



# *The Human Rights Advisory Panel*

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## **DECISION**

**Date of adoption: 05 April 2012**

**Case No. 160/09**

**Radmila TOMIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 05 April 2012,  
with the following members taking part :

Mr Marek NOWICKI  
Mr Paul LEMMENS  
Ms Christine CHINKIN

Assisted by  
Mr Andrey ANTONOV, 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 30 March 2009 and registered on 30 April 2009.
2. On 23 December 2009, the Panel requested the complainant to submit additional information. No response was received from the complainant.
3. On 13 January 2010, the Panel reiterated its request. The complainant's response was received on 11 February 2010.

4. On 17 February 2011, the complaint was communicated to the Special Representative of the Secretary-General (SRSG), for UNMIK's comments on admissibility. On 14 April 2011, the Panel received UNMIK's response.

## **II. THE FACTS**

5. The complainant is the wife of Mr Svetozar Tomić.
6. The complainant states that on 18 July 1998 Mr Tomić was abducted by unknown perpetrators from Bellacrkvë/Bela Crkva village, while travelling between Gjakovë/Đakovica and Rahovec/Orahovac.
7. The complainant states that she promptly reported her husband's abduction to the Yugoslav Red Cross, the OSCE Verification Mission in Kosovo, and human rights organisations. The complainant also states that on an unspecified date she reported Mr Tomić's disappearance to UNMIK International Public Prosecutors in Prishtinë/Priština.
8. Mr Svetozar Tomić was listed as a missing person in a communication from the International Committee of the Red Cross (ICRC) to UNMIK Police dated 12 October 2001, and in the database maintained by the UNMIK Office of Missing Persons and Forensics (OMPF). According to information provided by the SRSG, an investigation file concerning Mr Tomić was opened by the Missing Persons Unit of UNMIK Police in 2002.
9. On 1 December 2006, the mortal remains of Mr Tomić were handed over to his family by the UNMIK OMPF. A copy of the death certificate dated 1 December 2006 states that the cause of death was not ascertained.
10. 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. THE COMPLAINT**

11. The complainant complains about UNMIK's alleged failure to properly investigate the disappearance and killing of her husband. The complainant also complains about the pain and anguish suffered by her because of this situation.
12. The Panel considers that the complainant may be deemed to invoke, respectively, a violation of the right to life of Mr Tomić, guaranteed by Article 2 of the European Convention on Human Rights (hereinafter ECHR), and a violation of her own right to be free from inhuman or degrading treatment, guaranteed by Article 3 of the ECHR.

#### IV. THE LAW

13. 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.

#### **Alleged violation of Article 2 of the ECHR**

14. The complainant alleges in substance the lack of an adequate criminal investigation into the disappearance and killing of Mr Svetozar Tomić.
15. In his comments, the SRSG argues that the complaint is inadmissible pursuant to Section 1.2 of UNMIK Regulation No. 2006/12. The SRSG states that “there is nothing in the complaint that levels any allegation at UNMIK” and that the complaint is “instead directed against acts and omissions of the OSCE and other unspecified human rights groups”. The SRSG further states that the complainant never reported her husband’s abduction to UNMIK and that UNMIK may only have become aware of Mr Tomić’s disappearance sometime in 2002, probably after receiving information from the ICRC or the authorities of the then Federal Republic of Yugoslavia.
16. With regard to the SRSG’s objection that the complainant does not make direct allegations of human rights violations against UNMIK, the Panel notes that following the adoption of the United Nations Security Council Resolution 1244 of 10 June 1999, UNMIK became entrusted with the interim administration of Kosovo. The Panel deems that insofar as the complaint concerns the lack of effective investigation into the disappearance and killing of her husband, it shall be considered as addressed against UNMIK as the sole authority with the mandate to carry out such investigation.
17. The Panel also rejects the SRSG’s argument that, because the complainant never reported the matter to UNMIK, the latter did not have an obligation to carry out an investigation into Mr Tomić’s disappearance. In this regard, the Panel refers to the case law of the European Court of Human Rights setting out the obligation under Article 2 of the ECHR of the competent authorities to conduct an effective investigation into deaths resulting from the use of force as well as disappearances that occurred in “life-threatening circumstances”. The Court holds that the authorities must act of their own motion once the matter has come to their attention, and that they cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, e.g., European Court of Human Rights (ECtHR) (Grand Chamber), *İlhan v. Turkey*, no. 22277/93, judgment of 27 June 2000, § 63, ECHR 2000-VII; ECtHR, *Rantsev v. Cyprus and Russia*, no. 25965/04, judgment of 7 January 2010, § 232; ECtHR (Grand Chamber), *Al-Skeini and Others v. United Kingdom*, no. 55721/07, judgment of 7 July 2011, § 165). For the duty to investigate to arise, it is thus not decisive whether members of the deceased’s family or others have lodged a formal complaint with the relevant investigatory authority (ECtHR, *Ergi v. Turkey*, no. 23818/94, judgment of 28 July 1998, Reports of judgments and decisions, 1998-IV, § 82; ECtHR, *Yaşa v. Turkey*, no. 22495/93, judgment of 2 September 1998, Reports of judgments and decisions, 1998-VI, § 100; see also, *a contrario*, Human Rights Advisory Panel, *Bulatović*, no. 165/09, decision of 21 December 2011, §§ 16- 17).
18. The Panel notes that UNMIK authorities became aware of Mr Tomić’s disappearance at the latest in 2002, presumably through information received by the ICRC or other bodies previously contacted by the complainant. The Panel considers that from this moment

