



OPINION

Date of adoption: 12 November 2008

Case No. 04/08

Shaip CANHASI

against

UNMIK

The Human Rights Advisory Panel sitting on 12 November 2008, with the following members present:

Mr. Paul LEMMENS, Presiding Member
Ms Snezhana BOTUSHAROVA,

Mr. John J. RYAN, 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 makes the following findings and recommendations:

I. FACTS OF THE CASE

1. According to the complainant, the facts in this case are as follows.
2. On 3 February 2000, at approximately 23.00, 15 individuals forcibly entered an apartment in North Mitrovica/ë and killed the complainant's wife (Mrs Remzije Canhasi) in the presence of the complainant and an UNMIK Police Officer who lived in the apartment as a tenant.

3. On 4 February 2000, at approximately 00.30, UNMIK police officers removed the complainant and the UNMIK Police Officer from the apartment.
4. On 4 February 2000 the Regional Investigations Unit in Mitrovica/ë (RIU) together with a forensic team searched and documented the crime scene and secured evidence.
5. On 7 February 2000, a pathologist from the Institute of Forensic Pathology in Prishtinë/Priština performed an autopsy on Mrs Canhasi.
6. Between 4 and 20 February 2000, the RIU interviewed several witnesses who provided names and addresses of four individuals they alleged had killed Mrs Canhasi.
7. On 11 September 2000, the Research Institute of Criminalistics and Criminology of Sofia, Bulgaria examined the material evidence.
8. As on 29 January 2002, when the Ombudsperson in Kosovo addressed a report to the Special Representative of the Secretary General (SRSG) on the same matter, there were no indications that the competent authorities had taken any further action since 11 September 2000, and no record that the individuals identified by the witnesses in February 2000 were ever interviewed. The Ombudsperson sent follow-up letters dated 14 February 2003, 29 April 2003 and 6 May 2005 to the UNMIK Police Commissioner but did not receive any response.
9. The Panel notes that the facts as presented by the complainant are consistent with the Ombudsperson's report and have not been contradicted by the respondent.

II. PROCEEDINGS BEFORE THE PANEL

10. The complaint was introduced on 15 April 2008 and registered on the same date.
11. On 10 June 2008 the Panel communicated the complaint to the Special Representative of the Secretary-General (SRSG) pursuant to Section 11.3 of Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel requesting comments on the admissibility and merits of the complaint by 9 July 2008. The Panel also requested a copy of any decisions, given in the course of the investigation. The SRSG did not present any observations by the relevant date or request an extension of time within which to respond.
12. On 15 July 2008 the Panel declared the complaint admissible.
13. By letter dated 29 July 2008 the SRSG was informed of the decision and asked to respond to the substance of the complaint.
14. On 27 August 2008 the SRSG provided observations both on the admissibility and merits of the case. No documents from the investigation file were provided to the Panel.
15. The complainant answered the SRSG's observations by letter dated 29 October 2008.

III. PRELIMINARY OBJECTION ON THE ISSUE OF NON-EXHAUSTION OF REMEDIES

A. Arguments of the parties

16. In his letter dated 27 August 2008, the respondent contended that the complainant had failed to exhaust domestic remedies because there was no evidence that the complainant had directed himself towards the Police Commissioner or the Ministry of the Interior for further information into the case.
17. The complainant responded by stating that he had addressed several requests to the UNMIK Police Commissioner but had to date received no information on the progress of investigations. He also stated that he had addressed requests for information to a body now under the competence of the Ministry of the Interior of Kosovo. He noted that to date nothing had been done in his case. The complainant also attached a number of letters the Ombudsperson had written to the UNMIK Police Commissioner requesting an update on the investigation dated 14 February 2003, 29 April 2003 and 6 May 2005. Those requests for information also went unanswered.

B. The Panel's approach

18. Parties seeking to raise admissibility issues after a decision has been taken on the admissibility of a complaint will normally be estopped from the late presentation of admissibility arguments. However, in the present case, it is not necessary to take a position on the respondent's objection based on the non-exhaustion of remedies as that objection is, in any event, not founded as will be explained below.

