advisory Panel, sitting on 17 March 2011,
with the following members present:

Mr Marek NOWICKI, Presiding Member
Mr Paul LEMMENS
Ms Christine CHINKIN

Assisted by
Ms Anila PREMTI, Acting 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 complaints in all three cases (6,559 individual complaints, of which 961 complaints in case no. 33/10, Milos Sejat and others ("Elektrokosmet"), 3,711 complaints in case no. 34/10, Tomislav Milićević and others ("Sindikat JPPK Kosovo Obilić"), and 1,887 complaints in case no. 35/10, Radojko Gajić and others ("JP Termoelektrane Obilić"), were lodged with the Panel on 30 March 2010 and registered on the same date. The complainants are represented before the Panel by their respective trade unions. The complaint forms are identical for all complainants.

2. The three cases were joined on 9 August 2010, pursuant to Rule 20 of the Panel's Rules of Procedure.

3. On 13 August 2010, the Panel communicated the cases to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility of the cases.

4. The SRSG provided comments by a letter dated 27 August 2010.

5. On 15 September 2010, the Panel sent a letter to the complainants' representatives inviting them to submit their comments on the UNMIK observations.

6. They responded with three identical sets of comments by letters dated 20 October 2010.

II. THE FACTS

7. According to the complainants the facts in these cases may be summarised as follows:

8. The complainants are ethnic Serbs and a small number of other non-Albanians, former employees of three public enterprises in Kosovo dealing with mining, production of electricity, and distribution of electricity.

9. During the summer 1999, they were expelled from their workplaces (and many of them from their homes) and were prevented from returning.

10. None of them received notification of any official decision or other document related to their dismissals. As a result, no employment-related proceedings provided for by applicable law, were ever instituted by them.

11. Over the years, the trade unions representing the complainants addressed a number of organisations, institutions and officials in Kosovo and abroad, requesting protection of their members and restoration of their right to work. They addressed also the SRSG in 1999, 2000 and 2006, but with no results. The complainants' individual attempts to return to workplaces in Kosovo have been obstructed and collective return was something impossible to achieve. The only offer made during their meetings with various authorities in Kosovo was that they should apply for jobs in order to start new employment.

III. THE COMPLAINTS

12. The complainants allege that as a result of their dismissal and of the subsequent failure to allow for their return to their previous workplaces, their right to work was violated and they were victims of discrimination. They invoke Articles 7 and 23 of the Universal Declaration of Human Rights (UDHR) and Article 6 § 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

13. The complainants also allege a violation of their right of access to a court as a result of the impossibility of their obtaining redress through court proceedings, because of the lack of any formal decision of dismissal. They invoke Article 6 § 1 of the European Convention on Human Rights (ECHR) as well as Article 13 of the ECHR.

IV. THE LAW

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

15. In his comments on the admissibility of the complaints, the SRSG argues that they are not admissible as they do not meet the criteria set out in section 3.1 of UNMIK Regulation No. 2006/12. He states that in essence, the complainants appear to base their allegations that UNMIK violated their right to work and their right to be free from discrimination on the following grounds: (a) lack of a secure environment after June 1999 to enable the employees to return to work; (b) inability to exercise their rights under applicable labour law; and (c) discriminatory hiring practices. The SRSG then goes on to discuss in detail jurisdictional and admissibility issues on each of these three matters. With respect to the lack of a secure environment after 1999, the SRSG refers to the reports of the Secretary-General of the United Nations on UNMIK, submitted to the Security Council in 2005 (S/2005/88 of 14 February 2005 and S/2005/335 of 23 May 2005). According to the SRSG, these reports reflect the improved security on the ground for minority communities. There existed a sufficiently secure environment in which the employees were able to report to work by 23 April 2005, date of the start of the jurisdiction of the Panel, and no continuing situation existed after that date which would have prevented the complainants from reporting to work. With respect to the inability of workers to exercise their rights under applicable labour law, the SRSG argues that, if workers attempted to go to work but were unable to exercise their right, or if other attempts were made to inform their employer of their intention to return to work, or if requests for justification of the *de facto* termination of their employment were unanswered, they could have brought a case to the competent court for wrongful termination of their employment. In this context, as KEK is an enterprise falling under the administration of the KTA, in accordance with UNMIK Regulation No. 2002/12, any claims against KEK for wrongful termination or dismissal would have to be submitted to the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (the Special Chamber). However, this was never done. Finally, as regards the allegation of discriminatory hiring practices, first the Administrative Department of Labour and Employment, and later the Ministry of Labour and Social Welfare were, among others, responsible for implementation of labour and employment policies that ensure non-discrimination. UNMIK regulations and other legislation in Kosovo also prohibit all kinds of discrimination. In addition, similar to the allegations concerning wrongful termination or dismissal, the complainants could have brought a claim against KEK for discriminatory hiring practice before the Special Chamber.

