



OMBUDSPERSON INSTITUTION in KOSOVO

REPORT

***Ex Officio* Registration No. 42/2005**

Regarding the question of possible discrimination in the granting of construction material to repair houses that were categorized in category (4B), following the earthquake in the Gjilan/Gnjilane region on 24 April 2002

The Ombudsman in Kosovo, pursuant to Section 4.1 paras (b) and (f) of UNMIK Regulation No. 2006/6 on the Ombudsman Institution in Kosovo and Rules 13 and 15 of the Rules of Procedure of the Ombudsman Institution, on 30 June 2006,

has published the following report:

BACKGROUND INFORMATION

1. This Report is based in part on complaints received by the Ombudsperson from certain individuals dissatisfied with the Municipality of Gjilan/Gnjilane's (hereinafter "the Municipality") failure to allocate construction material to them. The Municipality had received certain funds from the Kosovo Government to purchase and distribute such material to persons whose houses had been damaged or destroyed as a result of an earthquake that had broken out in the Municipality on 24 April 2002. The majority of complaints were received from persons whose houses had been largely or completely destroyed.
2. This report is also based on data received from the Municipality that indicates that during the above-mentioned allocation and distribution process, human rights violations may have occurred.

SCOPE OF THE REPORT

3. This report examines whether the manner in which the Municipality allocated material assistance to certain individuals for the repair of damages caused by the earthquake raises certain issues with regard to these persons' right be free from all forms of discrimination and to property under Article 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms in conjunction with Article 1 Protocol No.1. (hereinafter "the European Convention on Human Rights" or "the Convention").

PROCEEDINGS BEFORE THE OMBUDSPERSON

4. On 24 December 2004, a large number of persons living in the Municipality complained to the Ombudsperson regarding the manner in which the Municipality had allocated assistance for houses damaged by the earthquake on 24 April 2002.
5. Throughout the months of December 2004 and January 2005, many more people came to the Ombudsperson Institution to complain about the allegedly discriminatory way in which the Municipality had allocated the above earthquake assistance.
6. On 11 February 2005, the Ombudsperson opened an *ex officio* investigation into the present case under Registration No. 42/2005.
7. On 11 February 2005, the Ombudsperson sent a letter to the President of the Municipality informing him about the opening of an official investigation before the Ombudsperson.
8. On 11 March 2005, the Ombudsperson sent a letter to the Acting Prime Minister of Kosovo and asked him to send a copy of the Government's decision to allocate financial assistance to repair houses damaged in the earthquake, to be distributed by the Municipality. The Ombudsperson never received an answer to his letter.

9. On 15 March 2005, the Ombudsperson wrote to the President of the Municipality asking for copies of the allocation decision issued by the Municipal Commission responsible for drafting the list of beneficiaries for the above assistance and for information on the criteria on the basis of which this list had been drafted. Copies of this letter were sent to the Deputy Special Representative of the Secretary-General for Civil Administration (hereinafter "Deputy SRSG"), the UNMIK Standards Coordinator, the Acting Prime Minister of Kosovo, the Standards Coordinator of the Kosovo Government, and the Chief Executive Officer of the Municipality.
10. On 17 March 2005, the Ombudsperson received information from the President of the Municipality in answer to the Ombudsperson's letter informing the Municipality about the opening of an official investigation before the Ombudsperson (see para. 6). The documents sent to the Ombudsperson included a chronological account of the work of the competent bodies of the Municipal Assembly regarding the repair of houses damaged by the earthquake, but no information on the criteria on the basis of which the lists had been compiled.
11. On 21 April 2005, the Ombudsperson wrote a reminder to the President of the Municipality reiterating his request of 15 March 2005 (see para. 9 *supra*). Copies of this letter were sent to the Deputy SRSG, the UNMIK Standards Coordinator, the Acting Prime Minister of Kosovo, the Standards Coordinator of the Kosovo Government, and the Chief Executive Officer of the Municipality.
12. On 30 June 2005, the Ombudsperson sent a letter to the Special Representative of the UN Secretary General (hereinafter "the SRSG") in which he asked the SRSG to intervene in order to ensure that the Ombudsperson be able to access official documents in the Municipality and to engage in mutual cooperation with regard to the instant case.
13. On 28 July 2005, the Ombudsperson received an answer from the Deputy SRSG, in which he supported the access to official documents by representatives of the Ombudsperson. If the Municipality posed any problems, the Ombudsperson's representative should address such problems to the UNMIK Regional Representative in the Municipality.
14. On 13 September 2005, representatives of the Ombudsperson met the Chief Executive Officer of the Municipality.
15. On 14 September 2005, representatives of the Ombudsperson met the President of the Commission responsible for the verification of cases that had suffered damages from the earthquake (hereinafter "the Verification Commission).
16. On 15 September 2005, the Ombudsperson sent to the President of the Verification Commission a list of names of 120 people who complained that they had not received any assistance from the Municipality although they fell under the category of people who were entitled to.