C. General principles

i. Legal basis of non-exhaustion of remedies

19. Section 3.1 of Regulation No. 2006/12 states that the Panel may only deal with a matter after it determines that all other available avenues for review of the alleged violations have been pursued.
20. The rationale for the non-exhaustion rule is to afford the competent authorities, primarily the courts, the opportunity to prevent or put right the alleged violations of the relevant international instruments. It is based on the assumption, reflected in Article 13 of the European Convention on Human Rights (hereafter: ECHR) and similar treaty provisions, that the domestic legal order will provide an effective remedy for violations of a complainant's rights (European Court of Human Rights (hereafter: ECtHR), *Selmouni v. France*, no. 25803/99, judgment of 27 July 1999, § 74).

ii. Availability and effectiveness

21. Applicants are only required to exhaust domestic remedies that are available and effective. The only remedies required to be exhausted are those that relate to the breaches alleged. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (ECtHR, *Selmouni v. France*, cited above, § 76; see also ECtHR, *Vernillo v. France*, no. 11889/85, 20 February 1991, § 27; ECtHR, *Akdivar and Others v. Turkey*, no. 21893/93, judgment of 16 September 1996, § 66; and ECtHR, *Dalia v. France*, no. 26102/95, judgment of 19 February 1998, § 38).

Discretionary or extraordinary remedies need not be exhausted (ECtHR, *Prystavka v. Ukraine*, no. 21287/02, decision of 17 December 2002; ECtHR, *Cinar v. Turkey*, no. 28602/95, decision of 13 November 2003). In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case (ECtHR, *Van Oosterwijck v. Belgium*, no. 7654/76, judgment of 6 November 1980, §§ 36-40; ECtHR, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 & 57945/00, judgment of 24 February 2005, §§ 116-117; ECtHR, *Isayeva and Others v. Russia*, nos. 57947/00, 57448/00, 57949/00, judgment of 24 February 2005, §§ 152-153).

iii. Burden of proof

22. It is incumbent on the respondent claiming non-exhaustion to satisfy the Panel that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the individual's complaints and offered reasonable prospects of success. In other words, if the respondent claims non-exhaustion, it bears the burden of proving that the complainant has not used a remedy that was both effective and available at the relevant time. The respondent must establish that these various conditions are satisfied (ECtHR, *Selmouni v. France*, cited above, § 75).

D. The Panel's assessment

23. In relation to the SRSG's observations on admissibility, the Panel notes that the respondent has not provided any information as to why the alleged avenues for review are remedies to be exhausted and why they are effective remedies (comp. ECtHR, *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria*, Series A, No. 302, judgment of 19 December 1994, § 93). The Panel is of the view that a request for further information on the progress of the investigation does not, in this case, constitute an 'available avenue for review' of the alleged violation, which is the alleged failure to conduct an adequate investigation into the murder of the complainant's wife. In the present case, the 'effective remedy' sought by the complainant was a 'thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life' (ECtHR., *Keenan v. United Kingdom*, no. 21987/93, judgment of 3 April 2001, § 122), not merely information which would have confirmed that the investigation had been stalled, apparently since 11 September 2000.
24. In any event, the Panel points out that the complainant has addressed himself to the UNMIK Police Commissioner on a number of occasions as well as to government agencies within the Ministry of the Interior of Kosovo. The Ombudsperson adopted a report in this matter on 29 January 2002 and sent three follow-up letters to the UNMIK Police Commissioner (see paragraph 8 above) without receiving a response to his request for a further update on the investigation.
25. Consequently the Panel dismisses the respondent's objection regarding the non-exhaustion of remedies.

IV. ALLEGED VIOLATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. The complaint

26. The complainant alleges that appropriate measures were not taken to properly investigate his wife's murder and therefore claims a breach of the procedural requirement to investigate the loss of life pursuant to Article 2 of the ECHR.

B. General principles

27. Article 2 of the ECHR, which safeguards the right to life, ranks as one of the most fundamental provisions in the ECHR and enshrines one of the basic values of democratic societies. The Panel must subject allegations of breach of this provision to the most careful scrutiny (see ECtHR, *Nachova and Others v. Bulgaria*, no. 43577/98 & 43579/98, judgment of 6 July 2005, § 93; ECtHR, *Angelova and Iliev v. Bulgaria*, no. 55523/00, judgment of 26 July 2007, § 91).

