



The Human Rights Advisory Panel

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OPINION

Date of adoption: 14 March 2013

Case No. 31/08

Marija LALIĆ

against

UNMIK

The Human Rights Advisory Panel, sitting on 14 March 2013,
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, as amended,

Having deliberated, makes the following findings:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 18 July 2008 and registered on the same date.
2. On 23 October 2008, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility and merits of the case. On 11 November 2008, the SRSG provided UNMIK's response.
3. On 17 November 2008, the Panel requested additional information from the complainant. The Panel received the complainant's responses on 15 December 2008 and on 16 January 2009.

4. On 24 September 2009, following the receipt of the additional information from the complainant, the Panel re-communicated the case to the SRSG for UNMIK's comments on the admissibility and merits of the case. On 15 October 2009, the SRSG provided UNMIK's response.
5. On 10 November 2010, the Panel requested further clarifications from the complainant. The complainant's response was received on 18 November 2010.
6. On 31 January 2011, the Panel requested information from the District Court of Prishtinë/Priština. No response was received.
7. On 3 May 2011, the Panel reiterated its request for further information to the District Court of Prishtinë/Priština. The response of the District Court was received on 5 May 2011.
8. On 20 July 2011, the Panel requested information in relation to the case from the Municipal Court of Prishtinë/Priština. The Municipal Court submitted its response on 4 September 2011.
9. On 6 December 2011, the Panel requested further information from the Municipal Courts of Prishtinë/Priština and Lipjan/Lipljan. The Panel received the responses of the Municipal Court of Prishtinë/Priština and of the Municipal Court of Lipjan/Lipljan on 12 December and 14 December 2011 respectively.
10. On 6 March 2012, the Panel received further information on the complaint at the District Court of Prishtinë/Priština.
11. On 29 March 2012, the Panel re-communicated the case to the SRSG for comments on admissibility, following the receipt of such additional information. On 4 May 2012, the Panel received UNMIK's response.
12. On 9 June 2012, the Panel declared the complaint partially admissible.
13. On 13 June 2012, the Panel informed the SRSG of the decision and requested UNMIK's comments on the merits of the case. On 16 July 2012, the SRSG provided UNMIK's response.
14. On 13 November 2012, the Panel received further information concerning the case from the District Court of Prishtinë/Priština.

II. THE FACTS

15. The complainant is a former resident of Kosovo, currently living in Serbia proper. She left Kosovo on 12 June 1999 due to security reasons.
16. The complainant states that in 1993 she filed a paternity suit with the District Court of Prishtinë/Priština against the alleged father of her daughter, who was born in 1991. On 17 December 1997, the above-mentioned Court, acting as court of first instance, rendered a

decision in the complainant's favour ordering the respondent to pay monthly allowances towards the upbringing of the child.

17. On an unspecified date, the respondent filed an appeal against this decision of the District Court. On 22 October 1998, the Supreme Court of Serbia, as the appeal court reversed the District Court's decision and referred the matter to the Municipal Court of Prishtinë/Priština for retrial.
18. The complainant states that notwithstanding this decision of the Supreme Court of Serbia, the retrial did not take place. She further states that her legal representatives requested the judicial authorities several times, including after UNMIK's arrival in Kosovo in June 1999, to expedite her case, but to no avail. However, she provides no documentation with respect to this request.
19. 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.
20. On 11 May 2011 and on 4 September 2011 respectively, the District Court and the Municipal Court of Prishtinë/Priština submitted to the Panel that they could not find any record of a paternity suit filed by the complainant.
21. However, on 6 March 2012, the original case file concerning the paternity suit was located in the archives of the District Court in Prishtinë/Priština. The Panel's Secretariat was able to inspect the file and collect relevant excerpts, including a copy of the Supreme Court's decision of 22 October 1998. It appears that the case file was never transmitted from the District Court to the Municipal Court of Prishtinë/Priština for retrial, as ordered by the Supreme Court.
22. Judicial proceedings concerning the complainant's paternity suit have not been concluded to date.

III. THE COMPLAINT

23. Insofar as the complaint has been declared admissible, the complainant complains about the alleged failure of the judicial proceedings to determine the legal paternity of her daughter and that such proceedings have therefore not been concluded within a reasonable time. She also complains that she did not have access to effective remedies and that, in the meantime, she has had to provide solely for the upbringing of the child.
24. The Panel considers that the complainant may be deemed to invoke a violation of her right of access to a court and of the reasonable time requirement guaranteed by Article 6 § 1 of the European Convention on Human Rights (ECHR), and a violation of her right to an effective remedy under Article 13 of the ECHR.