17. On 29 September 2005, the Ombudsperson received a document from the President of the Verification Commission containing a list of 98 people, which indicated the criteria applied by the Verification Commission. With regard to the 22 other people mentioned in the list sent by the Ombudsperson on 15 September 2005, the President of the Verification Commission stated that as these people had never been visited by the Commission, it did not have any documentation on their situation.
18. On 27 October 2005, the Ombudsperson sent a list with 22 people on it to the President of the Appeals Commission appointed by the Chief Executive Officer of the Municipality on 13 December 2004 for the examination of the appeals of people not satisfied with the decisions of the Verification Commission (hereafter “the Appeals Commission”). In his letter, the Ombudsperson informed the President of the Appeals Commission about certain information regarding people that had not been taken into account by the Verification Commission.
19. On 1 December 2005, the Ombudsperson received a document from the President of the Appeals Commission with the names of three complainants whose houses the Appeals Commission had visited. One of these complainants had received no assistance, whereas the others had received 1 000,00 and 2 000,00 EUR respectively. With regard to 19 others, the Commission declared that it did not possess any documents regarding their situation and for this reason had also not visited these people’s homes.
20. From January 2006 to June 2006, those persons whose homes had been destroyed but who had not received damage assistance from the Municipality continued to visit the Ombudsperson Institution’s office in Gjilan/Gnjilane regularly. Each time, they informed the representatives of that office that there had been no new developments in their cases.

FACTS

I. THE CIRCUMSTANCES OF THE CASE

The facts, in so far as they can be established, may be summarised as follows:

21. On 24 April 2002, the Gjilan/Gnjilane region was hit by a strong earthquake leaving one person dead and causing considerable material damage to private and public buildings in the area.
22. In December 2003, the Ministry of Finances allocated 3 700.000,00 EUR to the Municipality for assistance to those persons whose houses had suffered damages.
23. On 12 December 2003, a Verification Commission was formed within the Municipal Assembly of Gjilan/Gnjilane to verify the damages caused by the earthquake.

24. Between 19 December 2003 and 18 April 2004, the Verification Commission conducted its assessments. During this period, it visited 1287 families and selected 506 families to benefit from material assistance, based on the level of damage caused to their houses, their social situation and the present condition of their houses of residence. The damages were categorized by the Commission as follows:

Category “3A” included houses with damaged doors, windows, cracks in the walls, but not damages to holding constructions.

Category “3B” included houses with damages as in “3A” and with damaged roofs.

Category “4A” included those houses with damages falling under categories “3A” and “3B” including damages to the vital constructive elements, pillars, horizontal constructive elements, massive concrete slabs, but where the foundations of the houses are less damaged and have remained stable.

Category “4B” included those houses that had been destroyed completely.

25. On 12 May 2004, the Verification Commission issued a list of beneficiaries eligible for assistance to repair the damages caused by the earthquake.
26. In the beginning of December 2004, a list was published by the Municipality including 506 people as beneficiaries of assistance amounting to 1.200.000,00 Euros in total.
27. After the publication of the list by the Municipality, a number of citizens started to lodge appeals against the method in which the Verification Commission had compiled the list published by the Municipality.
28. On 13 December 2004, the Chief Executive Officer of the Municipality appointed a Commission for the examination of these appeals (hereafter “the Appeals Commission”).
29. On 27 January 2005, after the examination of appeals by the Appeals Commission, the Municipality published an additional list of 48 people who were beneficiaries of another 50.000,00 Euros.
30. In March 2006, following continuous complaints from persons who had not received financial assistance from the Municipality, the Municipality engaged in a public discussion with some of the above complainants, but no consensus or solution was reached.

