



The Human Rights Advisory Panel

Building D, UNMIK HQ Prishtinë/Priština, Kosovo | E-mail: hrap-unmik@un.org | Tel: +381 (0)38 504-604, ext. 5182

DECISION

Date of adoption: 16 December 2010

Case No. 36/08

Jahja MORINA

against

UNMIK

The Human Rights Advisory Panel on 16 December 2010,
with the following members present:

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

Assisted by
Mr Rajesh TALWAR, 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 11 August 2008 and registered on 20 August 2008. The complainant provided supplemental information on 6 October 2008.
2. On 22 October 2008, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility and the merits of the case. On 28 November 2008, the SRSG provided his response, indicating that the complaint was not substantiated.

3. On 15 December 2008, the Panel re-communicated the case to the SRSG for UNMIK's comments on the admissibility and the merits of the case, attaching additional information supplied by the complainant.
4. The Panel learned on 22 December 2008 of the death of Mr Jahja Morina on 19 November 2008 and accepted his heirs, Messrs Menditon and Besnik Morina, as the persons entitled to pursue the complaint. For practical reasons, the Panel will continue to name Mr Jahja Morina as the complainant, even though that capacity should now be attributed to Messrs Menditon and Besnik Morina.
5. On 19 January 2009, UNMIK provided its response.
6. On 23 April 2009, the Panel requested that UNMIK clarify some elements of its response. On 2 July 2009, the SRSG provided further comments on the case.
7. On 9 September 2009, the Panel forwarded the SRSG's comments to the complainant.
8. The complainant provided his response to the SRSG's comments in a letter dated 25 September 2009 and the complainant provided additional information in a letter dated 22 October 2009.
9. On 8 December 2009 and 26 February 2010, the Panel forwarded the complainant's response and the additional information to the SRSG for information.

II. THE FACTS

10. The complainant, now deceased, was the owner of the private company "Top Gun", located in Gjilan/Gnjilane where he also resided. His business commenced operations after paying the required administrative fee on 2 May 2001 and was issued a provisional business registration number on 12 August 2001.
11. On 4 October 2001 the Deputy UNMIK Municipal Administrator of the Gjilan/Gnjilane Municipality sent a certificate to KFOR, UNMIK Police and the Customs Service indicating that the complainant was the proprietor of "Top Gun" and that the business was registered. The certificate stated:

"It is confirmed that the business is approved and authorized to deal in the supply of equipments for sporting and hunting activities. Consequently it is permitted to buy and sell such hunting items as bullets, crossbows, arrows, traps, knives, fishing goods, and other requisites associated with hunting and shooting.

The activities of the business will require that he imports appropriate items of equipment."
12. On 16 October 2001, the complainant filed an amendment to his business registration to change the structure of the company and rename it "Sh.P.T. Top Gun". He was issued a new registration certificate on 18 December 2001.
13. On 21 July 2002, the UNMIK Municipal Administrator of the Gjilan/Gnjilane Municipality sent an additional certificate to KFOR, UNMIK Police and the Customs Service confirming the information above, adding that the permit was issued for "an unlimited period until the gentleman will run his business."

