



The Human Rights Advisory Panel

UNMIK HQ, East Wing, 10000 Pristina, Kosovo

DECISION

Date of adoption: 17 April 2009

Case No. 46/08

Ms. Snežana ZDRAVKOVIĆ

against

UNMIK

The Human Rights Advisory Panel sitting on 17 April 2009,
with the following members present:

Mr. Marek NOWICKI, Presiding Member
Mr. Paul LEMMENS
Ms. Snezhana BOTUSHAROVA

Mr. John J. RYAN, Executive Officer

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

Having deliberated, decides as follows:

I. THE FACTS

1. According to the complainant the facts in this case may be summarized as follows:
2. The complainant is a daughter of Mr. Tomislav Marković.
3. On 24 June 2000 Mr. Marković returned by car from Prokuplje, Serbia. He was on his way home, driving to the village Nëntë Jugoviç/Devet Jugovića (Pristina Municipality). He was travelling with his neighbour Mrs. Julka Radonjić.

4. Mr. Marković and Mrs. Radonjić passed a police checkpoint in Merdare and reached a KFOR checkpoint in Merdare. Their vehicle joined a KFOR convoy which was supposed to escort them to their homes throughout Kosovo.
5. The KFOR convoy was followed by a white van and a red VW Golf, which did not have any licence plates. Mr. Marković's vehicle was intercepted, he was taken out of his vehicle by three men and he was taken to the white van, which drove away. A fourth man took Mrs. Radonjić back to the KFOR checkpoint in Merdare, in Mr. Marković's car. Close to that checkpoint she was thrown out of the car. The perpetrators took Mr. Marković's vehicle and drove away with it. Mrs. Radonjić went back to the KFOR checkpoint and tried to explain what had happened. She was taken to Podujevë/Podujevo where she gave her statement. After that she was transported to the Police station on Vranjevc/Vranjevac, where she repeated her statement.
6. Mrs. Marković, who is the wife of Mr. Marković, received the information about the kidnapping of her husband from people who travelled with the convoy. She reported the kidnapping and disappearance of her husband to KFOR, UNMIK, the ICRC and all other relevant authorities in Kosovo and in Serbia.
7. The kidnapping was reported to UNMIK and the Kosovo Police Service (KPS) and registered in the Unit for Serious Crimes under number 2000-TE-944.
8. Mrs. Marković was questioned many times by UNMIK, KFOR and KPS. Statements were taken but she was not provided with copies of her statements.
9. The family of Mr. Marković received no information about any progress of an investigation of this case or the fate of Mr. Marković between 24 June 2000 and February 2007. Mrs. Marković asked information about the investigation several times from KFOR and UNMIK. On a weekly basis she went to Gračanica/Gracanice requesting information from UNMIK about her husband's case. The complainant has also requested information from the Commission for Missing Persons.
10. The whereabouts of Mr. Marković were unknown until February 2007 when the complainant was notified by the UNMIK Office on Missing Persons and Forensics that remains of her father were exhumed and identified.
11. The body of Mr. Marković had been exhumed from a mass grave in Pristina. According to the death certificate issued by the Department of Justice, Office of the medical examiner, the cause of the death was "gunshot to the head". The identification certificate of the Office on Missing Persons and Forensics states that the body of Mr. Marković was found on 17 June 2003.
12. The investigation of Mr. Marković's kidnapping and murder is still ongoing. According to the information provided by the complainant criminal charges were forwarded from SUP (Internal Affairs Service) Pristina to the Office of the District Public Prosecutor in Prokuplje, Serbia. According to the information provided by the SRSG the investigation is pending before the District Public Prosecutor's office in Pristina and there are separate proceedings ongoing in Prokuplje, Serbia.
13. The complainant alleges that because of a lack of information about what happened to Mr. Marković, the family has suffered mental anguish and felt sorrow, pain and uncertainty. Mrs. Marković has suffered from reactive prolonged

depressive state and arterial hypertension and is still being treated. The complainant was diagnosed with high tension anxiety (HTA) and her sister has also suffered from stress.