II. RELEVANT INSTRUMENTS

31. Section 11 of United Nations Security Council Resolution 1244 (1999) (10 June 1999)(hereinafter “S/RES/1244 (1999)”) reads, in pertinent part,

'The Security Council [...]

[d] decides that the main responsibilities of the international civil presence will include [...]

(j) protecting and promoting human rights [...]

32. The Constitutional Framework for Provisional Self-Government in Kosovo, promulgated by UNMIK Regulation No. 2001/9 (15 May 2001) reads, in pertinent part:

[...]

3. Human Rights

3.1 All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms.

3.2 The Provisional Institutions of Self-Government shall observe and ensure internationally recognized human rights and fundamental freedoms, including those rights and freedoms set forth in:

(a) The Universal Declaration on Human Rights;

(b) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;

(c) The International Covenant on Civil and Political Rights and the Protocols thereto; [...]

3.3 The provisions on rights and freedoms set forth in these instruments shall be directly applicable in Kosovo as part of this Constitutional Framework. [...]

33. The Kosovo Assembly Law No. 2004/3 on Anti-Discrimination (19 February 2004), promulgated by UNMIK Regulation No. 2004/32 (20 August 2004) reads, in pertinent part:

[...]

Article 2

Principles

The regulation of the issues dealing with non-discrimination is based on these principles:

a) The principle of equal treatment shall mean that there shall be no direct or indirect discrimination against any person or persons, based on sex, gender, age, marital status, language, mental or physical disability, sexual orientation, political affiliation

or conviction, ethnic origin, nationality, religion or belief, race, social origin, property, birth or any other status;

[...]

Article 3 Terms

For the purposes of Article 2 (a), the terms below are defined as follows:

(a) Direct discrimination shall be taken to have occurred where one person is treated less favorably than another is, has been or would be treated in a comparable situation based on one or more grounds such as those stated in Article 2(a);

(b) Indirect discrimination shall be taken to have occurred where an apparently neutral provision, criterion or practice would put persons, on the basis of one or more grounds such as those stated in Article 2(a), at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

[...]

Article 4 Implementation Scope

This Law shall apply to all natural and legal persons as regards both the public and private sectors, including public bodies, in relation to any action or inaction which violates the right or rights of any natural or legal person or persons, to:

[...]

(f) Social advantages, including but not limited to humanitarian assistance;

[...]

Chapter III

Bodies for the promotion for equal treatment

[...]

Article 10 Existing body

An authorized body to receive and investigate complaints concerning violations of rights based on discrimination is the Ombudsperson of Kosovo, which will review cases in compliance with his or her authority according to the legislation in force.

34. UNMIK Regulation No.2000/45 On Self- Government of Municipalities of Kosovo (11 August 2000) reads, in pertinent part:

[...]

Section 2
Municipalities in Kosovo

[...]

2.2 Municipalities shall regulate and manage public affairs in their territory within the limits fixed by law and so as to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo. They may attend to matters of general concern that are connected with the municipality and that are not to be attended to solely by the Central Authority or another body.

[...]

Chapter VI
Complaints and judicial

Section 35
Complaints

35.1 A person may file a complaint about an administrative decision of a municipality if he or she claims that his or her rights have been infringed by the decision. Complaints must be submitted in writing to the Chief Executive Officer or made in person at the office of the Chief Executive Officer within the period of one month from the complainant being notified of the decision.

35.2 The Chief Executive Officer shall re-examine both the legality of the decision and the administrative process by which it was reached. He or she shall give the complainant a reasoned response in writing within one month of the receipt of the complaint.

35.3 If the complainant is dissatisfied with the response of the Chief Executive Officer, the complainant may refer the matter to the Central Authority, which shall consider the complaint and decide upon the legality of the decision.

[...]

