



The Human Rights Advisory Panel

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DECISION

Date of adoption: 21 October 2010

Case No. 52/09

B. A.

against

UNMIK

The Human Rights Advisory Panel on 21 October 2010,
with the following members taking part:

Mr Marek NOWICKI, Presiding Member
Mr Paul LEMMENS
Ms Christine CHINKIN

Assisted by
Mr Rajesh TALWAR, 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, including through electronic means, in accordance with Rule 13 § 2 of its Rules of Procedure,

Decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 17 April 2009 and registered on the same date.
2. On 12 June 2009, the Panel requested further information from the complainant. The complainant responded on 18 September 2009.

3. On 2 November 2009, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility of the case.
4. On 22 January 2010, UNMIK provided its response.
5. On 21 July 2010, the Panel sent UNMIK's response to the complainant for comments. The complainant replied to the Panel on 7 September 2010.

II. THE FACTS

6. The complainant states that his father, Mr M.A., left the village of Matiqan/Matičane for Graçanicë/Gračanica on 13 June 1999, leaving his father, Mr M.A. and his mother behind in the village. Mr M.A. disappeared in the village of Matiqan/Matičane on 26 June 1999. According to the complainant, late that same night, his mother left Matiqan/Matičane for Graçanicë/Gračanica.
7. The complainant claims that after his father went missing, he received phone calls from "the Albanians" who informed him that his father had been killed on the family property and that the complainant could freely collect his remains. He claims that he could not collect his father's remains since he could not obtain an escort from KFOR or from the police. The mortal remains of Mr M.A. were exhumed from an unmarked grave on 10 June 2000 and an autopsy was conducted by the Organization for Security and Cooperation in Europe (OSCE). The OSCE autopsy concluded that the cause of death was massive trauma to the head. The mortal remains of Mr M.A. were returned to the family on 13 November 2000.
8. According to the SRSG, it is possible that the investigation into the death of Mr M.A. was conducted by investigators from the International Criminal Tribunal for the former Yugoslavia (ICTY) since ICTY reference numbers appear on a number of documents submitted by the complainant. The Panel notes that there is no other indication of any interaction between UNMIK and the ICTY regarding the investigation into the death of Mr M.A.
9. On 9 December 2008, UNMIK's responsibility with regard to police and justice in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK Department of Justice and UNMIK Police were handed over to their EULEX counterparts.

III. COMPLAINTS

10. The complainant complains about UNMIK's alleged failure to properly investigate the kidnapping and death of his father. He also complains that this situation caused mental pain and suffering to himself and his family.
11. The Panel considers that the complainant may be deemed to invoke, respectively, a violation of the right to life of his father, guaranteed by Article 2 of the European Convention on Human Rights (ECHR), and a violation of the rights of himself and his

family to be free from inhuman or degrading treatment, guaranteed by Article 3 of the ECHR.

IV. THE LAW

12. Before considering the case on its merits, the Panel must first decide whether to accept the case, considering the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.
13. Section 3.3 of UNMIK Regulation No. 2006/12 provides that the Panel may only deal with a matter after it determines that it is not manifestly ill-founded.
14. The complainant alleges in substance violations concerning the lack of an adequate criminal investigation into the disappearance and death of his father, and the way he and his family as a next-of-kin have been treated by the authorities. The Panel notes that Mr M.A. was last seen alive on 26 June 1999, which is more than ten years ago.
15. The SRSG argues that the disappearance and death of Mr M.A. were possibly the subject of an ICTY-led investigation. The SRSG elaborates by stating that, “In this context, considering the primary [*sic*] jurisdiction of the ICTY for prosecuting serious violations of international humanitarian law, as stipulated in Article 9(2) of the *Statute of the International Tribunal for the Former Yugoslavia*, it is very-well warranted that UNMIK Police and local or international prosecutors in Kosovo have not initiated their own investigation into the death of” Mr M.A. The SRSG concludes that the Panel should inquire with the ICTY as to whether they were investigating the matter, and if so “UNMIK would not be the appropriate respondent to the complaint, and thus, the complaint should be deemed inadmissible”.
16. However, the Panel has already addressed this issue in its decision in the case of *S.C.* The Panel recalls that the Statute of the ICTY explicitly states that national courts have concurrent jurisdiction with the ICTY for serious violations committed in the territory of the former Yugoslavia, including Kosovo, unless a formal request is sent to the relevant national courts to defer their competence in a particular matter. While it is true that the ICTY enjoys primacy jurisdiction should it request a national or domestic authority to defer to it, the concept of primacy jurisdiction explicitly provides for national or domestic courts to exercise concurrent jurisdiction (see, Human Rights Advisory Panel (HRAP), *S.C.*, no. 02/09, decision of 9 September 2010 §§ 19-24.)
17. The Panel therefore rejects UNMIK’s argument that it is not the “appropriate respondent” in this matter. In the absence of a formal request for referral pursuant to Article 9(2) of the Statute of the ICTY in conjunction with Rules 9-10 of the ICTY Rules of Procedure and Evidence, UNMIK cannot argue that it yielded to the primacy of the ICTY in this investigation (see, HRAP, *S.C.*, cited above, §§ 19-24). Simply relying on the presence of an ICTY reference number on certain documents and a misunderstanding of the concept of primacy jurisdiction can not release UNMIK from its obligations under Article 2 of the ECHR.
18. UNMIK argues in the alternative that there was little evidence upon which UNMIK could have initiated an investigation into the death of Mr M.A. Specifically, the SRSG relies on the fact that Mr M.A. was over 80 years old at the time of his disappearance and that his cause of death was massive trauma to the head. The SRSG speculates that the complainant “may, for instance, have accidentally fallen down on his head”. Thus, in the view of the SRSG, since there is no conclusive evidence that Mr M.A. was in fact murdered, no

mention of the circumstances surrounding Mr M.A.'s disappearance, and no indication that his disappearance was reported to any authority when it occurred, there was very little information on which UNMIK could have acted.

19. Regarding this second argument, the Panel rejects the argument that, since the massive head trauma which caused the death of Mr M.A. could have theoretically been caused by an accident, UNMIK is thus absolved of any responsibility to investigate the disappearance and death of Mr M.A. The Panel recalls that 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 person 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). The Panel finds that the disappearance of any person present in the territory of Kosovo at the time of the events in question gives rise to a rebuttable presumption that the person disappeared in "life-threatening circumstances", thus obliging UNMIK to conduct an investigation into the person's disappearance.
20. The Panel notes that the SRSG's remaining arguments under the second heading are closely tied to the effectiveness of the investigation and thus the merits of the complaint. Although the SRSG raises these issues during the admissibility stage of the proceedings, the Panel recalls that where an admissibility issue is closely linked to the merits of the complaint, the Panel may join the issue to the merits, provided that there is no other obstacle to the admissibility, pursuant to Rule 31*bis* of the Panel's Rules of Procedure.
21. The Panel therefore concludes that the SRSG's remaining arguments concerning effectiveness of the investigation must be joined to the merits of the complaint. No other ground for declaring the complaint inadmissible has been established.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT ADMISSIBLE.

Rajesh TALWAR
Executive Officer

Marek NOWICKI
Presiding Member