



# *The Human Rights Advisory Panel*

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## **DECISION**

**Date of adoption: 14 March 2013**

**Case No. 02/10**

**Shehide MALOKU**

**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,

Having deliberated, decides as follows:

### **I. PROCEEDINGS BEFORE THE PANEL**

1. The complaint was introduced on 6 February 2010 and registered on 8 February 2010.
2. Between 9 and 18 April 2010 and on 15 April 2011, the Panel received additional documentation from the complainant.
3. On 24 August 2011, the Panel requested additional information from the Supreme Court in Prishtinë/Priština. On 5 October 2011, the Panel received the requested information.
4. On 20 November 2012, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility of the case. On 12 February 2013, the SRSG provided UNMIK's response.

## II. THE FACTS

5. On 18 May 2000, the complainant, who was in her sixth month of pregnancy with twins, was admitted to hospital in Prishtinë/Priština, with various symptoms related to her condition.
6. On 6 June 2000, the pregnancy was terminated on advice from her doctors. During the surgical intervention, the operating team found that the medical condition of the complainant necessitated her sterilisation, so that her life would not be endangered by any future pregnancies. This was undertaken without obtaining her consent.
7. The complainant states that she was not informed about the sterilisation and that she became aware of the situation only on 4 July 2001, during a medical check-up in a clinic in Gjakovë/Djakovica.
8. According to the complainant, on 16 April 2002, she brought a criminal report against four members of the operating team, including Dr. B.K. A criminal investigation was subsequently opened against Dr. B.K.
9. On 15 September 2005, two doctors were charged by the District Public Prosecutor (DPP) of Prishtinë/Priština with irresponsible medical treatment, on the basis of Article 219 of the Provisional Criminal Code of Kosovo (PCCK), promulgated by UNMIK Regulation No. 2003/25 of 6 July 2003 on the Provisional Criminal Code of Kosovo.
10. Between February 2006 and January 2007, the District Court of Prishtinë/Priština conducted a trial with respect to this prosecution. On 19 May 2008 the Court pronounced its judgment, dated 14 May 2008. The Court acquitted the defendants of the charges, due to lack of evidence.
11. On 3 July 2008, the DPP of Prishtinë/Priština appealed against this judgment to the Supreme Court. This appeal was followed by an appeal by the complainant, lodged on 11 July 2008.
12. On 27 January 2009, the Supreme Court rejected both appeals. The DPP's appeal was declared inadmissible on the ground that it had not been announced within the legal deadline of eight days from the notification of the judgement, imposed by Article 400 of the Provisional Criminal Procedure Code of Kosovo (PCPCK), promulgated by UNMIK Regulation No. 2003/26 of 6 July 2003 on the Provisional Criminal Procedure Code of Kosovo. The complainant's appeal was declared inadmissible on the ground that the subject matter of the appeal did not fall within the categories of offences for which, according to Article 399(3) of the PCPCK, the injured party is allowed to appeal.
13. On 23 March 2009, the complainant lodged a request with the Supreme Court for revision of its judgment. The Panel is unaware of the outcome of this request.
14. On the same day, the complainant reported a criminal offence of Abuse of Official Position or Authority on the basis of Article 339 of the PCCK allegedly committed by the former prosecutor, who had handled the case before the District Court and filed the appeal with the Supreme Court. The report was submitted to the Kosovo Chief Public Prosecutor and the Public Prosecutor of Prishtinë/Priština. According to the complainant, the former prosecutor had failed to perform his duty by failing to announce his appeal within the deadline or,

alternatively, to announce that he renounced the criminal prosecution at the appeal stage, which would have made the complainant's appeal admissible. The Panel is unaware of the outcome of this report.

15. On the same day, the complainant lodged a request with the District Court of Prishtinë/Priština to reopen the proceedings against the two doctors, as well as a request to return to the *status quo ante* and to allow her to continue the prosecution from the moment when the public prosecutor allegedly withdrew from the prosecution. On 16 April 2009, the District Court declared the request to reopen the criminal proceedings unfounded and the request to continue the prosecution inadmissible. On 5 May 2009, the complainant lodged an appeal against this judgment with the Supreme Court. On 13 July 2009, the Supreme Court upheld the District Court Decision, dated 16 April 2009, and found the complainant's appeal ill-founded, pursuant to Article 434(3) of the PCPCK.
16. On 30 March 2009, the complainant sent a complaint about the processing of the case to the President of the Assembly of Judges of the European Union Rule of Law Mission in Kosovo (EULEX) and to the Chief EULEX Prosecutor. The Panel is unaware of any reaction to the complaint.

### III. THE COMPLAINT

17. The complainant argues that because of the failure of the public prosecutor to announce his appeal within the deadline, and because of subsequent decisions of the Supreme Court (on her appeal against the judgment acquitting the defendants) and the District Court of Prishtinë/Priština (on her request for reopening the criminal proceedings), she has been denied the right as an injured party to undertake prosecution herself, guaranteed by the PCPCK.
18. The Panel considers that the complainant can be deemed to invoke a violation of the right of access to a court, guaranteed by Article 6 § 1 of the European Convention on Human Rights (ECHR).

### IV. THE LAW

19. 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.
20. On 9 December 2008, UNMIK's responsibility with regard to police and justice in Kosovo ended with 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.
21. In his comments, the SRSG, argues that the complaint be dismissed as a result of the final decision of the Supreme Court not taking place until 27 January 2009. As a result, since the process of appeal ended after the end of UNMIK's responsibility with regards to judicial matters (see above), the case falls outside of the Panel's jurisdiction.

22. With regard the criminal proceedings, the Panel notes that after 9 December 2008 UNMIK can in principle no longer be held responsible for acts or omission imputable to the Kosovo authorities (see § 20 above).
23. The Panel has no doubts as to the profound suffering caused to the complainant by the events she suffered. However, since the final process of appeal was not concluded until 16 April 2009, the Panel concludes that UNMIK was no longer exercising executive authority over the Kosovo judicial system and had no responsibility for any violation of human rights allegedly committed thereafter (see Human Rights Advisory Panel, *Sefa*, no. 9/10, decision of 26 November 2011, § 9).
24. For this reason, the Panel considers that the complaint is outside of its jurisdiction *ratione personae*, and must therefore be declared inadmissible.

**FOR THESE REASONS,**

The Panel, unanimously,

**DECLARES THE COMPLAINT INADMISSIBLE.**

Andrey ANTONOV  
Executive Officer

Marek NOWICKI  
Presiding Member