16. In their response to the SRSG's comments, the complainants emphasise that they stand by what they have stated in their initial complaints. They reiterate that they had continuously attempted to return to their previous workplaces, and many meetings had been held for this purpose with various authorities in Kosovo. However the only possible option that had been offered to them during such meetings was to apply for jobs in order to start new employment, but what the complainants were actually requesting was to return to their previous workplaces. Thus, their efforts, both individual and through their trade unions had remained without results.

17. Despite the evidently important issues raised by the cases and the scale of alleged violations, nevertheless the Panel first has to ascertain whether it is competent *ratione temporis* to deal with the complaints.

Dismissal from work

18. The Panel considers that insofar as the complainants complain about their alleged dismissal, there may be some uncertainty as to when exactly this dismissal took place, since there was no formal decision by their employer. However, the complainants quote a KEK representative who stated that on the basis of the existing law, a worker who had unjustifiably been absent from work for five consecutive days could be removed from work, and that the employer waited until September 1999 to consider that the employees had left their work. The moment of the termination of the complainants' employment should therefore be situated in that month.

19. The Panel recalls that, according to Section 2 of UNMIK Regulation No. 2006/12, it has jurisdiction only over "complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights".

20. Contrary to what the complainants argue, the Panel considers that their dismissal was an instantaneous act, which does not give rise to any possible continuous situation (see European Court of Human Rights (ECtHR), *Jovanović,* no. 59109/00, decision of 28 February 2002; compare in the same sense, with respect to the termination of a tenancy agreement, ECtHR, (Grand Chamber) *Blečič v. Croatia*, judgment of 8 March 2006, *ECHR*, 2006-III , § 86), with respect of damaging or the destruction of property, HRAP, *Lajović*, no. 09/08, decision of 16 July 2008, § 7; HRAP, *Milka Zivković*, no. 29/08, decision of 26 November 2010, § 28).

21. It follows that this part of the complaint lies outside the Panel's jurisdiction *ratione temporis*.

Failure to allow for the complainants' return to their previous employment and the impossibility for them to obtain redress through court proceedings

22. The complainants also complain that due in particular to subsequent discriminatory employment practices of KEK, all the efforts by their trade unions to allow for the return of Serbian employees to their previous employment as well as their own individual efforts to return to their workplaces have failed. Actually such efforts appear to be closely related to the termination of their employment in 1999, as during meetings with various authorities in Kosovo, the complainants through their representatives, were requesting only to return to their previous employment and workplaces. The other possible option offered to them, that of applying for new jobs in order to start employment, has been rejected by them. Therefore these efforts cannot be detached from their original termination of employment. Or, to state it positively, as the European Court of Human Rights has done with respect to its jurisdiction under the ECHR: "… the Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing this interference cannot bring it within the Court's temporal jurisdiction" (ECtHR (Grand Chamber), *Blečič v. Croatia*, cited above, *ECHR*, 2006-III, at § 77).

23. The same conclusion applies to the allegation that it was impossible for the complainants to obtain redress through court proceedings, allegedly because of the lack of a formal decision of dismissal.

24. Therefore, these parts of the complaint also lie outside the Panel's jurisdiction *ratione temporis*.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINTS INADMISSIBLE.

Anila PREMTI	Marek NOWICKI
Acting Executive Officer	Presiding Member