14. The complainant states that from the time he commenced commercial activities, he relied on the certificates issued by the UNMIK Municipal Administrator of the Gjilan/Gnjilane Municipality and informed UNMIK Police (headquarters) and UNMIK Police in Gjilan/Gnjilane when paying his customs fees for ammunition imported from Albania, Italy and Serbia proper.
15. Upon the request of an UNMIK International Prosecutor, on 24 October 2002, an UNMIK International Judge issued a search order for weapons, ammunition, and/or flammable substances at the complainant's home, business and vehicles, or in vehicles or premises near the properties cited in the order. The order also listed the seizure of certain documents, computer disks, etc., covering the period from 4 October 2001 until the date of the search.
16. On 29 October 2002, UNMIK Police conducted a search of the relevant premises in the presence of the complainant and presented a copy of the 24 October 2002 search order. Also during the search, UNMIK Police provided the complainant with a letter, signed by the UNMIK Municipal Administrator of the Gjilan/Gnjilane Municipality and dated 25 October 2002, stating that the UNMIK Municipal Administrator "had no right to issue such licence or authorisation" for the right to sell ammunition or hunting equipment and that the complainant "should consider this permit as void."
17. UNMIK Police confiscated all the ammunition and business documents that he kept in his shop and provided him with a list of confiscated items, confirming that more than 50,000 rounds of ammunition as well as a number of documents and business records were confiscated. According to the complainant, they also found his hunting rifle, but since he had a valid UNMIK weapon authorisation for the gun, they did not confiscate it. UNMIK Police questioned the complainant and requested that he terminate any further orders for ammunition and inform the police of the arrival of any pending shipments.
18. On 31 October 2002, the complainant signed written orders for his stores outside of Gjilan/Gnjilane to cease the sale of ammunition. On 1 November 2002, the complainant sent a letter to UNMIK Police requesting authorization to sell ammunition.
19. On 5 November 2002, the complainant met with UNMIK Police and indicated that a shipment of ammunition ordered prior to the search of his premises would arrive in Kosovo on 6 November 2002. When the shipment of 182,250 bullets arrived on 7 November 2002, one day late, UNMIK Police confiscated the ammunition and issued a list of confiscated items.
20. Following the search of his Gjilan/Gnjilane store, the complainant requested that his other stores in Prishtinë/Priština, Pejë/Peć, Ferizaj/Uroševac and Rahovec/Orahovac stop selling ammunition and return all remaining stock to the Gjilan/Gnjilane store. On 12 November 2002, UNMIK Police confiscated the 4072 bullets that had been returned to the Gjilan/Gnjilane store and again provided the complainant with a list of confiscated items.
21. On 28 December 2002, an UNMIK International Investigating Judge issued another search order for the complainant's home and vehicles, but it is not clear whether any items were confiscated during execution of that order.
22. There is no indication that following the second search order any further investigative activity took place in relation to the alleged criminal activity of the complainant.
23. On 10 April 2003, the complainant's lawyers wrote to the President of the District Court of Gjilan/Gnjilane seeking the return of the confiscated goods. In that letter, they stated

that the International Public Prosecutor told the complainant that she did not plan on initiating any criminal procedure against the complainant since there were no grounds for doing so. They argued that therefore Article 209 of the Law on Criminal Proceedings of the Socialist Federative Republic of Yugoslavia (SFRY) (*SFRY Official Gazette No. 26/86*), in force at the time by virtue of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo of 12 December 1999, required that seized property should immediately be returned since the prosecutor had failed to find any evidence of criminal wrongdoing.

24. Also on 10 April 2003, the complainant's lawyers wrote to the UNMIK International Prosecutor who had requested the search order and requested that the ammunition be returned to the complainant, noting that he would comply with the relevant provisions of UNMIK Administrative Direction No. 2003/1 implementing UNMIK Regulation No. 2001/7 on the Authorisation of Possession of Weapons in Kosovo of 17 January 2003, regarding the storage of such ammunition. In that letter, the complainant's lawyers also referenced the conversation between the complainant's representatives and the UNMIK International Prosecutor regarding the lack of legal grounds for criminal prosecution of the complainant. The letter noted that the destruction of the ammunition would cause irrevocable damage to the complainant. The complainant's lawyers also sent a letter on the same date to the UNMIK International Judge who had ordered the search, repeating the statements above.
25. On 6 June 2003, the complainant wrote to UNMIK Police and the Kosovo Police Service, detailing the events above, and requesting permission to sell ammunition in accordance with their understanding of UNMIK Administrative Direction No. 2003/1 and noting that during an earlier 26 March 2003 conversation with the UNMIK International Public Prosecutor in charge of the criminal investigation, the complainant learned that the ammunition would eventually be destroyed.
26. On 20 June 2003, the UNMIK Police in Gjilan/Gnjilane responded to the complainant, indicating that "[t]he Regulation for legalising stores (for) the sale of ammunition and other hunting equipments is in process".
27. On 24 April 2004, the Ombudsperson Institution in Kosovo wrote to the Deputy SRSG for Police and Justice, requesting him to indicate the legal provision UNMIK relied upon to refuse the complainant's right to conduct his trade. In a 16 December 2004 letter, the Principal Deputy SRSG responded that:

"ownership, control, possession and use of weapons in Kosovo for any purposes, including trade, are subject to stringent requirements and restrictions introduced by UNMIK in its legislation pursuant to its mandate.

This is essentially a matter of security and must be treated accordingly.

Pending the ongoing development and finalisation of a comprehensive legislative framework governing hunting, and subject to an authoritative determination that the necessary security conditions are in place, hunting activities in Kosovo are in effect suspended.