IV. THE LAW

A. Concerning the facts of the matter and evaluation of evidence

The Parties' submissions

25. The complainant complains that the judicial proceedings to determine legal paternity over her child, which were initiated before the District Court of Prishtinë/Priština in 1993, have not been concluded to date. The complainant states that, after the Supreme Court ordered a re-trial in 1998, she requested the competent courts on several occasions, including after the arrival of UNMIK in Kosovo, to resume the proceedings. However no action was undertaken and no decision has been taken to date on her claim.
26. In his comments dated 16 July 2012, the SRSG argues that the information gathered by the Panel at the District Court of Prishtinë/Priština in a meeting with the court administrator may be “indicative, but not conclusive” with respect to the facts of the matter. According to the SRSG, “it still needs to be asserted whether the file relating to the paternity suit of the complainant is still located at the District Court and was never transferred to the Municipal Court”. In the SRSG’s view, it is very likely that the file went missing during the events of the Kosovo conflict, in particular between the end of 1998 and mid-1999.

The Panel’s assessment

27. With regard to the objection of the SRSG that some facts of the matter – in particular whether the file relating to the paternity suit is still stored at the District Court of Prishtinë/Priština and was never transferred to the Municipal Court – are not sufficiently established, the Panel recalls that, according to Section 15.1 of UNMIK Regulation No. 2006/12, it has the power to investigate complaints and to request submission of information and documentation from UNMIK and from third parties.
28. The Panel also refers to the jurisprudence of the European Court of Human Rights establishing that there are no procedural barriers to the admissibility of evidence or pre-determined formulae for the assessment of evidence so gathered. According to the established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar rebutted presumptions of fact (see European Court of Human Rights (ECtHR), *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, judgment of 6 July 2005, § 147). In accordance with the European Court’s practice, the Panel adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions.
29. In the instant case, the Panel was provided with documentation by court officials that the original case file of the matter was, as of 6 March 2012, still stored at the District Court of Prishtinë/Priština and that the case was never transferred to the Municipal Court for retrial. In addition, the Municipal Court of Prishtinë/Priština informed the Panel that complaint had never been registered before it for retrial. In these circumstances, and having regard to the fact that UNMIK does not submit any documentation that suggests otherwise, the Panel considers the facts of the matter established as related above (§§ 15-22).

B. Alleged Violation of Article 6 § 1 of the ECHR

The Parties' Submissions

30. The complainant complains that the judicial proceedings to determine legal paternity over her child have been pending since 1993 and that the Kosovo courts have not determined her claim. The complainant also states that, on several occasions, she addressed the relevant Kosovo courts and UNMIK requesting that the examination of her case be expedited; however, she did not receive any feedback. The complainant further states that during all this period, she has had to sustain her child as a single mother, with limited social welfare assistance.
31. On the merits of the complaint, the SRSG states that at the time of the referral for retrial of the paternity dispute, in 1998, UNMIK was not deployed in Kosovo and thus did not have any responsibility over the administration of justice herein. The SRSG recalls that UNMIK was deployed only in June 1999 when the situation in Kosovo, including the court system, was “very precarious and not controlled by any overseeing institution or body”. For these reasons, the complaint is unmerited and shall be rejected.

The Panel's assessment

32. The right to a fair trial, access to a court and reasonable time guarantee is envisaged by Article 6 § 1 of the ECHR, which in relevant parts, reads as follows:

“In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by and independent and impartial tribunal established by law [...]”

33. The Panel notes that it is not disputed that judicial proceedings to determine the legal paternity of a child involve the determination of civil rights and obligations in the sense of Article 6 of the ECHR, and that therefore Article 6 applies to the instant case.
34. The Panel refers to the case-law of the European Court of Human Rights that the right to a fair trial envisaged by Article 6 embodies the “right to a court”. This right shall be understood not only as the right to institute proceedings before a court in civil matters, but also the right to obtain a determination of the dispute by the court. In this regard the European Court has held that it would be illusory if a domestic legal system allowed an individual to bring a civil action before a court without ensuring that the case would be determined by a final decision in the judicial proceedings. It would be unconceivable for Article 6 § 1 to describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without guaranteeing the parties that their civil disputes will be finally determined (see, among other judgments, ECtHR, *Multiplex v. Croatia*, no. 58112/00, judgment of 10 July 2003, § 45; ECtHR, *Kutić v. Croatia*, no. 48778/99, § 25, ECHR 2002-II; ECtHR, *Dubinskaya v. Russia*, no. 4856/03, judgment of 13 July 2006, § 41; see also HRAP, *Milogorić and Others*, nos. 38/08 and others, opinion of 24 March 2011, § 35).
35. The Panel also notes, however, that this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the competent authorities. In this respect, the authorities enjoy a

certain margin of appreciation. However, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 of the ECHR if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see ECtHR, *Stubbings and Others v. United Kingdom*, judgment of 22 October 1996, Reports of Judgments and Decisions, 1996-IV, p. 1502, § 50; see also HRAP, *Milogorić and Others*, cited above, § 44; *Berisha and Others*, nos. 27/08 and others, opinion of 23 February 2011, § 25; *Lalić and Others*, nos. 09/08 and others, opinion of 9 June 2012, § 22).

