



The Human Rights Advisory Panel

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DECISION

Date of adoption: 12 September 2012

Cases Nos 91/09 and 338/09

Aleksandar MARKOVIĆ and Ljubinka MARKOVIĆ

against

UNMIK

The Human Rights Advisory Panel, on 12 September 2012,
with the following members taking part:

Mr Marek NOWICKI, Presiding Member
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 of Mr Aleksandar Marković was introduced on 8 April 2009 and registered on 30 April 2009. The complaint of Mrs Ljubinka Marković was introduced on 14 April 2009 and registered on 30 April 2009.
2. On 9 December 2009, the Panel requested Mr Aleksandar Marković to provide additional information. No response was received.
3. On 9 August 2010, the Panel decided to join the two cases pursuant to Rule 20 of the Panel's Rules of Procedure.

4. On 6 October 2010, the Panel reiterated its request for additional information to both complainants. No response was received.
5. On 22 December 2011, the Panel communicated the complaints to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility of the complaints.
6. On 28 December 2011, the Panel obtained additional information from Mr Aleksandar Marković in relation to the complaints.
7. On 13 February 2012, the SRSG submitted UNMIK's response.

II. THE FACTS

8. The first complainant is the son and the second complainant is the wife of Mr Đorđe Marković.
9. The complainants state that on 11 June 1999 they left Kosovo for security reasons and that Mr Đorđe Marković remained in their house in Suharekë/Suva Reka, waiting for his own father. According to the account of neighbours, between 11 and 12 June 1999 members of the Kosovo Liberation Army broke into Mr Đorđe Marković's flat, beat him up brutally and took him away towards an unknown direction. Since that time his whereabouts have remained unknown.
10. The complainants state that the abduction was reported to the Serbian Ministry of Internal Affairs, the Yugoslav Red Cross and the International Committee of the Red Cross (ICRC). An ICRC tracing request for Mr Đorđe Marković remains open. Likewise, his name appears in two lists of missing persons, communicated by the ICRC to UNMIK Police on 12 October 2001 and 11 February 2002 respectively, as well as in the database compiled by the UNMIK Office on Missing Persons and Forensics.
11. 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 COMPLAINTS

12. The complainants complain about UNMIK's alleged failure to properly investigate the abduction and probable killing of their family member. The complainants in essence also complain about the fear, pain and anguish suffered by them because of this situation.
13. The Panel considers that the complainants may be deemed to invoke, respectively, a violation of the right to life of Mr Đorđe Marković, guaranteed by Article 2 of the European Convention on Human Rights (ECHR), and a violation of their own right to be free from inhuman or degrading treatment, guaranteed by Article 3 of the ECHR.

IV. THE LAW

14. Before considering the cases on their merits, the Panel must first decide whether to accept the cases, 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

15. The complainants allege in substance the lack of an adequate criminal investigation into the abduction and probable killing of Mr Đorđe Marković.
16. In his comments, the SRSG raises no objection to the admissibility of this part of the complaints.
17. The Panel considers that the complaints under Article 2 of the ECHR raise 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 complaints is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12.
18. No other ground for declaring this part of the complaints inadmissible has been established.

Alleged violation of Article 3 of the ECHR

19. The complainants allege mental pain and suffering caused to them by the situation surrounding the abduction of their family member.
20. In his comments, the SRSG argues that, while the complainants state that they have suffered mental pain and anguish as a result of the disappearance of their relative, there is no assertion that this suffering was a result of any acts or omissions attributable to UNMIK. The SRSG further argues that the minimum level of severity required for facts to fall within the scope of Article 3 has not been attained. According to the SRSG, this part of the complaints is therefore inadmissible as manifestly ill-founded.
21. The Panel considers that, despite the lack of express allegations put forward by the complainants in this respect, the complaints set forth relevant facts relating to the abduction of the complainants' relative upon which the alleged violation of the complainants' rights under Article 3 of the ECHR may be based.
22. The Panel 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 of Human Rights 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 (HRAP), *Zdravković*, no. 46/08, decision of 17 April 2009, § 41, and HRAP, *Radisavljević*, no. 156/09, decision of 17 February 2012, § 18).

23. 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).
24. With regard to the SRSG’s objection related to the threshold of suffering required under the ECHR, the Panel considers that the examination of this element can not be detached from the examination of the merits of the complaints.
25. The Panel considers that this part of the complaints 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 complaints is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12, and rejects the objection raised by the SRSG.
26. No other ground for declaring this part of the complaints inadmissible has been established.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINTS ADMISSIBLE.

Andrey ANTONOV
Executive Officer

Marek NOWICKI
Presiding Member