



# *The Human Rights Advisory Panel*

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## **OPINION**

**Date of adoption: 6 June 2013**

**Cases No. 308/09**

**Milorad RAJOVIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 6 June 2013,  
with the following members present:

Mr Marek NOWICKI, Presiding Member  
Ms Christine CHINKIN  
Ms Françoise TULKENS

Assisted by  
Mr Andrey ANTONOV, Executive Officer

Having considered the aforementioned complaint, introduced pursuant to Section 1.2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel,

Having deliberated, makes the following findings and recommendations:

### **I. PROCEEDINGS BEFORE THE PANEL**

1. The complaint was introduced on 7 September 2009 and registered on 14 September 2009.
2. On 17 September 2009, the Panel received further information from Avni Q. Vula, legal representative of the complainant.
3. On 22 May 2010, the Panel requested the complainant to provide additional information. No response was received.

4. On 18 September 2012, the Panel communicated the complaint to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility of the case. On 1 November 2012, the SRSG provided UNMIK's response.
5. On 9 November and 4 December 2012, the Panel requested additional information from the OSCE Mission in Kosovo (OMiK). On 15 November and 14 December 2012, OMiK provided its response.
6. On 18 December 2012, the Panel sought further comments on the admissibility of the complaint from the SRSG. On 10 January 2013, the SRSG provided UNMIK's response.
7. On 31 January 2013, the Panel declared the complaint admissible.
8. On 4 February 2013, the Panel forwarded the decision on admissibility to the SRSG, inviting UNMIK's observations on the merits of the case. On 26 March 2013, the SRSG provided UNMIK's response.

## **II. THE FACTS**

9. The complainant is the owner of a company "Udarnik Komerc LLC", which owns a property in Pejë/Peć.
10. On 29 February 2000 and again on 8 July 2000, in accordance with the regulations governing socially and publicly owned property, UNMIK authorised OMiK to occupy this property under the belief that these premises were socially owned.
11. On 1 March 2000, OMiK took over this property as part of its regional offices within the municipality. The complainant states that after OMiK occupied the premises he immediately informed them that the premises belonged to him and that some form of rental agreement needed to be made. The complainant alleges that during this period and up to 1 November 2007, no rental agreement was established or rent paid to him through his company.
12. On 1 November 2007, the complainant's company signed a contract to rent the same premises to OMiK, the terms of which have been complied with to date. The complainant alleges, however, that he has been unable to enter into negotiations with OMiK regarding the occupation of the premises between 1 March 2000 and 1 November 2007 and the backdated rental payments owed to the company.

## **III. THE COMPLAINT**

13. Insofar as the complaint has been declared admissible, the complainant in substance alleges that the non payment of rent by OMiK constituted a violation of his right to the peaceful enjoyment of his possession, guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR).

## IV. THE LAW

### A. Submissions by the parties

#### *The complainant's submissions*

14. The complainant refers to the intransigence of OMiK to pay rent for the use of the premises in Pejë/Peć for the period 1 March 2000 to 1 November 2007.
15. In this respect, as indicated above, the complainant invokes a violation of his right to the peaceful enjoyment of his possession, guaranteed by Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR).

#### *UNMIK's submissions*

16. In his comments on the merits of the complaint, the SRSG acknowledges that OMiK's role within Kosovo was as a distinctive pillar of UNMIK and that its occupation of the premises in Pejë/Peć was in the exercise of UNMIK's mandate derived from UN Security Council Resolution 1244 (1999). However, the SRSG argues that a distinction must then be drawn between UNMIK's mandate and the internal implementation of such a mandate.
17. The SRSG submits that OMiK, as an inter-governmental organisation with a separate budget and administration, was in no way subject to the interference or instruction of UNMIK. Referring to the Panel's decision in the case of *Jovanović*, no. 39/08, decision of 17 October 2008, the SRSG argues OMiK must be seen as a separate organisation different from UNMIK and that UNMIK was in no way privy to or responsible for the selection of premises to be used by OMiK. More significantly, UNMIK never took part in any "internal discussions with OMiK regarding its premises or had the opportunity or right to influence any of its administrative decisions".
18. The SRSG accepts that the initial authorisation to occupy the premises by OMiK in Pejë/Peć was provided by UNMIK (see § 10 above). Such permission, the SRSG argues, was granted on the basis of evidence obtained from cadastral records indicating that the property was owned by the "Public Housing Enterprise", an enterprise believed to have been socially owned. The SRSG adds, however, that at the time of the authorisation both UNMIK and OMiK were unaware of the "alleged title rights of the complainant to the property".
19. The SRSG argues further that, in line with operating procedures of all international organisations, any costs or liabilities incurred must be dealt with through internal procedures adopted. In relation to OMiK, any costs or liabilities therefore incurred must be addressed to its Headquarters in Vienna. "UNMIK is not privy to decisions made at OSCE Headquarters in Vienna regarding OSCE Mission rental payments issues".
20. The SRSG then refers to the Panel's admissibility decision in this case, dated 31 January 2013. He cites the distinction made by the Panel between OMiK's occupation of the premises before and after November 2007 and concludes that at all times it exercised "the same functions under the UNMIK mandate in accordance with UN SC resolution 1244 (1999), as it did when OMiK commenced the occupation of the premises concerned in 2000".

