



The Human Rights Advisory Panel

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DECISION

Date of adoption: 10 June 2011

Case No. 13/08

Gani THAÇI

against

UNMIK

The Human Rights Advisory Panel sitting on 10 June 2011,
with the following members present:

Mr Paul LEMMENS, Presiding Member
Ms Christine CHINKIN

Assisted by
Ms Anila PREMTI, Acting Executive Officer

Having noted Mr Marek Nowicki's withdrawal from sitting in the case, pursuant to Rule 12 of the Rules of Procedure,

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 2 June 2008 and registered on the same date. On 17 June 2008 the complainant further developed his complaint.

2. By letter dated 6 October 2008 the Panel requested clarifying information from the Special Representative of the Secretary-General (SRSG). The SRSG responded to the Panel by letter dated 12 December 2008, indicating that he was not yet in possession of the disciplinary file of the complainant. Upon a new request by the Panel on 27 January 2010, the SRSG replied on 1 February 2010 that he still could not retrieve the file.
3. The Panel requested further information from the SRSG on 4 February 2010. The SRSG replied on 19 May 2010 that he was unable at that moment to provide the requested information. On 2 August 2010 that information was received.
4. On 9 September 2010 the Panel declared inadmissible part of the complaint. It also decided to adjourn the examination of the rest of the complaint.
5. On 29 September 2010 the Panel communicated the remaining part of the complaint to the SRSG for UNMIK's comments on admissibility. The Panel again requested the SRSG to provide it with the disciplinary file of the complainant.
6. On 2 December 2010 the SRSG informed the Panel that efforts were undertaken to retrieve the disciplinary file at the United Nations Headquarters. In these circumstances, the SRSG had no comments on the admissibility of the complaint, but reserved his right to provide comments at a later stage.
7. On 6 January 2011 the Panel received additional information from the complainant, which it communicated to the SRSG on 17 February 2011.
8. The SRSG provided his comments on the admissibility of the complaint on 21 March 2011. The comments indicate that UNMIK has remained unable to obtain the entire disciplinary file of the complainant.

II. THE FACTS

9. The facts, insofar as relevant at this stage of the proceedings, may be summarised as follows.

A. The 2001 disciplinary proceedings

10. In October 1999 the complainant was appointed commander of a sheltering command in the Kosovo Protection Corps (KPC).
11. In 2000 he was demoted to a lower position. He brought action against this decision before the courts, but his claim was dismissed. Other efforts to be restored to his previous (or a higher) post also failed.
12. On 1 August 2001 the KPC Commander (Lieutenant General Çeku) suspended the complainant, *inter alia* on the ground that in July 2001 he had made unauthorised statements about or on behalf of the KPC. The suspension would stay in effect

pending the outcome of disciplinary proceedings brought against the complainant based on the same facts. The decision stated that approval had been obtained from the Joint Security Executive Committee (JSEC). The JSEC was at that time the highest body for security coordination between UNMIK and KFOR, and the competent disciplinary body in cases of criminal acts and major acts of non-compliance with the KPC Disciplinary Code. On 13 August 2001 the complainant appealed against his suspension to the Strategic Board of the KPC. According to the complainant, no decision has been taken on that appeal.

13. In October 2001 the complainant was provided with the copy of a notification by the UNMIK Coordinator for KPC, addressed to the Commander of the KPC, dated 10 August 2001, stating that the latter should dismiss a number of KPC members, including the complainant, "further to JSEC advice on 8 August 2001". It later emerged that the JSEC had in fact taken the decision to dismiss the KPC members. It seems that the complainant has never received a copy of such a decision. Moreover, the decision was never approved by the SRSG, the only authority competent to dismiss members of the KPC (see Section 2.3 of UNMIK Regulation No. 1999/8 of 20 September 1999 on the Establishment of the Kosovo Protection Corps).
14. According to the complainant, he did not receive any payment from the KPC after 1 July 2001.

