

OMBUDSPERSON INSTITUTION in KOSOVO

REPORT

Ex officio Investigation No. 19/01

Regarding the Removal of

Emrush Xhemajli, Gafurr Elshani and Sabit Gashi

from the List of Candidates for the November 2001 Elections

The Ombudsperson for Kosovo, pursuant to Sections 4.4 and 4.9 of UNMIK Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo and Rules 18 and 21 of the Rules of Procedure of the Ombudsperson Institution, on 29 October 2001,

has presented the following Report to Mr. Hans Haekkerup, Special Representative of the Secretary General of the United Nations, within the meaning of those provisions:

PROCEEDINGS BEFORE THE OMBUDSPERSON

1. On 24 September 2001, the Ombudsperson was informed about the cases of Mr. Emrush Xhemajli and Mr. Gafurr Elshani, who are respectively President and Vice-president of the Peoples' Movement of Kosovo (hereinafter PMK) and Mr. Sabit Hajdin Gashi, Vice-president of the National Movement for Liberation of Kosovo (hereinafter NMLK). According to the information received by the Ombudsperson, all of these persons were removed from the candidates lists of their respective political parties for the Kosovo Assembly elections to take place on 17 November 2001. The names apparently were removed from the lists on the bases of one or more Executive Orders issued by Mr. Hans Haekkerup, the Special Representative of the Secretary-General (hereinafter the SRSG), to the Central Election Commission. [Throughout this Report, Mr. Emrush Xhemajli, Mr. Gafurr Elshani and Mr. Sabit Hajdin Gashi will be referred to as 'the three individuals' or 'the individuals affected'.]
2. On 8 October 2001, the Ombudsperson opened an *ex officio* investigation regarding the case, which was registered under *ex officio* Registration No. 19/01.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

The facts of the case, in so far as they can be ascertained, may be summarized as follows:

A. In the case of Mr. Emrush Xhemajli and Mr. Gafurr Elshani:

3. In summer 2001, several newspapers in Kosovo published a list of persons considered to be 'undesirable' by the Government of the United States, which became known as the "George Bush list" or the "black list". The names of Mr. Emrush Xhemajli and Mr. Gafurr Elshani appeared on the list.
4. On 10 September 2001, the People's Movement of Kosovo (PMK) presented its electoral list to the Central Elections Commission in Kosovo. The names of Mr. Emrush Xhemajli and Mr. Gafurr Elshani were included on this list as candidates for election to the Kosovo Assembly.

5. Towards the end of September 2001, several newspapers published in Kosovo reported that candidates whose names appeared on the so-called 'George Bush List' would be removed from the list of candidates eligible to run in the elections of November 2001.

6. At a meeting called several days later by Ambassador Daan Everts, Head of the OSCE Mission in Kosovo and Chairman of the Central Election Commission, Mr. Xhemajli and Mr. Elshani were informed that their names had been removed from the list of candidates on the basis of an Executive Order issued by the SRSG.

7. Neither at the meeting with Ambassador Everts nor at any subsequent time were Mr. Xhemajli and Mr. Elshani provided with a copy of the relevant Executive Order or any formal written documentation related to their removal from the candidates list. Nor were they apprised of the existence of any procedures or mechanisms through which they could lodge an appeal against the Executive Order.

B. In the case of Mr. Sabit Gashi, Vice-president of the National Movement for Liberation of Kosovo (NMLK):

8. The name, Mr. Sabit Gashi, appeared on the list referred to in para. 3 above.

9. On 10 September, 2001, the National Movement for Liberation of Kosovo (NMLK) presented its electoral list to the Central Elections Commission in Kosovo. The name of Mr. Sabit Gashi was included on this list as a candidate for election to the Kosovo Assembly.

10. Shortly thereafter, Amb. Everts orally informed Mr. Gashi that he would be excluded from the list of candidates on the basis of an Executive Order of Mr. Hans Haekkerup, the Special Representative of the Secretary-General.

11. On 26 September, 2001, the President of NMLK, Mr. Fatmir Humoli wrote a letter to Amb. Everts stating that the Mr. Sabit Gashi identified as being on the 'black list' was not the same person on the electoral slate of NMLK, citing to different dates and places of birth in support of his position.