36. With specific regard to the length of proceedings, the Panel recalls that the ECHR places a duty on the States to organise their legal system so as to allow the courts to comply with the requirements of Article 6 § 1, including that of a trial within a “reasonable time” (see ECtHR, Grand Chamber [GC], *Pélissier and Sassi v. France*, no. 25444/94, judgment of 25 March 1999, § 74, ECHR 1999-II).
37. The Panel notes that the right to a fair trial is also protected by the Universal Declaration on Human Rights (Article 10) and by the International Covenant on Civil and Political Rights (ICCPR) (Article 14). The Panel notes that the latter instrument had been ratified by the Former Socialist Republic of Yugoslavia on 2 June 1971.
38. Turning to the circumstances of the present case, the Panel notes that the complainant instituted judicial proceedings for the determination of paternity of her child before the District Court of Prishtinë/Priština in 1993 and that there has been no determination on her claim to date.
39. The Panel recalls concerning its temporal jurisdiction that, according to Section 2 of UNMIK Regulation No. 2006/12 it shall have jurisdiction 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”. It follows that the Panel is competent *ratione temporis* to evaluate the compliance of the judicial proceedings concerning the paternity suit with Article 6 of the ECHR only for the period after 23 April 2005, while taking into consideration the state of the case at that date (see HRAP, *Milogorić and Others*, cited in § 34 above, at §§ 19-20).
40. The Panel notes that the judicial proceedings instituted by the complainant in 1993 were still pending at the moment of UNMIK’s deployment in Kosovo in June 1999. In particular, the Panel notes that at this time, the order for retrial issued by the Supreme Court of Serbia in 1998 was still pending. The Panel also notes that, as there is no evidence that any action was undertaken by the courts between June 1999 and 23 April 2005, this was the situation at the start of the Panel’s jurisdiction, with no determination having been made on the complainant’s claim. The period under review ends on 9 December 2008, with EULEX taking over responsibility in the area of administration of justice (see § 19 above).
41. In his comments on the merits of the complaint, the SRSG argues that UNMIK cannot be held accountable for the failure of the Kosovo courts to issue a determination on the complainant’s case. The SRSG argues that when the Supreme Court referred the paternity suit to the Municipal Court for retrial, UNMIK was not yet deployed in Kosovo and did not have responsibilities over the judiciary therein. The SRSG further argues that even at the

time of UNMIK's deployment in 1999, the situation in Kosovo and the status of the justice sector was very precarious and not controlled by any overseeing institution or body.

42. In this regard, the Panel notes that UNMIK was deployed in Kosovo pursuant to the United Nations Security Council Resolution 1244 (1999) of 10 June 1999, with the mandate, among other things,

“to provide an interim administration for Kosovo ... while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo”.
43. The scope of UNMIK's mandate was further clarified by the United Nations Secretary-General Reports of 12 June 1999 (S/1999/672) and of 12 July 1999 (S/1999/672) to the Security Council on the implementation of Resolution 1244 (1999). It includes specifically the “organization and oversight of the judicial system” and the exercise of “all legislative and executive powers, including the administration of the judiciary”. In implementing its mandate in the territory of Kosovo, including the re-establishment of the rule of law, UNMIK was requested to “respect the laws of the Republic of Yugoslavia and the Republic of Serbia” and “the existing institutions” insofar as they were not incompatible with internationally recognized human rights standards and UNMIK's mandate under Resolution 1244 (1999). Further UNMIK was requested “to protect and promote human rights in Kosovo”, to be guided by “international human right standards as the basis for the exercise of its authority in Kosovo” and to “adopt human rights policies in respect of its administrative functions”.
44. Due to the collapse of the administration of justice in Kosovo, and having acknowledged the “urgent need to build genuine rule of law in Kosovo, including through the immediate re-establishment of an independent, impartial and multi-ethnic judiciary” (see 12 July 1999 report § 66-67), UNMIK established in June 1999 an Emergency Justice System. This was composed of a limited number of local judges and prosecutors and was operational until a regular justice system became operative in January 2000. In January 2003, the UN Secretary-General reporting to the Security Council on the implementation of Resolution 1244 (1999) defined the justice system in Kosovo at that moment as being “well-functioning” and “sustainable”.
45. The Panel therefore considers that, although it is certainly true that UNMIK was not yet present in Kosovo in 1998 – that is when a retrial was ordered - it is also true that it became responsible for the interim administration of Kosovo, including the administration of justice, as of 10 June 1999. The Panel also considers that, in compliance with its executive functions and human rights obligations, it is legitimate to expect that UNMIK's efforts towards the re-establishment of the rule of law and the organisation of the judiciary in Kosovo, should also entail policies to ensure the realisation of the fair trial guarantees, including the right of access to a court, for those whose judicial claims were pending at the time of UNMIK's arrival.
46. In this regard, the Panel refers to the principle of continuity of obligations contained in human rights treaties, as established by the United Nations Human Rights Committee (HRC) in the context of obligations arising from the ICCPR and referred to by the European Court of Human Rights, that fundamental rights protected by international treaties belong to the people living in the territory of the State party concerned. In particular, the HRC has stated