35.7 The rights set out in this section shall be additional to any rights that the person may have to refer an administrative decision to the Ombudsperson or to a court of law.

Section 36 Judicial Protection of the Law

A person may seek relief in a court of law against decisions of a municipality, in accordance with the rules and procedures of the relevant court.

35. The statute of Gjilan/Gnjilane Municipality (16 March 2001) reads, in pertinent part:

[...]

Article 3

Municipalities shall regulate and manage public affairs in their territory within the limits fixed by law and so as to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo (see Section 2.2, Reg. 2000/45).

Article 4

All organs and bodies of a municipality shall ensure that inhabitants of the municipality enjoy all rights and freedoms without distinction of any kind, such as race, ethnicity, color, sex, language, religion, political or other opinion, national or social status (see Section 2.4, Reg. 2000/45).

36. The European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (hereinafter “the European Convention on Human Rights ” or “the Convention”) and its Protocols read, in pertinent part:

[...]

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[...]

Article 1 of Protocol No. 1

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 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.

ANALYSIS

37. After receiving complaints regarding the allocation of material assistances by the Municipality for repairing the houses damaged by the earthquake on 24 April 2002, the Ombudsperson conducted a thorough investigation into the respective proceedings to see whether they had been conducted in a manner that was compatible with international human rights and rule of law standards. He considers that the instant case could raise issues under international law, as specified in the European Convention of Human Rights, whose principles are also laid down in the Kosovo Assembly's Anti-Discrimination Law.
38. In this context, the Ombudsperson recalls the contents of Article 14 of the European Convention on Human Rights, which reads as follows:
- “The enjoyment of the rights and freedoms set forth in Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
39. At the outset, the Ombudsperson notes that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of them (See the case of *Koua Poirrez v. France*, judgment of 30 September 2003, see also *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994 and *Gaygusuz v. Austria*, judgment of 16 September 1996).
40. The instant case could raise issues with regard to the right to property of the persons concerned, protected by Article 1 of Protocol No. 1 to the Convention, which reads as follows:

“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 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.”

41. In order for the instant case to fall within the ambit of Article 1 of Protocol No. 1, the allocation of assistance for damages deriving from the earthquake in 2002 must affect the relevant persons’ possessions.
42. In the case of *Koua Poirrez v. France* cited above, the European Court of Human Rights reiterated that the right to emergency assistance - in so far as provided for in the applicable legislation – is a pecuniary right for the purposes of Article 1 of Protocol No.
43. In the instant case, the persons who suffered damages following the earthquake in 2002 did not have a right to emergency assistance by law. However, the fact that the Kosovo Government allocated a certain sum to helping them rebuild their homes and asked the Municipality to distribute these funds to the persons needing them constitutes a promise of assistance that, for the purposes of this legal analysis, raised a legitimate expectation among potential beneficiaries of such assistance that may be qualified as similar to the expectations raised by a law on emergency relief.
44. Assuming thus that Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1, is applicable to this case, it follows that the distribution of material assistance for damages to residential property caused by the earthquake must be, in accordance with Article 14, conducted in a non-discriminatory manner, thus giving each applicant in need the same chances to receive such assistance and not excluding certain applicants based on grounds that are unreasonable and not legitimate. This obligation is laid down even more specifically in Article 4 (j) of the Anti-Discrimination Law, which provides that this Law protects individuals from discriminatory treatment in cases involving their rights to “social advantages, including, but not limited to humanitarian assistance” (see para. 33 *supra*).
45. In order to ensure adequate safeguards, the Municipality undertaking these proceedings must ensure that they are conducted in a fair and impartial manner leaving no room for any form of arbitrariness or discrimination.
46. At the outset, the Ombudsperson notes that one of the primary requirements necessary for preventing any form of arbitrariness is the prerequisite that such proceedings are firmly rooted in a legal basis.
47. In the instant case, the Government of Kosovo allocated 3 700 000,00 Euro for the purpose of disaster relief following the 2002 earthquake. It determined that the Municipality of Gjilan/Gnjilane should be responsible for the distribution.
48. The Municipality thereupon formed a Verification Commission that was responsible for identifying beneficiaries of this assistance. This Verification Commission set its own criteria for verifying the damage caused by the Earthquake, namely the level of damage

caused to each house, the individuals' social situation and the present condition of their houses of residence.