21. The SRSG concludes that the complaint remains inadmissible and consequently should be rejected by the Panel on the basis that it has no competence to judge matters regarding OMiK's administrative activities. As a result, no violation of the complainant's right to the peaceful enjoyment of his possession can be attributed to UNMIK.

## **B. The Panel's assessment**

### *Preliminary observation*

22. Before turning to an examination of the complaint, the Panel would like to clarify the scope of its review.
23. Section 2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel provides that the Panel shall have jurisdiction 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". It follows that events that took place before 23 April 2005 generally fall outside the jurisdiction *ratione temporis* of the Panel. To the extent that such events gave rise to a continuing situation, the Panel has jurisdiction to examine complaints relating to that situation, but only insofar as the situation continued after 23 April 2005.
24. The Panel contrasts this with the signing of a contract between the complainant and OMiK for the period beginning 1 November 2007. At that stage, a private contractual relationship was agreed between the parties for the use of the premises by OMiK. Any dispute with respect to the terms and conditions of this contract would then be regarded as a private contractual matter rather than one bearing on the functions for which UNMIK held final responsibility.

### *Organisational relationship between UNMIK and OMiK*

25. The Panel recalls that OMiK was established on 1 July 1999. Its deployment was based on Permanent Council Decision 305 (P.C.DEC/305), which referred to UN Security Council Resolution 1244 (1999) and charged the Mission with activities related to institution and democracy building and human rights as a "distinct component within the overall framework of the United Nations Interim Administration Mission in Kosovo".
26. The Panel notes further that the UN Secretary-General Report of 12 June 1999, subsequently confirmed by OSCE Permanent Council Decision No. 305 (see above), recognised the role that OSCE would play in Kosovo under the leadership of the UN. Paragraph 3 of this report stated that "The Special Representative of the Secretary-General will have overall authority to manage the Mission and coordinate the activities of all United Nations agencies and other international organizations as part of UNMIK" (S/1999/672). This was further confirmed on 12 July 1999 in the UN Secretary-General Report of that date, which re-enforced UNMIK as being the lead organisation in the administration of Kosovo and OMiK's position within this structure (S/1999/779).

27. The Panel refers to the exchange of letters between UN Under-Secretary General for Peacekeeping Operations, Ambassador Bernard Miyet, and Ambassador Kim Traavik, Representative of the OSCE Chairman-in-Office, dated 16 and 19 July 1999, which references an agreement regarding the allocation of tasks to be undertaken by OMiK under UNMIK<sup>1</sup>. The letters confirmed among other things that the institution-building component of UNMIK would be headed by a Deputy Special Representative of the UN Secretary-General, who would be the Head of OMiK. In his or her capacity as the Deputy SRSG, he or she would also report on activities of the institutional-building component to the SRSG. The SRSG would also retain overall and ultimate authority for the interpretation and implementation of provisions of UN Security Council Resolution 1244 (1999) in relation to its civil aspects. The SRSG would have responsibility for ensuring that all UNMIK activities, including the OSCE-led institution building component, were carried out in an integrated, cohesive and effective manner.
28. Indeed, the Panel notes, that in his reports to the Security Council on activities taken by UNMIK in Kosovo the UN Secretary-General frequently referenced the actions of OMiK throughout the Panel's jurisdiction. See for example the quarterly reports of the UN Secretary-General on the United Nations Interim Administration in Kosovo 3 January 2008.
29. The Panel therefore concludes that although OMiK represented a distinct pillar of the international presence in Kosovo, responsibility for its overall activities remained within UNMIK.