B. The 2005 disciplinary proceedings

15. On 28 January 2005 the UNMIK Coordinator for KPC (Major General Freer) informed the KPC Commander (Lieutenant General Çeku) and the KFOR Inspectorate for KPC Issues that the dismissal of the complainant did not comply with the procedure as set out in the KPC Disciplinary Code of 2001, then in force, and that the disciplinary case should be reviewed. The UNMIK Coordinator for KPC also informed the complainant that, because of procedural irregularities, the decision to dismiss him had never been approved by the SRSG, and that therefore his case would have to be reconsidered by the JSEC.
16. On 10 February 2005 the KPC Legal Office sent a memo containing the charges against the complainant to Colonel Cikaçi, at that time the Deputy Commander of the KPC Second Protection Zone. The complainant received this information on 16 February 2005. On 17 February 2005 he submitted a statement to the KPC Second Protection Zone, containing his comments on the charges made against him. This statement was to be sent to the JSEC. It is unclear whether this statement actually reached its destination. According to the complainant, it did not.
17. In April 2005 the JSEC recommended to dismiss the complainant (report No. 685/05). According to some statements made by the complainant, the JSEC also recommended that, in light of the fact that the complainant had been suspended as of 1 August 2001 and since that suspension remained in force, he should not receive any remuneration. However, taking into account the duration of the proceedings and the fact that the case had not received the necessary attention, the JSEC recommended that the complainant receive an additional payment equal to the monthly salary of a corporal with the KPC. The Panel has not been furnished with a copy of this

recommendation. The documents submitted by the complainant and the information provided by the SRSG do not allow the Panel to determine when and how the complainant was informed of this recommendation.

18. The SRSG agreed with the recommendation of the JESC, allegedly on 5 July 2005. The Panel has not been furnished with a copy of that decision, but the SRSG does not contest the fact that such a decision has been taken. Pursuant to this decision, the complainant was effectively dismissed from the KPC. It is not clear whether the complainant received any payment, as recommended by the JESC
19. According to the complainant, he filed an “appeal” against this decision on 15 July 2005. The appeal was accompanied by a memo of 11 pages. The complainant argued, among other things, that he was considered suspended for four years, while a suspension may last up to six months at the most. The appeal was sent to Colonel Cikaçi, in his capacity of Deputy Commander of the KPC Second Protection Zone, with a request to forward the appeal, through the KPC General Headquarters, to the JSEC.
20. There was no reaction to this appeal. After the complainant had enquired about the state of the proceedings, the then UNMIK Coordinator for KPC (Major General Steirn) sent him a letter on 14 March 2006, which reads as follows:

“I refer to my predecessor’s memo dated 1 November 2005 and my Legal Officer’s memo dated 19 January 2006.

As previously indicated, your appeal of JSEC Report 685/05 was not received by my office, the KPC or [the KFOR Inspectorate for KPC Issues]. Under the Disciplinary Code, appeals have to be made through [the KPC Commander] within 21 days. You were asked to re-send your appeal via the proper channels and provide proof of postage of the appeal previously sent, which has not been done. Although you have sent proof of postage of a number of letters, you have failed to provide proof of postage of the letter dated 18 (*sic*) July 2005 which contains your actual appeal.

Since your appeal was not received by [the KPC Commander] or any of the other concerned offices, and you cannot show that you did send it within the 21-day limit for appeals, I regret to inform you that this case is now closed.”

21. On 10 April 2006 the complainant sent a memo to Colonel Cikaçi, asking him for an explanation about what he had done with the complainant’s appeal, sent on 15 July 2005. The Panel is not aware of any reaction to that memo.
22. On 13 July 2006 the complainant was received by the KPC Commander (Lieutenant General Selimi). He handed over a memo in which he complained about the fact that his statement of 17 February 2005 and his appeal of 15 July 2005 had not been forwarded by Colonel Cikaçi to the required destination. He requested an examination of his appeal. It seems that no further action was taken on this memo.

C. The administrative dispute relating to the alleged inaction of the JSEC and the KPC

23. In the meantime, on 29 June 2006, the complainant had initiated an administrative dispute with the Supreme Court against the inaction of the JSEC and the KPC Second Protection Zone.
24. On 14 May 2008 the Supreme Court declared the petition inadmissible. The reasons for the judgment are as follows:

“UNMIK Regulation No. 2001/9 of 15 May 2001 On a Constitutional Framework for Provisional Self-Government in Kosovo provides in Section 7 that the Kosovo Protection Corps (KPC) is a civilian emergency organisation, established under the law, which carries out in Kosovo rapid disaster response tasks for public safety in times of emergency and humanitarian assistance. By the provisions of Section 8.1, item k, of the mentioned Regulation, it is provided that the KPC shall act under the control and authority of the Special Representative of the Secretary-General of the United Nations (SRSG).

Section 3 of UNMIK Regulation No. 1999/8 On the Establishment of the Kosovo Protection Corps provides that the Kosovo Protection Corps shall operate under the authority of the SRSG.

Article 30, paragraph 1, point 5, of the Law on Administrative Disputes provides that no administrative dispute can be initiated in matters for which the possibility of initiating an administrative dispute is excluded by an explicit legal provision.