that “once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession” (see HRC, General Comment No. 26: Continuity of Obligations, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1, § 4; see also, *mutatis mutandis*, ECtHR, *Bijelić v. Montenegro and Serbia*, no. 11890/05, judgment of 28 April 2009, §§ 58 and 69).

47. The Panel notes that in the instant case no action was undertaken by UNMIK to ensure that the complainant’s claim pending within the Kosovo justice system at the time of UNMIK’s arrival was examined by the competent authorities. As a matter of fact, such claim is still registered and pending within the Kosovo justice system to date.
48. The Panel also notes that, apart from the assumption that the file has been lost during the 1998-1999 conflict in Kosovo, which has been rebutted by the Panel, UNMIK has not provided any explanation as to why the complainant’s claim was not proceeded with by the courts. The Panel also notes that no explanation has been provided by UNMIK as to whether any policy was developed by UNMIK for a transitional system to ensure that cases already pending in the Kosovo courts before its arrival were dealt with. It appears that such cases were left pending as they were neither formally dismissed nor adjudicated, as in the case of the complainant.
49. In light of the above, the Panel finds that the complainant’s right of access to a court as envisaged by Article 6 of the ECHR has been violated.
50. The Panel notes that the complainant’s allegations that judicial proceedings concerning the paternity suit were not concluded within a reasonable time raise the same issues as those considered above under the right of access to a court.
51. For this reason, the Panel finds that it is not necessary to examine the issue of the length of proceedings.

C. Alleged Violation of Article 13 of the ECHR

52. The Panel finds that the complaint under Article 13 of the ECHR (right to an effective remedy) concern essentially the same issues as those discussed under Article 6 § 1. In these circumstances, it finds that no separate issues arise under Article 13 of the ECHR (see HRAP, *Milogorić and Others*, cited in § 34 above, at § 49).

V. RECOMMENDATIONS

53. In light of the Panel’s findings in this case, the Panel is of the opinion that some form of reparation is necessary.
54. It would normally be for UNMIK to take the appropriate measures in order to put an end to the violation noted and to redress as far as possible the effects thereof. However, as the Panel noted above (see § 19) UNMIK’s responsibility with regard to the judiciary in Kosovo ended on 9 December 2008, with EULEX assuming full operational control in the area of rule of law. UNMIK therefore is no longer in a position to take measures that will have a direct impact on proceedings pending before the municipal courts.

55. The Panel considers that this factual situation does not relieve UNMIK from its obligation to redress as far as possible the effects of the violations for which it is responsible. In line with the case law of the European Court of Human Rights on situations of reduced State jurisdiction, the Panel is of the opinion that UNMIK must endeavour, with all the diplomatic means available to it vis-à-vis the Kosovo authorities, to obtain assurances that the case filed by the complainant will be duly processed (see ECtHR [GC], *Ilașcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, § 333, ECHR 2004-VII; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171, ECHR 2010 (extracts); ECtHR [GC], *Catan and Others v. Republic of Moldova and Russia*, nos. 43370/04 and others, judgment of 19 October 2012, § 109; see also HRAP, *Milogorić and Others* cited in § 34 above, at § 49).
56. The Panel further considers that UNMIK should take appropriate steps towards adequate compensation of the complainant for non-pecuniary damage suffered as a result of the prolonged stay of the proceedings instituted by her.

FOR THESE REASONS,

The Panel, unanimously,

- 1. FINDS THAT THERE HAS BEEN VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS WITH RESPECT TO THE RIGHT OF ACCESS TO A COURT;**
- 2. FINDS THAT IT IS NOT NECESSARY TO EXAMINE THE COMPLAINT UNDER ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS WITH RESPECT TO THE LENGTH OF PROCEEDINGS;**
- 3. FINDS THAT IT IS NOT NECESSARY TO EXAMINE THE COMPLAINT UNDER ARTICLE 13 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.**

Andrey ANTONOV
Executive Officer

Marek NOWICKI
Presiding Member