onwards, UNMIK authorities had an obligation to conduct an effective investigation into Mr Tomić's disappearance pursuant to Article 2 of the ECHR.

19. For these reasons, the Panel considers that the complaint under Article 2 of the ECHR raises serious issues of fact and law, the determination of which should depend on an examination of the merits. The Panel concludes therefore that this part of the complaint is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.
20. No other ground for declaring this part of the complaint inadmissible has been established.

### **Alleged violation of Article 3 of the ECHR**

21. The complainant alleges mental pain and suffering allegedly caused to her by the situation surrounding the abduction and killing of her husband.
22. In his comments, the SRSG argues that with respect to issues under Article 3 of the ECHR the complaint is overly vague, and for this reason should be declared inadmissible.
23. The Panel considers that, despite the lack of express allegations put forward by the complainant in this respect, the complaint sets forth relevant facts upon which the alleged violation of Article 3 of the ECHR may be based.
24. The Panel also refers to the case law of the European Court of Human Rights with respect to the question whether a member of the family of a disappeared person can be considered the victim of a treatment contrary to Article 3 of the ECHR, which prohibits inhuman treatment. The European Court accepts that this may be the case, depending on the existence of "special factors which give the suffering of the [family member] a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation". The Court further holds that "relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries". It also emphasises "that the essence of such a violation does not so much lie in the fact of the disappearance of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention" (see, e.g., European Court of Human Rights (ECtHR) (Grand Chamber), *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, *ECHR*, 1999-IV; ECtHR (Grand Chamber), *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2001, § 156, *ECHR*, 2001-IV; 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; see also Human Rights Advisory Panel, *Zdravković*, no. 46/08, decision of 17 April 2009, § 41).
25. The Panel considers that a complainant may invoke a violation of Article 3 of the ECHR even if there is no explicit reference to specific acts of the authorities involved in the investigation, since also the passivity of the authorities and the absence of information given to the complainant may be indicative of inhuman treatment of the complainant by the authorities (see HRAP, *Mladenović*, no. 99/09, decision of 11 August 2011, § 22; HRAP, *Petković*, no. 133/09, decision of 16 December 2011, § 20).
26. However, where the disappeared person is later found dead, the applicability of Article 3 of the ECHR is in general limited to the distinct period during which the member of the

family sustained uncertainty, anguish and distress appertaining to the specific phenomenon of disappearances (see, *e.g.*, ECtHR, *Luluyev and Others v. Russia*, no. 69480/01, judgment of 9 November 2006, §§ 114-115, *ECHR*, 2006-XIII; see also ECtHR, *Gongadze v. Ukraine*, no. 34056/02, judgment of 8 November 2005, § 185, *ECHR*, 2005-XI; HRAP, *Petković*, referred in § 25 above, at § 21).

27. In this respect, the question arises whether the complaint has been filed in time. Section 3.1 of UNMIK Regulation No. 2006/12 states that the Panel “may only deal with a matter ... within a period of six months from the date on which the final decision was taken”. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the complainant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the complainant (ECtHR (Grand Chamber), *Varnava and Others v. Turkey*, nos. 16064/90 and others, judgment of 18 September 2009, § 157). Where the complaint relates to a continuing situation, which has come to an end, the six-month time limit starts to run from the date on which the situation has come to an end.
28. The Panel notes that the mortal remains of Mr Svetozar Tomić were returned to the complainant on 1 December 2006. It is at that moment that the period during which an issue could arise under Article 3 of the ECHR, came to an end. For the purpose of Section 3.1 of UNMIK Regulation No. 2006/12, the six-month time limit therefore started to run from that date.
29. The complaint was filed with the Panel on 30 April 2009, that is after the expiration of the above-referred six-month period.
30. The Panel therefore must conclude that this part of the complaint falls outside the time-limit set by Section 3.1 of UNMIK Regulation No. 2006/12.

**FOR THESE REASONS,**

The Panel, unanimously,

- **DECLARES ADMISSIBLE THE COMPLAINT RELATING TO THE RIGHT TO LIFE;**
- **DECLARES INADMISSIBLE THE REMAINDER OF THE COMPLAINT.**

Andrey ANTONOV  
Executive Officer

Marek NOWICKI  
Presiding Member