



The Human Rights Advisory Panel

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DECISION

Date of adoption: 21 November 2012

Case No. 255/09

Ranko MILENKOVIĆ

against

UNMIK

The Human Rights Advisory Panel, sitting on 21 November 2012,
with the following members present:

Mr Marek NOWICKI, Presiding Member
Ms Christine CHINKIN
Ms Françoise TULKENS

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 was introduced on 10 April 2009 and registered on 30 April 2009.
2. On 23 December 2009, the Panel requested additional information from the complainant. On 24 November 2010, the Panel reiterated its request for additional information to the complainant. No response was received.
3. On 19 April 2011, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on admissibility.
4. On 31 May 2011, UNMIK provided its response.

5. On 14 May 2012, the Panel received additional information from the complainant by telephone.
6. On 24 May 2012, the Panel re-communicated the complaint to the SRSG for additional comments on the admissibility. The SRSG provided UNMIK's response on 10 October 2012.

II. THE FACTS

7. The complainant is the brother of Mr Rajko Milenković. The complainant states that his brother disappeared on 14 November 1999 in the northern part of Mitrovicë/Mitrovica.
8. According to information provided by the SRSG, on 15 November 1999, Mr Rajko Milenković's disappearance was reported by his late wife, Mrs Vesna Milenković, to the UNMIK Police in Mitrovicë/Mitrovica and an investigation was opened. The complainant states that he also reported the disappearance to the Red Cross of Serbia, the International Committee of the Red Cross (ICRC) and "other authorised organs of the Republic of Serbia".
9. According to information provided by the SRSG, an unidentified body, later believed to be that of Mr Rajko Milenković, was discovered in Bukosh/Bukoš, Suharekë/Suva Reka municipality on 29 December 1999. The report of an autopsy conducted on 4 January 2000 states that the body indicated that a homicide had probably occurred.
10. On 10 June 2000, the unidentified body was re-exhumed by a team of the International Tribunal for the Former Yugoslavia and a second autopsy was conducted on 19 July 2000. According to the autopsy report, the death was probably caused by a trauma to the chest.
11. In November 2000, the Missing Person Unit of UNMIK Police contacted Mrs Vesna Milenković for identification of the clothing found on the body believed to be that of Mr Rajko Milenković. During this meeting, Mrs Milenković reportedly requested that the body be re-examined for the purpose of confirming the identity as Mr Rajko Milenković's. It appears that the body was re-exhumed and a third autopsy was scheduled to be conducted at the morgue in Prishtinë/Priština on 15 December 2000. However, it is not clear what the result of this autopsy was, nor where the body was subsequently stored or buried.
12. In his comments on admissibility, the SRSG states that at some time in 2001, the body was eventually identified as that of Mr Rajko Milenković through "comparison of ante-mortem and post-mortem" information concerning the victim. However, the family refused to accept the mortal remains without a positive match through DNA analysis.
13. On 5 May 2003, the UNMIK Office on Missing Persons and Forensics confirmed the mortal remains to be those of Mr Rajko Milenković based on the DNA analysis performed by the International Commission on Missing Persons. It appears that in the meantime Mr Rajko Milenković's mortal remains could not be located and handed over to his family.
14. In this regard, the complainant states that, after a first attempt at identification in 2001, he was not contacted by UNMIK or any other relevant authorities in relation to the identification of Mr Milenković's mortal remains through DNA and/or their return to the family.
15. An ICRC tracing request for Mr Rajko Milenković remains open.

16. 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

17. The complainant complains about UNMIK's alleged failure to properly investigate the disappearance of his brother. He also complains about the mental pain and suffering allegedly caused to himself and his family by this situation.
18. The Panel considers that the complainant may be deemed to invoke, respectively, a violation of the right to life of his brother, guaranteed by Article 2 of the European Convention on Human Rights (ECHR), and a violation of his own right to be free from inhuman or degrading treatment, guaranteed by Article 3 of the ECHR.

IV. THE LAW

19. Before considering the case on the 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

20. The complainant alleges in substance the lack of an adequate criminal investigation into the disappearance of his brother.
21. In his comments, the SRSG does not raise any objection to the admissibility of this part of the complaint.
22. 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.
23. No other ground for declaring this part of the complaint inadmissible has been established.

Alleged violation of Article 3 of the ECHR

24. The complainant alleges mental pain and suffering caused to himself and his family by the situation surrounding the disappearance of his brother.
25. In his comments, the SRSG argues that, while the complainant states that he has suffered mental pain and anguish as a result of the disappearance, there is no express allegation that this fear and anguish were a result of UNMIK's response to the disappearance of Mr Rajko Milenković. For that reason, this part of the complaint is inadmissible as manifestly ill-founded.

26. 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 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).
27. 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.
28. The Panel considers that this part of the complaint 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, and rejects the objection raised by the SRSG.
29. No other ground for declaring this part of the complaint inadmissible has been established.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINT ADMISSIBLE.

Andrey ANTONOV
Executive Officer

Marek NOWICKI
Presiding Member