



The Human Rights Advisory Panel

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DECISION

Date of adoption: 26 September 2012

Cases Nos. 51/09 and 53/09

Kenan ČELIĆ and Enver FAZLIJA

against

UNMIK

The Human Rights Advisory Panel, sitting on 26 September 2012,
with the following members present:

Mr Marek NOWICKI, Presiding Member
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, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint of Mr Kenan Čelić (case no. 51/09) was introduced on 7 March 2009 and registered on 17 April 2009. The complaint of Mr Enver Fazlija (case no. 53/09) was introduced on 27 March 2009 and registered on 17 April 2009.
2. On 9 September 2010, the Panel decided to join the cases pursuant to Rule 20 of the Panel's Rules of Procedure.
3. On 12 June 2009, the Panel requested further information from Mr Enver Fazlija. On 18 September 2009 and 3 January 2011, the Panel received further information from Mr Enver Fazlija. On 14 June 2011, the Panel received further information from Mr Kenan Celić.

4. On 2 November 2009, the complaint of Mr Enver Fazlija was communicated to the Special Representative of the Secretary-General (SRSG), for UNMIK's comments on the admissibility of the complaint. On 4 February 2010, UNMIK submitted its response.
5. On 8 November 2010, the Panel decided to re-communicate the complaint of Mr Enver Fazlija and communicated the complaint of Mr Kenan Čelić for UNMIK's comments on the admissibility of the joined complaints. On 7 March 2011, UNMIK submitted its response.

II. THE FACTS

6. Mr Kenan Čelić is the son of Mr Avdija Čelić. Mr Enver Fazlija is the father of Mr Gafur Fazlija and brother-in-law of Mr Avdija Čelić.
7. The complainants state that on 3 July 1999, Mr Avdija Čelić and Mr Gafur Fazlija were abducted in Prishtinë/Priština by unknown persons.
8. The complainants state that the abductions were reported to the International Committee of the Red Cross (ICRC), UNMIK and KFOR.
9. On 4 July 1999, the bodies of two persons were discovered near Prishtinë/Priština. The British KFOR collected the bodies and delivered them to the Prishtinë/Priština city hospital. Subsequently, these unidentified bodies were buried in Dragodan cemetery in Prishtinë/Priština.
10. On 31 July 1999, the ICRC opened a tracing request for Mr Gafur Fazlija, and on 14 February 2000 for Mr Avdija Čelić. Likewise, their names appear in the database compiled by the UNMIK Office on Missing Persons and Forensics (OMPF).
11. On 19 November 2001 UNMIK Police exhumed the mortal remains suspected to be those of Mr Avdija Čelić and Mr Gafur Fazlija. On 20 November 2001, the OMPF issued two identification certificates confirming that the mortal remains belonged to Mr Avdija Čelić and Mr Gafur Fazlija. In addition, the clothes found on the dead bodies were identified by a family member during an identification display organised by the UNMIK Police Missing Persons Unit (MPU) in Graçanicë/Gračanica. No DNA analyses were performed at that time.
12. On 21 November 2001, the mortal remains of Mr Avdija Čelić and Mr Gafur Fazlija were handed over to their family members, who buried them in the cemetery in Preoc/Preoce village, Prishtinë/Priština municipality. Subsequently, on 26 November 2001 MPU closed the case.
13. The OMPF death certificate dated 27 November 2001 indicates that on 21 November 2001 the autopsy on Mr. Gafur Fazlija's mortal remains established that his death was caused by a stab wound.
14. The complainants clarified to the Panel that although they doubt the accuracy of the identification, they do not now wish to allow the mortal remains of their relatives to be exhumed for DNA testing.
15. 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

16. The complainants complain about UNMIK's alleged failure to properly investigate the abductions and killings of Mr Avdija Čelić and Mr Gafur Fazlija, including the failure to perform any DNA analysis on their mortal remains in order to properly identify them. The complainants in essence also complain about the fear, pain and anguish suffered by themselves because of this situation.
17. The Panel considers that the complainants may be deemed to invoke, respectively, a violation of the right to life of Mr Avdija Čelić and Mr Gafur Fazlija, 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

18. 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

19. The complainants complain about UNMIK's alleged failure to properly investigate the abductions and killings of Mr Avdija Čelić and Mr Gafur Fazlija, including the failure to perform any DNA analysis on their mortal remains in order to properly identify them.
20. In his comments, the SRSG argues that through an appropriate investigation UNMIK was able to locate and identify the mortal remains of Mr Avdija Čelić and Mr Gafur Fazlija, thus complying with one of the procedural requirements established by Article 2 of the ECHR, namely the obligation to conduct an investigation capable of determining the fate and whereabouts of the missing person. Additionally, the SRSG clarifies that UNMIK identified the mortal remains of Mr Avdija Čelić and Mr Gafur Fazlija in 2001 by the traditional methods in practice at the time which did not involve DNA analyses. Notwithstanding, the SRSG does not make a formal objection to the admissibility of this part of the complaint.
21. 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.
22. No other ground for declaring this part of the complaint inadmissible has been established.

Alleged violation of Article 3 of the ECHR

23. The complainants allege mental pain and suffering caused to them by the situation surrounding the abductions and killings of Mr Avdija Čelić and Mr Gafur Fazlija.
24. In his comments, the SRSG does not object to the admissibility of this part of the complaint.
25. The Panel notes that according to the case law of the European Court of Human Rights a member of the family of a disappeared person can under certain conditions be considered the victim of treatment by the authorities contrary to Article 3 of the ECHR, which prohibits inhuman treatment. Where the disappeared person is later found dead, the applicability of Article 3 is in principle limited to the distinct period during which the member of the family sustained the uncertainty, anguish and distress appertaining to the specific phenomenon of disappearances (see, *e.g.*, European Court of Human Rights (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).
26. In the present case, the relevant period lasted until 21 November 2001 when the mortal remains of Mr Avdija Čelić and Mr Gafur Fazlija were handed over to the complainants and subsequently buried by the family.
27. The Panel recalls that, according to Section 2 of UNMIK Regulation No. 2006/12, it has jurisdiction only over “complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights”.
28. The Panel has no doubts as to the profound suffering caused to the complainants by the disappearance and death of their relatives. Nevertheless, the Panel must conclude that this part of the complaints lies outside its jurisdiction *ratione temporis* (see Human Rights Advisory Panel (HRAP), *Patrnogić*, no. 252/09, decision of 16 December 2011, §§ 16-20).

FOR THESE REASONS,

The Panel, unanimously,

- DECLARES ADMISSIBLE THE COMPLAINTS RELATING TO THE RIGHT TO LIFE;

- DECLARES INADMISSIBLE THE REMAINDER OF THE COMPLAINTS.

Andrey ANTONOV
Executive Officer

Marek NOWICKI
Presiding Member