28. The obligation to protect the right to life under Article 2 of the ECHR, read in conjunction with a State's general duty under Article 1 of the ECHR to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, ECtHR, *McCann and Others v. United Kingdom*, no. 18984/91, judgment of 27 September 1995, § 161; ECtHR, *Kaya v. Turkey*, Reports 1998-I, p. 324, judgment of 19 February 1998, § 86; ECtHR, *Kelly v. the United Kingdom*, no. 30054, judgment of 4 May 2001, §§ 94-98; see also Human Rights Advisory Panel (hereafter HRAP), *Balaj and others*, no. 04/07, admissibility decision of 6 June 2008, § 14).

29. The Panel points out that the said procedural obligation under Article 2 is not confined to cases of active State involvement in a killing, but has a broader autonomous scope (ECtHR, *Šilih v. Slovenia*, no. 71463/01, judgment of 28 June 2007, § 94; see also ECtHR, *Yasa v. Turkey*, no. 22495/93, judgment of 2 September 1998, § 100; ECtHR, *Menson v. United Kingdom*, no. 47916/99, decision on admissibility of 6 May 2003, § 1). In *Angelova and Iliev v. Bulgaria*, cited above, the European Court of Human Rights (ECtHR) held that:

92... "The present case should therefore be distinguished from cases involving the alleged use of lethal force either by agents of the State or by private parties with their collusion (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324; *Shanaghan v. the United Kingdom*, no. 37715/97, § 90, 4 May 2001; *Angelova v. Bulgaria*, no. 38361/97, ECHR 2002-IV; *Nachova and Others*, cited above; and *Ognyanova and Choban v. Bulgaria*, no. 46317/99, 23 February 2006), or in which the factual circumstances imposed an obligation on the authorities to protect an individual's life, for example where they had assumed responsibility for his welfare (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II) or where they knew or ought to have known that his life was at risk (see *Osman v. the United Kingdom*, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII).

93. However, the absence of any direct State responsibility for the death of the applicants' relative does not exclude the applicability of Article 2 of the Convention. The Court reiterates that by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, Reports 1998-III, p. 1403, § 36), Article 2 § 1 of the Convention imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person,

backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Osman*, cited above, § 115).

94. The Court reiterates that in the circumstances of the present case this obligation requires that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment. Where death results, as in the present case, the investigation assumes even greater importance, having regard to the fact that the essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life (see *Anguelova*, cited above, § 137; *Nachova and Others*, cited above, § 110; and *Ognyanova and Choban*, cited above, § 103), ...”

30. The obligation to investigate is not of result, but of means. Critically the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eyewitness testimony (ECtHR, *Kelly v. United Kingdom*, cited above, §§ 94-98; ECtHR, *Orhan v. Turkey*, no. 25656/94, 18 June 2002, § 92) and evidence from other key witnesses (ECtHR, *Önen v. Turkey*, no. 22876/93, judgment of 14 May 2002, § 88; ECtHR, *Tahsin Acar v. Turkey*, no. 26307/95, judgment of 8 April 2004, §§ 230-232). Where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures (ECtHR, *Brecknell v. United Kingdom*, no. 32457/04, judgment of 27 November 2007, §§ 71, 75). Any deficiency in the investigation which undermines its ability to establish the cause of death, or to identify the person or persons responsible will risk falling foul of this standard (ECtHR, *Nachova and Others v. Bulgaria*, cited above, § 113; ECtHR, *Ognyanova and Choban*, cited above, § 105; ECtHR, *Angelova and Iliev v. Bulgaria*, cited above, § 95; HRAP, *Balaj and others*, cited above, §14).
31. A further aspect of an adequate investigation is a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (ECtHR, *Hugh Jordan v. United Kingdom*, no. 24746/94, judgment of 4 August 2001, § 109; ECtHR, *Finucane v. United Kingdom*, no. 29178/95, judgment of 1 July 2003, § 71).
32. For an investigation to comply with the Article 2 requirements, it must be a continuing one which demonstrates real progress in the conduct of the investigation (ECtHR, *Yasa v. Turkey*, cited above § 100). Any lengthy periods of inactivity in a case may be indicative of a failure to effectively continue the investigation for the purpose of identifying the perpetrators (see for example ECtHR, *Takhayeva v. Russia*, no. 23286/04, judgment of 18 September 2008, § 93).
33. The Panel is mindful of the need not to interpret the positive obligation to investigate in such a way that would impose an impossible or disproportionate burden on authorities, bearing in mind the difficulties of policing modern societies and conscious of the difficult operational choices in terms of priorities and resources (ECtHR, *Osman v. United Kingdom*, cited above, § 116; ECtHR, *Akdoğdu v. Turkey*, no. 46747/99, judgment of 18 October 2005, § 45; ECtHR, *Dodov v. Bulgaria*, no.