Due to the fact that Section 3.2 (*sic*) of UNMIK Regulation No. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo provides that KFOR personnel shall be immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo, no administrative dispute can be initiated against the Joint Security Executive Committee within the KFOR General Headquarters seated in Prishtinë/Priština and against the KPC Second Protection Zone seated in Prishtinë/Priština.

For the reasons mentioned above and pursuant to Article 30, paragraph 2, of the [Law on Contested Procedure], the Court decided as in the enacting clause of the present judgment.”

25. On 24 June 2008 the complainant filed a criminal complaint against the judge of the Supreme Court who presided over the chamber that handed down the judgment of 14 May 2008. The Panel has not been informed of any further developments with respect to that complaint.

D. The criminal charges against Colonel Cikaçi

26. In the meantime, on 4 July 2006, the complainant had brought private charges against Colonel Cikaçi in the Municipal Court of Prizren. He complained that Colonel Cikaçi had not forwarded his statement of 17 February 2005 made during the disciplinary proceedings, and later had not forwarded his appeal of 15 July 2005 against the decision of the SRSJ of 5 July 2005.
27. It seems that the Municipal Court of Prizren handed down two judgments in this case. In a first judgment, dated 11 September 2006, the Court declared the charges inadmissible, as they had been filed more than three months after the complainant knew about the existence of the alleged criminal acts. It seems that the case has later been reopened. In any event, in a second judgment, handed down on 18 September 2008, after a hearing at which both the complainant and Colonel Cikaçi appeared, the Court noted the latter's statement that he had not received anything that would have to be forwarded to a given body and that, if he had received anything, he would have forwarded it to the KPC Legal Office, which in turn would have forwarded it to the required destination. The Court considered that there was not sufficient evidence to prove that the defendant had actually received the complainant's statement or his appeal. The Court declared the defendant not guilty of the charges. This latter judgment was sent to the complainant's son on 4 November 2008 as the complainant was living abroad at that moment.
28. The complainant appealed against the judgment on 12 November 2008. By judgment of 17 December 2008 the District Court of Prizren declared the appeal inadmissible, as it had been filed out of time. The complainant does not seem to have appealed against that judgment of the District Court.

III. THE COMPLAINT

29. The complainant complains about the fact that his comments on the disciplinary charges brought against him in 2005 were not effectively examined by the JSEC before it took the decision to recommend his dismissal.
30. He further complains about the fact that his appeal against the decision of the SRSJ, approving the recommendation of the JSEC (decision allegedly taken on 5 July 2005), was in fact never examined by the body with which he filed the appeal, *i.e.* the JSEC. He argues that this is due to the fact that Colonel Cikaçi, Deputy Commander of the KPC Second Protection Zone, to whom the complainant had sent his appeal on 15 July 2005, did not forward his appeal to the competent body.
31. He additionally complains about the judgment of the Supreme Court of 14 May 2008 declaring inadmissible the administrative dispute filed by him, relating to the failure by the JSEC and the KPC to act on his appeal against the decision of the SRSJ of 5 July 2005.
32. The first complaint can be considered from the point of view of the right of access to public service, guaranteed by Article 25 (c) of the International Covenant on Civil and Political Rights (CCPR), while the second and the third complaints can be considered from the point of view of the right to an effective remedy against alleged

violations of a person's human rights (Article 2 (3) of the CCPR, read in combination with Article 25 (c) of the CCPR) (see the Panel's decision of 9 September 2010, § 36).

IV. THE LAW

33. 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 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel.
34. According to Section 3.1 of UNMIK Regulation No. 2006/12, the Panel may only deal with a matter after it determines that the matter has been submitted "within a period of six months from the date on which the final decision was taken".
35. The SRSG argues that the complaint was filed outside the six-month time-limit. He notes that it is assumed that the SRSG approved the recommendation to dismiss the complainant on 5 July 2005. The complainant was informed by the UNMIK Coordinator for the KPC on 14 March 2006 that his appeal against the decision of the SRSG was never received by the JESC and could not be located in any of the files. That notification by the UNMIK Coordinator for the KPC can be considered as the day of final notification of the complainant's dismissal from the KPC. The complaint was filed with the Panel only on 2 June 2008. On that date the six-month time-limit for the submission of a complaint to the Panel had clearly lapsed.
36. The SRSG further argues that the final decision of the District Court of Prizren of 17 December 2008 in relation to the criminal charges brought by the complainant against a former KPC colonel for allegedly not forwarding his appeal to the relevant authorities, is of no relevance for the six-month requirement, as these proceedings relate to criminal proceedings between two private individuals and thus do not involve UNMIK.
37. The six-month time-limit imposed by Section 3.1 of UNMIK Regulation No. 2006/12 requires complainants to lodge their complaints within six months of the final decision in the process of exhaustion of available remedies. For the purpose of calculating the six-month period only remedies that are normal and effective can be taken into account as a complainant cannot extend the strict time-limit imposed under the Regulation by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue under the Regulation (see, with respect to the six-month time-limit imposed by Article 35 § 1 of the European Convention on Human Rights (ECHR): European Court of Human Rights (ECtHR), *Fernie v. United Kingdom*, no. 14881/04, decision of 5 January 2006; ECtHR, *Svenska Flygföretagens Riksförbund and Skyways Express AB v. Sweden*, no. 32535/02, decision of 12 December 2006; ECtHR, *Sobczynski v. Poland*, nos. 355/04 and 358/04, decision of 25 September 2007; ECtHR, *Hysi v. Albania*, no. 38349/05, decision of 26 February 2008).