If and when all the requirements for allowing hunting activities in Kosovo are fulfilled and the security environment permits, an UNMIK Regulation could be used to govern trade and importation of hunting weapons, including ammunition and equipment" (emphasis in the original).

28. On 10 February 2004, a non-governmental organisation called the Criminal Resources Defence Center (CDRC) wrote to the UNMIK Office of Legal Affairs inquiring as to what steps they should take to resolve the situation, noting that UNMIK Regulation No. 2000/47 of 18 August 2000 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo precluded any legal remedy the complainant may have had against UNMIK.
29. On 18 June 2008, the complainant wrote to the President of the District Courts of Gjilan/Gnjilane and Prishtinë/Priština as well as to the UNMIK International Public Prosecutors and Kosovar Public Prosecutors in Gjilan/Gnjilane and Prishtinë/Priština, summarising the facts of his case and requesting confirmation as to whether there is any legal procedure pending against him in the respective courts or prosecutors' offices. The President of the District Court of Gjilan/Gnjilane and the District Public Prosecutor's Office of Gjilan/Gnjilane both responded that they had no record of the complainant's case in their offices. The District Public Prosecutor stated that the letters addressed to the UNMIK International Public Prosecutor had been forwarded to the UNMIK Department of Justice in Prishtinë/Priština.
30. On 12 September 2008, the Office of the Special Prosecutor of Kosovo sent the complainant a letter, attaching the 8 August 2008 Ruling of the Special Prosecutor which dismissed the criminal charges submitted against the complainant. From the Ruling of the Special Prosecutor, it also appears that approximately 1,070 additional rounds of ammunition were seized on 22 January 2003 and 27 January 2003 from the complainant. The Special Prosecutor concludes that "it results that at the time he exercised his business he had a valid licence and his activity cannot be considered as illegal".
31. On 22 September 2008, the complainant sent a complaint against the Ruling to the Special Prosecutor's Office requesting an explanation as to why the case was in the prosecutor's office for six years before being dismissed, alleging that a number of violations of the criminal procedure code had occurred during the procedure against him, and requesting that the documents and the ammunition seized be returned to him. He also requested detailed information concerning the legal basis for the rumoured destruction of the ammunition which had been removed to the United States KFOR contingent's headquarters at Camp "Bondsteel" in the Gjilan/Gnjilane region.
32. On 9 December 2008, UNMIK's responsibility with regard to the judiciary in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo.
33. On 9 February 2009, the representative of the heirs of the complainant wrote to the EULEX International Prosecutor responsible for the succession to the Kosovo Special Prosecutor's Office requesting a ruling on the issues mentioned in the complainant's 22 September 2008 request. The EULEX International Prosecutor replied to the complainant by stating that EULEX is not competent to destroy items confiscated by UNMIK and that compensation must be requested from the competent authorities.
34. The heirs' representative responded by sending a further letter to the EULEX Chief International Prosecutor on 25 July 2009, indicating that while he was aware of EULEX's competencies, the Special Prosecutor's Office operating under EULEX should possess all the documents previously held by the office when it was under UNMIK, and therefore they should be able to respond to the request of 22 September 2008.

35. The EULEX Chief International Prosecutor provided a response in September 2009 indicating that as the complainant's case was considered closed at the time of the handover of responsibility, EULEX would not have been in possession of any evidence held by UNMIK, which should have been dealt with prior to the handover. He went on to state that EULEX was able to locate one binder "in the UNMIK buildings" which contained the list of seized items and financial books, but that they had no record of what happened to such items after 2002. He also indicated that EULEX could not find any records concerning the destruction of the items by KFOR and that it would probably require a direct inquiry to KFOR to obtain such records.
36. The heirs' representative submitted to the Panel on 25 September 2009 that, in the interim, they had contacted the United States KFOR contingent regarding the order to destroy any evidence in the complainant's case. United States KFOR in turn told the complainant to directly contact the institution involved, namely UNMIK.
37. As an attachment to the 25 September 2009 submission, the heirs' representative attached two signed statements from Kosovan hunting associations indicating that, as of September 2009, there was no way of obtaining through legal means ammunition for hunting or sport purposes in Kosovo. The only way to obtain such ammunition was through the black market.