59548/00, judgment of 17 January 2008, § 102; ECtHR, *Albekov v. Russia*, no. 68216/01, judgment of 9 October 2008, §79). However, even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (ECtHR, *Brecknell v. United Kingdom*, cited above, § 65; ECtHR, *McKerr v. United Kingdom*, no. 28883/95, judgment of 4 May 2001, §§ 111, 114). In these circumstances the Panel must satisfy itself that the authorities have done enough to discharge their obligation to conduct an effective investigation in this case.

C. Application to the present case

34. Where the competent authorities have a positive obligation to ensure compliance with a relevant human rights standard, such as the requirement to conduct a thorough and effective investigation pursuant to Article 2 of the ECHR, it is for the authorities to demonstrate that they have taken reasonable steps to fulfill their positive obligations. In the present case, no information has been provided to indicate that any steps have been taken to progress the investigation since approximately 11 September 2000. The Panel must therefore assess the effectiveness of the investigation on the basis of the information submitted by the complainant including the Ombudsperson's report into the matter, as compared with the absence of information concerning progress in the investigation presented by the respondent (compare, for example, ECtHR, *Takhayeva v. Russia*, cited above, § 89).
35. The Panel accepts that an autopsy and forensic examination, including crime scene examination, have been carried out by the respondent. However, there is no indication that statements have been taken from all relevant witnesses, including eyewitnesses. The evidence suggests that witnesses interviewed by the police provided the names and addresses of a number of individuals alleged to have been involved in the killing of Ms Canhasi, but there is no evidence to indicate that statements have been taken from these individuals, or even that efforts to take statements have been made. There is no further evidence available to the Panel to demonstrate that reasonable efforts have been made to identify the perpetrators. Despite the apparent identification of possible suspects to the killing, the investigation has been pending for eight years without achieving any substantial result (compare, for example, ECtHR, *Isaak v. Turkey*, no. 44587/98, judgment of 24 June 2008, § 124). Further, there is no information available to the Panel to demonstrate that any efforts have been taken to continue the investigation into the murder over an eight year period since September 2000.
36. Another deficiency of the investigation was the failure to keep the next-of-kin of the victim, namely the complainant, involved in and informed about the investigative process. Despite repeated requests for information about the investigation, the complainant was not updated. He apparently had no access to the investigation, or to any explanation as to why statements were not taken from persons alleged to have been involved in the crime.
37. In these circumstances the Panel finds that the authorities have failed to carry out an effective criminal investigation into the circumstances surrounding the death of Mrs Canhasi. The investigations required under Article 2 of the ECHR must be able to lead to the identification and punishment of those responsible (ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 117). This requirement has not been met in the present case.

38. Consequently the Panel finds that there has been a violation of Article 2 in its procedural aspect.

V. RECOMMENDATIONS

39. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary. It recommends that the respondent take the following measures:

- the respondent should, with due diligence, undertake effective measures to identify the perpetrators. Such effective measures must include taking all reasonable steps to ensure that statements are taken from relevant witnesses and conducting a comprehensive review of the investigation to determine what further steps may be taken to identify the perpetrators and to bring them to justice;
- the respondent should award adequate compensation to the complainant for his suffering in relation to the inadequate investigation into his wife's murder;
- the respondent should take immediate and effective measures to implement the recommendations of the Panel, including through informing the complainant and the Panel about further developments in this case.

FOR THESE REASONS,

The Panel, unanimously,

- **REJECTS THE RESPONDENT'S OBJECTION AS TO NON-EXHAUSTION OF DOMESTIC REMEDIES;**
- **FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS IN RESPECT OF THE FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION INTO THE CIRCUMSTANCES IN WHICH MRS SHAIPI CANHASI WAS MURDERED;**
- **RECOMMENDS THAT THE RESPONDENT TAKE THE MEASURES SET OUT IN PARAGRAPH 39 OF THIS OPINION TO EFFECT REPARATION FOR THE CONSEQUENCES OF THE VIOLATION OF THE COMPLAINANT'S HUMAN RIGHTS.**

John J. RYAN
Executive Officer

Paul LEMMENS
Presiding Member