14. The search for Mr. Marković has required considerable moral and material efforts from the family. According to the complainant, the family received different types of information from private persons concerning the possible fate of Mr. Marković. The complainant and other family members reported this information to UNMIK, but the family was never informed of whether or not UNMIK had followed up on the additional information provided by the family.

II. COMPLAINT

15. The complainant alleges in substance the lack of an adequate criminal investigation into the kidnapping and murder of her father. She relies on Article 2 of the European Convention on Human Rights (hereafter: ECHR).
16. The complainant further alleges that the lack of an adequate criminal investigation and the failure to investigate the events which led to the disappearance of Mr. Marković and the lack of information on the efforts by authorities to find Mr. Marković have caused mental suffering to the complainant in breach of Article 3 of the ECHR.

III. PROCEEDINGS BEFORE THE PANEL

17. The complaint was introduced on 13 November 2008 and registered on the same date.
18. The Panel communicated the case to the SRSG on 9 December 2008 giving him the opportunity to provide comments on behalf of UNMIK on the admissibility and merits pursuant to Section 11.3. of UNMIK Regulation No. 2006/12 and Rule 30 of the Panel's Rules of procedure.
19. The SRSG answered the Panel's request by letter dated 30 December 2008.
20. The Panel communicated the case to the SRSG a second time on 26 January 2009 giving him the opportunity to provide comments on behalf of UNMIK on the admissibility and merits of the complaint, specifically in consideration of the alleged violation of Article 3 of the ECHR.
21. The SRSG provided his additional comments on the admissibility and merits by letter dated 12 February 2009.
22. Upon the Panel's request it was provided with more information from the complainant on 6 March 2009.

IV. THE LAW

23. Before considering the case on its merits the Panel has to decide whether to accept the case, taking into consideration the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.

1. Right to life

A. Whether all available avenues for review have been pursued

24. Section 3.1 of UNMIK Regulation No. 2006/12 provides 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.
25. The SRSG stated that in his opinion the case appears *prima facie* inadmissible. He is of the view that all other avenues for review have not been exhausted because the complainant's case is pending before the District Public Prosecutor's Office in Pristina and there is an ongoing separate proceeding in Prokulpje, Serbia.
26. The Panel notes that Mr. Marković was kidnapped and disappeared on 24 June 2000, which is more than 8 years ago.
27. The complainant alleges in substance the lack of an adequate criminal investigation into the kidnapping and murder of her father.
28. The Panel considers that the SRSG's objection raises issues concerning the effectiveness of the criminal investigation which are closely linked to the merits of the complaint concerning the procedural aspect of the right to life. Accordingly, this issue should be joined to the merits of the case (see, among others, European Court of Human Rights (hereafter: ECtHR), *Ibragimov and others v. Russia*, no. 34561/03, judgment of 29 May 2008, § 75).

B. Whether the complaint is manifestly ill-founded

29. 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 shall subject allegations of breach of this provision to the most careful scrutiny (see ECtHR, *Nachova and others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, judgment of 6 July 2005, § 93, ECHR 2005-VII; ECtHR, *Angelova and Illiev v. Bulgaria*, no. 55523/00, judgment of 26 July 2007, § 91).
30. The European Court of Human Rights has found a continuing violation of Article 2 of the ECHR when there has been a failure of the authorities to conduct an effective investigation into the whereabouts and fate of a missing persons who has disappeared in life-threatening circumstances (see for example ECtHR, *Cyprus v. Turkey* [GC], no. 25781/94, judgment of 10 May 2001, §§ 125-136, ECHR 2001-IV). Delaying crucial steps of the investigation or not taking necessary investigative steps may constitute a breach of Article 2 of the ECHR (see for example ECtHR, *Rasayev and Chankaeyva v. Russia*, 38003/03, judgment of 2 October 2008, §§ 71-78).
31. The Panel points out that the procedural obligation under Article 2 is not confined to cases where it has been established that the killing was caused by an agent of the State (ECtHR, *Tanrikulu v. Turkey* [GC], no. 23763/94, § 103, ECHR 1999-IV;

see also Human Rights Advisory Panel, *Canhasi*, no. 04/08, opinion of 12 November 2008).