III. THE COMPLAINT

38. The complainant specifically complains that UNMIK violated the right to enjoyment of rights provided for in the Universal Declaration of Human Rights (UDHR) regardless of the international status of the territory in which a person resides (Article 2 of the UDHR), the right to freedom from discrimination and equal protection before the law (Article 7 of the UDHR), the right to an effective remedy before a national tribunal (Article 8 of the UDHR), and the right to be free from the arbitrary deprivation of property (Article 17 of the UDHR).
39. In addition, the complainant argues that UNMIK is responsible for a violation of the right to a fair and public hearing within a reasonable time and the right of access to a court, guaranteed by Article 6 § 1 of the European Convention on Human Rights (ECHR), the right to an effective remedy guaranteed by Article 13 of the ECHR and the right to be free from discrimination in the enjoyment of his rights guaranteed by Article 14 of the ECHR.

IV. THE LAW

40. Before considering the case on its merits, the Panel must first decide whether to accept the case, considering the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.
41. In his first set of comments of 28 November 2008, the SRSG argued that the case was *prima facie* inadmissible since the complainant failed to provide all relevant facts upon which the alleged violation of human rights occurred as required by Section 11.1 of UNMIK Regulation No. 2006/12.
42. In his second submission on admissibility, the SRSG argues that the complaint is *prima facie* inadmissible since the complainant had not exhausted all available remedies. The SRSG specifically states:

“From the documentation submitted, it is understood that administrative errors may have taken place at the municipal administration level. An administrative appeal to the Municipality of Gjilane should be made regarding the request for compensation for confiscated property in light of the 8 August 2008 ruling from the Kosovo Special Prosecutor’s Office. In this regard, it would assist the appeal, if the Kosovo Special Prosecutor’s Office in Pristina would issue a further ruling or provide further information on the confiscated property. A request to appeal against the judicial proceedings can be made to the District or Supreme Courts.”

43. In his further clarification of 3 July 2009, the SRSG argued as follows:

“On the basis of the documentation submitted by the complainant, it is understood that on 8 August 2008, the Kosovo Special Prosecutor’s Office (KSPO) issued a ruling whereby all criminal charges against Mr. Morina were rejected. In response to this ruling, Mr. Morina requested from the KSPO that his property and business records be returned to him. It would appear that Mr. Morina has not yet received a response to that request. Given that this request is pending, the complainant must await the outcome of this response which should address the remedy he is seeking. Depending on the recommendation of the Special Prosecutor, it may be the case that Mr. Morina’s family, which represents Mr. Morina following his death on 19 November 2008, would need to approach the Gjilane Municipality and/or KFOR through their respective administrative procedures in order to obtain the compensation they seek.”

44. At the outset, the Panel rejects the assertion that the complaint was not substantiated within the meaning of Section 11.1 of UNMIK Regulation No. 2006/12. The Panel notes that already in his initial complaint, the complainant has provided all facts necessary for its determination.

45. Regarding the SRSG’s objection for non-exhaustion of remedies, the Panel notes that the remedies suggested by the SRSG do not appear to have any basis in law, or at least no basis which UNMIK is able to identify. The administrative procedures identified, even if they existed, do not deal with the object of the complaint, namely, the alleged use of an unlawful criminal prosecution to execute a seizure of goods from the complainant. Although the UNMIK Municipal Administrator of the Gjilan/Gnjilane Municipality may have also acted *ultra vires* in granting the complainant the right to sell ammunition, the act of revoking his licence to sell ammunition did not allegedly deprive the complainant of his property, nor did it subject him to an allegedly prolonged criminal investigation.

46. Insofar as the SRSG considers that the remedies outlined above provide a civil remedy for the taking of the complainant’s property, the Panel notes that the complainant alleges that no such remedy exists in law. As the SRSG has not been able to identify the legal basis for such alleged remedies, the Panel considers that it must examine this issue on the merits. Although the SRSG raises these issues during the admissibility stage of the proceedings, the Panel recalls that where an admissibility issue is closely linked to the merits of the complaint, the Panel may, pursuant to Rule 31*bis* of the Panel’s Rules of Procedure, join the issue to the merits, provided that there is no other obstacle to the admissibility (see Human Rights Advisory Panel, *R.P.*, nos. 120/09 and 121/09, decision of 26 November 2010).

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

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT ADMISSIBLE.

Rajesh TALWAR
Executive Officer

Marek NOWICKI
Presiding Member