49. Neither the Municipality nor the Verification Commission drafted any rules of procedure for the Verification Commission to follow. In this context, the Ombudsperson notes that when the Municipal Assembly established the Verification Commission, it appointed seven persons to be members of this Verification Commission, but did not decide on any details regarding the decision-making process by the Commission. There was no decision on how many members of the Verification Commission were entitled to take decisions, nor were there any provisions for their replacement should one or more of the members of the Verification Commission not attend meetings or resign. The practical effect of this lack of a detailed regulation was that when one member of the Verification Commission resigned and another member stopped taking part in sessions, no replacement members were appointed. The Verification Commission thus took decisions with five members instead of seven without it being clear whether such decisions were valid or not. The decisions themselves also did not always contain the signatures of the five remaining members.
50. Such a lack of regulations on how many members were permitted to take valid decisions on behalf of the Verification Commission creates a situation where there are no safeguards to prevent certain members of the Verification Commission from taking decisions that are not supported by the majority behind the back of other Commission members. It leaves the members to operate in whichever way and in whichever composition they see fit and thus leaves a considerable amount of room for arbitrary behaviour.
51. Also, the fact that the Verification Commission was permitted to establish its own criteria and its own rules left the whole process of assessing the various applications entirely up to the Commission. There was no outside influence or supervision of the process of distributing funds for the repair of damaged houses. The Verification Commission thus operated with near-to complete impunity, in particular as throughout the entire allocation proceedings, it was not obliged to report back to any other body within the Municipality, nor to the Government of Kosovo, which had allocated the funds for disaster relief in the first place. In the absence of adequate laws and procedures governing the work of the Verification Commission, this would have been the last and most basic form of guaranteeing that arbitrariness in the decision-making process be kept to a minimum. But not even this minimum was maintained.
52. Instead, the Commission had complete power over the way in which material assistance was distributed to the respective beneficiaries and did not have to answer to any laws, procedures or supervisory bodies. All of the above factors lead to the conclusion that the entire proceedings did not contain sufficient safeguards to prevent arbitrary behaviour on the side of the Commission and thus did not sufficiently protect the complainants' rights to be free from all forms of discrimination.

53. At the same time, the complaints made to the Ombudsperson gave evidence of the negative consequences such a lack of proper procedure and oversight could have, since it now renders it impossible for the Verification Commission to prove that it operated in a proper manner. This could have been avoided with proper procedure and supervision on the side of the Municipality and the Government.

54. In this context, the Ombudsperson notes that even if the Municipality later established an Appeals Commission, this only served to review complaints of persons dissatisfied with the work of the Verification Commission, but did not resolve the problems mentioned above regarding the composition and lack of prior supervision of the Verification Commission.

Conclusion

55. In light of the above lack of legal, procedural and hierarchical safeguards to ensure that the assessment and distribution proceedings were conducted in a fair and impartial manner, the Ombudsperson considers that the rights of the persons applying to receive damage assistance were left without sufficient protection against discriminatory behaviour in violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.

RECOMMENDATIONS

56. The Ombudsperson recommends that the Minister of Local Government Administration, as soon as possible but no later than **1 September 2006**:

- ensure that further complaints of persons whose damages were categorized under category 4B and who consider that they should have received material assistance from the Municipality be reviewed and dealt with appropriately by the competent Appeals Commission set up for this purpose by the Municipality of Gjilan/Gnjilane;
- ensure that in future cases where *ad hoc* commissions are set up in municipalities, in particular if they involve the distribution of financial assistance, the competent Municipal Assembly draft and approve an appropriate procedure for these commissions, as well as criteria on the basis of which such assistance should be distributed;
- inform the Ombudsperson about any action taken in response to these recommendations.

57. The Ombudsperson further recommends that the Assembly of Kosovo:

- start drafting a Law on Emergency Assistance or, in case the drafting of such a law has already started,
- proceed with the drafting of the law taking into consideration the concerns expressed by the Ombudsperson in this report.

Hilmi Jashari
Acting Ombudsperson