38. The Panel notes that the SRSG accepts that, for the purposes of the examination of the admissibility of the present complaint, the letter of the UNMIK Coordinator for the KPC of 14 March 2006 informing the complainant that his appeal was not received and that the case was “closed”, can be considered as the day of final notification of the decision allegedly taken on 5 July 2005, dismissing the complainant from the KPC.
39. After having received that notification, the complainant initiated an administrative dispute with the Supreme Court against the alleged failure by the JESC and the KPC to take action on his appeal against the decision dismissing him. Such a petition to the Supreme Court is a remedy that could offer effective redress, as an administrative dispute can be lodged with the Supreme Court against the failure by an administrative authority to decide on an appeal (Article 26 of the Law on Administrative Disputes).
40. It is true that the jurisdiction of the Supreme Court can be excluded by law (Article 30, paragraph 1, point 5, of the Law on Administrative Disputes). In the present case, the Supreme Court found that its jurisdiction was excluded by virtue of the immunity granted to UNMIK and KFOR personnel. While the Supreme Court referred only to Section 3.2 of UNMIK Regulation No. 2000/47 of 18 August 2000 On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, it is clear from the context of the relevant reasoning that it in fact relied on Sections 2.4 and 3.2 of the said Regulation, which guarantee immunity from jurisdiction before courts in Kosovo to KFOR personnel *viz.* the SRSG, the Principal Deputy SRSG and the Deputy SRSG’s, the Police Commissioner and other high-ranking officials as may be decided from time to time by the SRSG. The lack of jurisdiction of the Supreme Court should normally lead to the conclusion that a petition to the Supreme Court was not one to be exhausted, and that it therefore was not to be taken in account for the purpose of calculating the six-month period.
41. However, the Panel notes that precisely the lack of jurisdiction of the Supreme Court is the object of one of the complaints. A finding by the Panel that the Supreme Court, by declaring itself without jurisdiction, had violated the human rights of the complainant, would imply that lack of jurisdiction was not a valid reason to hold against the complainant for denying him access to the Supreme Court. Nor would it be possible in these circumstances to consider that, for the purpose of calculating the six-month period, the administrative dispute raised with the Supreme Court was a remedy bound to fail. As a result, the decision of the Supreme Court declaring the complainant’s petition inadmissible would have to be considered the final decision in this case (compare ECtHR, *Remli v. France*, judgment of 23 April 1996, *Reports of judgments and decisions*, 1996-II, p. 572, § 42). The complaint, submitted to the Panel on 2 June 2008, initially directed against the failure by the Supreme Court to act on his petition and on 17 June 2008 extended to the Supreme Court’s judgment of 14 May 2008, would then have to be considered as being filed within the six-month time-limit. It should be noted that the subsequent private charges brought by the complainant against Colonel Cikaçi would on this reasoning have no bearing on the admissibility of the complaint.
42. The decision on the objection to admissibility thus appears to depend on the outcome of the examination of the merits of the complaint. The Panel recalls that where an

admissibility issue is closely linked to the merits of the complaint, it may, pursuant to Rule 31*bis* of its Rules of Procedure, join the issue to the merits, provided that there is no other obstacle to admissibility (see Human Rights Advisory Panel (HRAP), *R.P.*, nos. 120/09 and 121/09, decision of 26 November 2010; HRAP, *Morina*, no. 36/08, decision of 16 December 2010, § 46).

43. The Panel considers that the complaint raises serious issues of fact and law, the determination of which should depend on an examination of the merits of the complaint. The Panel therefore concludes that the complaint is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.

44. No other ground for declaring the complaint inadmissible has been established.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES ADMISSIBLE THE REMAINDER OF THE COMPLAINT.

Anila PREMTI
Acting Executive Officer

Paul LEMMENS
Presiding Member