12. In a 15 October 2001 letter to Mr. Humoli, Amb. Everts stated:

On the basis of information recently delivered to both UNMIK and OSCE from the Government of the United States, I write to inform you that the Mr. Sabit Gashi, the Vice-president of the LKCK (sic) and no. 2 on your party's candidate list, is the same person as the Mr. Sabit Gashi listed in the US Executive Order annexed to the UNMIK Executive Decision.

It follows that Mr. Sabit Hajdin Gashi is ineligible to be a candidate in the forthcoming election of the Assembly scheduled for 17th November and therefore has been deleted from your party's candidate list.

13. Mr. Gashi has never received a copy of either the 'U.S. Executive Order' or of the 'UNMIK Executive Decision'. Nor has he been apprised of the existence of any procedures or mechanisms through which he could lodge an appeal against either executive act or otherwise to appeal against his removal from the list of electoral candidates.

II. RELEVANT INSTRUMENTS

14. Section 1 of UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999) (hereinafter UNMIK Regulation No. 1999/1) reads, in pertinent part:

1. All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.

15. Section 1.3 of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo (12 December 1999) as amended by UNMIK Regulation No. 2000/59 (27 October 2000) (hereinafter UNMIK Regulation No. 2000/59) reads, in pertinent part:

In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in [...] The European Convention on Human Rights and Fundamental Freedoms of 4 November 1950

16. Section 1 of UNMIK Regulation No. 2000/21 on the Establishment of the Central Election Commission reads:

The Central Election Commission shall be independent and impartial.

17. Article 3 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms (hereinafter the European Convention on Human Rights or the Convention) reads, in pertinent part:

The High Contracting Parties undertake to hold free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

18. Article 8 of the European Convention on Human Rights reads, in pertinent part:

1. Everyone has the right to respect for his private ... life....

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

19. Para. 1 of Article 6 of the European Convention on Human Rights reads, in pertinent part:

In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time by independent and impartial tribunal established by law.[...]

20. Article 11 of the European Convention on Human Rights reads, in pertinent part:

1. Everyone has the right to ... freedom of association with others....

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others.....

21. Article 13 of the European Convention on Human Rights reads:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ANALYSIS

The right to free elections: Article 3 of the Additional Protocol to the European Convention on Human Rights

22. The Ombudsperson is called upon to examine whether the removal of the three named individuals from the list of candidates eligible to be elected to the Kosovo Assembly on 17 November 2001 can be considered to be in compliance with the requirements of Article 3 of the First Protocol to the European Convention on Human Rights which states in so far as relevant:

The High Contracting Parties undertake to hold free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

23. At the outset, the Ombudsperson recalls that unlike other Articles of the Convention, Article 3 of the First Protocol primarily imposes an obligation on the State rather than guaranteeing a right of an individual. However, the Article does encompass the right of the individual to vote and to stand for election. (*Mathieu-Mohin v. Belgium* judgment of 2 March 1987 and *Gitonas and Others v. Greece* judgment of 23 June 1997).

24. The Ombudsperson recalls that implementation of Article 3 of the First Protocol to the European Convention on Human Rights, as "a characteristic principle of democracy", is one of the conditions for the protection and enjoyment of human rights (*Mathieu-Mohin v. Belgium* Judgment of 2 March 1987). The word 'choice' in Article 3 of the First Protocol implies that the authorities must provide for the creation and existence of political parties and must enable the parties to present candidates for the elections. The word 'free' enhances this obligation by requiring the state to ensure that political parties are able to select their candidates without pressure or interference.

25. However, the Ombudsperson also recalls that the rights to vote and to stand for election are not absolute. In some circumstances defined by law, a state may prohibit an individual or a political party from running for election (see, e.g. *Fryske Nasjonale Partij v. Netherlands*, Appl. No 22200/84, 45 DR 240). However, a state may not exercise this power in order to thwart the free expression of the opinion of the people (*W, X, Y and Z v. Belgium*, Appl. No. 6745/74 and 6746/74, 2 DR 110).