#### *Activities of OMiK*

30. In relation to the activities of OMiK, the Panel draws a distinction between its private contractual activities and those public actions performed as a part of its role as a pillar of UNMIK within Kosovo. The period between 1 March 2000 and 1 November 2007, during which OMiK took over the premises of the complainant's company without express agreement and consent for the purposes of undertaking its public activities, must be seen in the context of performing an action relating to the role of UNMIK pursuant to UN Security Council Resolution 1244 (1999). No express or implied agreement was made with the complainant's company for the use of the premises as part of OMiK's operation in Pejë/Peć during this period. Indeed, OMiK's authority to take over such premises in this context can only have derived from its inclusion within UNMIK's administrative framework (see § 15 to 17 above) and UN Security Council Resolution 1244 (1999).

#### *General Principles*

31. Article 1 of Protocol No. 1 to the ECHR states, in relevant part,

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce

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<sup>1</sup> See *The OSCE in the New International Environment in Kosovo*, Marcin Czapliński, <http://www.core-hamburg.de/documents/yearbook/english/09/Czapliński-en.pdf>, Centre for OSCE Research, OSCE Year Book 2009.

such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

32. The Panel must first examine the question as to whether there was interference with the complainants’ right to peaceful enjoyment of his property from 23 April 2005, the period marking the start of the Panel’s jurisdiction, until 1 November 2007.
33. The Panel notes that the SRSG and the OSCE do not dispute ownership of the premises in question. As indicated by the complainant, the property was purchased by him in 1993 and verified by the competent court under no. 2767/93. Subsequently, on 1 November 2007, the OSCE concluded a rental contract with the complainant’s company for occupation of the premises.
34. The Panel therefore concludes that the occupation of premises in Pejë/Peć by OMiK between 1 March 2000 and 1 November 2007 prevented the complainant from dealing with his property as he sought fit and thereby constituted an interference pursuant to Article 1 of Protocol No. 1 to the ECHR.
35. The Panel must then determine whether or not this interference contravenes Article 1 Protocol No. 1 of the ECHR. The Panel recalls the case law of the European Court of Human Rights:

“... Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule” (see, e.g., ECtHR (Grand Chamber), *Perdigao v. Portugal*, no. 24768/06, judgment of 16 November 2010, § 57).

36. The Panel notes that the activities of OMiK did not involve a deprivation of property within the meaning of the second sentence of the first paragraph of Article 1 because the complainant, through his company, remained the legal owner of the premises in Pejë/Peć. The Panel considers that the occupation of the premises constituted control of the use of property, within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see ECtHR, *Mellacher v Austria*, judgment 19 December 1989, Series A, no. 169, § 44; ECtHR, *Matos E Silva, LDA and Other v Portugal*, no. 15777/89, judgment of 16 September 1996, § 79; *Gasus Dosier – und Fördertechnik GmbH v Netherlands*, no 15375/89, judgment 23 February 1995, § 57; *Doğan v Turkey*, nos 8803-8811/02, 8813/02 and 8815-8819/02, judgment 29 June 2004, § 143, ECHR 2004-VI).

37. The Panel must then consider the lawfulness of the interference.
38. The SRSG maintains that the initial grant of property to OMiK was on the basis that it was believed that the property had been socially owned, based on cadastral records seen in February and July 2000 (see § 16 above). The complainant states that after OMiK occupation of the premises he immediately informed OMiK's that the premises were his and that some form of rental agreement needed to be established.
39. Although the Panel has not been provided with these cadastral records, it does not dispute that at the time of the original grant to OMiK, UNMIK believed that the premises were socially owned. However, the Panel notes that by 23 April 2005, the complainant had adduced evidence of his ownership to both OMiK and UNMIK making them aware of the genuine nature of his claim. Once UNMIK had been notified of the issue ownership of the property, it was under a duty to review and, if necessary, rectify the nature of the occupation by OMiK. The Panel therefore concludes that UNMIK's failure to undertake any remedial action such as entering into a contract for rent regarding the claim constituted an unlawful interference by UNMIK.
40. In the light of the foregoing, the Panel finds that there has been a violation of Article 1 of Protocol No. 1 of the ECHR in respect to the unlawful occupation of the premises in Pejë/Peć by OMiK.

## **V. RECOMMENDATIONS**

41. In light of its findings in this case, the Panel is of the opinion that some form of reparation is necessary.
42. The Panel recommends that UNMIK should undertake appropriate steps vis-à-vis OSCE to redress the complainant for pecuniary damage.

### **FOR THESE REASONS,**

The Panel, unanimously,

- 1. FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.**
- 2. RECOMMENDS THAT UNMIK:**
  - a. TAKE APPROPRIATE STEPS VIS-À-VIS OSCE TO REDRESS THE COMPLAINANT FOR PECUNIARY DAMAGE;**

- b. TAKE IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND INFORM THE COMPLAINANT AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Andrey Antonov  
Executive Officer

Marek NOWICKI  
Presiding Member