32. In light of the foregoing principles, the Panel considers that this aspect of the complaint raises complex issues of fact and law which cannot be resolved at this stage in the examination of the complaint, but require examination of the merits. It follows that this aspect of the complaint cannot be declared manifestly ill-founded within the meaning of Section 3.3 of Regulation No. 2006/12. No other ground for declaring it inadmissible has been established.

2. Inhuman and degrading treatment

A. Objection as to the Panel's characterization in law of the facts of the case

33. The SRSG raised an objection with respect to the Panel's intention to examine the case from the point of view of Article 3 of the ECHR, as this resulted from the Panel's second communication to the SRSG. The objection is formulated as follows:

According to Rule 26 (e) of the HRAP Rules of Procedure, which reflects the European Court of Human Rights standards on legal certainty and fairness of proceedings, the content of a complaint 'shall set out a succinct statement of the alleged violations of the instruments mentioned in Section 1.2. of Regulation no. 2006/12.' It is clear that all alleged violations of the European Convention on Human Rights must be made by the applicant at the time of the application. A later addition of alleged violations of the European Convention on Human Rights is not provided for under the Regulation and Procedural Rules, which only allow the Panel to request 'factual information and comments during the review of the complaint'.

34. The Panel notes that the original complaint contained sufficient factual information and a sufficient statement of alleged violations concerning Article 3 of the ECHR. The Panel emphasises that the legal interpretation is not the responsibility of the complainant. The Panel has jurisdiction to review the circumstances complained of in the light of the various human rights instruments mentioned in Section 1.2 of UNMIK Regulation No. 2006/12. In the performance of that task it is free to attribute to the facts of the case a characterisation in law different from that given by the complainant or, if need be, to view the facts in a different manner. Furthermore, the Panel has to take into account not only the original complaint but also the additional documents provided to it (see ECtHR, *K.-H. W. v. Germany* [GC], no. 37201/97, judgment of 22 March 2001, § 107, ECHR 2001-II; ECtHR, *Stankov v. Bulgaria*, no. 68490/01, judgment of 12 July 2007, § 47).
35. For the above reasons the Panel considers that it has jurisdiction to examine the complaint from the point of view of Article 3 ECHR. It therefore rejects the objection raised by the SRSG.

B. Whether all available avenues for review have been pursued

36. As recalled above, Section 3.1 of UNMIK Regulation No. 2006/12 provides 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.
37. The complainant alleges that the failure to investigate the kidnapping and disappearance of her father and the lack of information have caused mental suffering to her and her family.
38. Regarding the alleged violation of Article 3 of the ECHR, the SRSG raised the same objection as regarding to Article 2. In his statement the SRSG considered the case *prima facie* inadmissible because all other avenues for review have not been exhausted. The SRSG refers to the fact that the complainant's case is pending before the District Public Prosecutor's Office in Pristina and that there is an ongoing proceeding in Prokuplje, Serbia.
39. In this connection, the Panel notes, taking into account the nature of the complaint raised under Article 3 of the ECHR, that the question whether the requirement to exhaust remedies has been satisfied is closely linked to the complaint concerning the inhuman and degrading treatment. Accordingly, this issue should be joined to the merits of the case.

C. Whether the complaint is manifestly ill-founded

40. The prohibition of inhuman and degrading treatment is guaranteed by Article 3 of the ECHR.
41. According to the case law of the European Court of Human Rights related to a situation of enforced disappearance close relatives of the victim may themselves be victims of treatment in violation of Article 3. The essence of such a violation does not mainly lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes when the situation is brought to their attention (see, e.g., ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 139).
42. In light of the foregoing principles, the Panel considers that this aspect of the complaint raises complex issues of fact and law which cannot be resolved at this stage in the examination of the complaint, but require examination of the merits. It follows that this aspect of the complaint cannot be declared manifestly ill-founded within the meaning of Section 3.3 of Regulation No. 2006/12. No other ground for declaring it inadmissible has been established.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT ADMISSIBLE.

John J. RYAN
Executive Officer

Marek NOWICKI
Presiding Member