26. As with respect to other rights guaranteed under the European Convention on Human Rights, the Ombudsperson recalls that the first condition to be met by a government imposing restrictions on rights is that any such restrictions must be 'in accordance with law'. The attributes of lawfulness in the sense of the Convention are set forth, *inter alia*, in Special Report No. 1 on the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) and on the Implementation of the Above Regulation, addressed to Mr. Hans Haekkerup, Special Representative of the Secretary General of the United Nations (26 April 2001)(hereinafter Special Report No. 1).

27. The Ombudsperson observes that no law currently in force in Kosovo provides either criteria or procedures for the removal of individuals from the list of candidates eligible to be elected to the Kosovo Assembly, based solely on the discretion of the SRSG or on Executive documents issued by heads of other States. Such acts therefore have no legal basis. The Ombudsperson further observes that even should a law be promulgated granting power to the executive to order the removal of candidates or otherwise entrenching arbitrariness, any such law would be incompatible with the principles underlying Article 3 of the First Protocol of the European Convention on Human Rights.

28. The Ombudsperson further observes that where the threshold requirements of lawfulness are not met, as here, any further examination of the matter is rendered moot: the violation of the right at issue is caused by the unlawfulness itself (Cf. para. 14 of Special Report No. 1).

Conclusion

29. The Ombudsperson concludes, therefore, that there has been a violation of Article 3 of the First Protocol of the European Convention on Human Rights.

The right to respect for private life: Article 8 of the European Convention of Human Rights

30. The Ombudsperson is called upon to examine whether the repercussions of the removal of the three individuals' names from the candidates list for the forthcoming elections can be considered to be in compliance with the requirements of Article 8 of the European Convention on Human Rights which states, in so far as relevant:

1. Everyone has the right to respect for his private ...life.....
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

31. The Ombudsperson recalls that the guarantees afforded by Article 8 encompass, *inter alia*, the right to protection of one's good name and against attacks on one's reputation (*mutatis mutandis* Niemietz v. Germany judgement of 16 December 1992). The Ombudsperson also recalls that in order to fall within the purview of the Article, any interference with a protected right must be by a public authority.

32. The Ombudsperson observes that the inclusion of the names of the individuals affected in a 'black list' that has been widely disseminated in Kosovo and on the basis of which they have been declared ineligible to stand for elections to the Kosovo Assembly constitutes a serious interference with their right to respect for private life. The Ombudsperson further observes that the interference has occurred as a result of actions of public authorities, including the Special Representative of the Secretary-General and the Central Elections Commission.

33. The Ombudsperson has previously found that no legal basis exists for the removal of the individuals affected from the list of candidates for election to the Kosovo Assembly (see para. 27 *supra*). The Ombudsperson observes that the principles governing lawfulness apply equally to the right to private life guaranteed under Article 8 of the Convention.

Conclusion

34. The Ombudsperson concludes, therefore, that there has been a violation of the right to private life guaranteed under Article 8 of the European Convention on Human Rights.

The right to a fair hearing in the determination of a civil right: Article 6 of the European Convention on Human Rights

35. The Ombudsperson is called upon to examine whether the individuals affected have been afforded their right to a fair and public hearing as guaranteed under para. 1 of Article 6 of the European Convention on Human Rights, which states, in so far as relevant:

In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by independent and impartial tribunal established by law.

36. The Ombudsperson recalls that the European Court of Human Rights has held that the rights to enjoy a good reputation, to protect the honour of one's family and to restore one's good name constitute civil rights in the sense of Article 6 of the Convention (*Kurzac v. Poland* Judgment of 22 February 2001).

37. With reference to his findings above regarding the right to respect for private life guaranteed under Article 8 of the Convention (para. 31), the Ombudsperson observes that the civil nature of the

rights at issue in the instant case brings them within the remit also of Article 6 for the purpose of judicial protection. No such protection has been afforded to the individuals affected.

Conclusion

38. The Ombudsperson concludes, therefore, that there has been a violation of the right to a fair hearing guaranteed under para. 1 of Article 6 of the European Convention for Human Rights.

The right to freedom of association: Article 11 of the European Convention on Human Rights

39. The Ombudsperson is called upon to examine whether the removal of the names of the three individuals from the list of candidates presented by their respective political parties for the forthcoming elections can be considered to be in compliance with the requirements of Article 11 of the European Convention on Human Rights which states, in so far as relevant:

1. Everyone has the right to ... freedom of association with others....

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others....

40. The Ombudsperson recalls that one of the underlying purposes of Article 11 is to ensure that governmental authorities refrain from interfering with the development of political party platforms, the choice of candidates for elections or other internal aspects of political party operations. (see e.g. *United Communist Party of Turkey and Others v. Turkey* judgement of 30 January 1998 and *Refah Partisi (the Welfare Party) Erbakan, Kazan and Tekdal v. Turkey* judgment of 31 July 2001). The Ombudsperson further recalls that any restrictions on the enjoyment of protected rights must be in accordance with law (see e.g. para. 26 *supra*).

41. The Ombudsperson observes that his previous findings with respect to Article 3 of Protocol No. 1 to the Convention (see para. 27 and 29) and Article 8 of the Convention (see para. 32 and 34) are equally applicable to the rights protected under Article 11.

Conclusion

42. The Ombudsperson concludes, therefore, that there has been a violation of the right to freedom of association guaranteed under Article 11 of the European Convention on Human Rights.

The right to an effective remedy: Article 13 of the European Convention on Human Rights

43. The Ombudsperson is called upon to examine whether the individuals whose names have been removed from the list of candidates for the forthcoming elections can be considered to have had available to them an effective remedy as required by Article 13 of the European Convention on Human Rights, which states:

Everyone whose rights and freedoms as set forth in this Convention shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

44. The Ombudsperson recalls that the European Court of Human Rights has held that Article 13 requires that anyone with an arguable claim that his or her rights under the Convention has been violated will be able to have the substance of that claim reviewed by a national authority, which must

also have the capacity to grant appropriate relief (Halford v. United Kingdom judgement of 25 June 1997).

45. The Ombudsperson observes that the removal of the names of the three individuals from the list of candidates for the forthcoming elections constitutes a violation of their rights under Articles 8 and 11 of the Convention and Article 3 of Protocol No. 1 to the Convention. The individuals affected thus must be considered to have a right to have their claims reviewed in accordance with Article 13. The Ombudsperson further observes, in this regard, that Section 1 of UNMIK Regulation 1999/1 vests total executive authority in the Special Representative of the Secretary General (SRSG), who has himself determined that the names of the individuals affected should be removed from the list. As the SRSG is both the highest national authority and the person who acted in his official capacity to remove the names from the list, no viable remedy in the sense of Article 13 of the Convention can be considered to exist.

Conclusion

46. The Ombudsperson concludes, therefore, that there has been a violation of the right to an effective remedy guaranteed under Article 13 of the European Convention on Human Rights.

RECAPITULATION OF CONCLUSIONS

47. The Ombudsperson is of the opinion that the removal of the names of Mr. Emrush Xhemajli, Mr. Gafurr Elshani and Mr. Sabit Gashi from the list of candidates for the elections of 17 November 2001 for the Kosovo Assembly and related circumstances as addressed herein constitute violations of:

the right to free elections under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature guaranteed under Article 3 of Protocol No. 1 to the European Convention on Human Rights;

the right to respect for private life guaranteed under Article 8 of the European Convention on Human Rights;

the right to a fair hearing for the determination of a civil right guaranteed under paragraph 1 of Article 6 of the European Convention on Human Rights;

the right to freedom of association guaranteed under Article 11 of the European Convention on Human Rights;

the right to an effective remedy before a national authority guaranteed under Article 13 of the European Convention on Human Rights.

RECOMMENDATIONS

48. The Ombudsperson recommends that the Special Representative of the Secretary-General of the United Nations should, no later than 2 November 2001:

Reinstate Mr. Emrush Xhemajli, Mr. Gafurr Elshani and Mr. Sabit Gashi on the list of candidates for the elections of 17 November 2001 for the Kosovo Assembly

Ensure that all means are pursued to ensure that these candidates are provided the same status and guarantees as they would have enjoyed had their names not been unlawfully removed from the aforementioned list.

Inform the Ombudsperson of the actions taken in response to these Recommendations, in accordance with Section 4.9 of UNMIK Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo.

Marek Antoni Nowicki
Ombudsperson