



DECISION¹*

Date of adoption: 26 November 2011

Cases Nos. 43/09, 54/09, 114/09, 173/09 & 242/09

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against

UNMIK

The Human Rights Advisory Panel, sitting on 26 November 2011,
with the following members present:

Mr Marek NOWICKI, Presiding Member
Mr Paul LEMMENS
Ms Christine CHINKIN

Assisted by
Mr Andrey ANTONOV, Executive Officer

Having considered the aforementioned complaints, 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 complaints of ██████████ (case no. 43/09) and ██████████ (case no. 54/09) were introduced on 27 March 2009 and registered on 17 April 2009. The complaint of ██████ (case no. 114/09) was introduced on 10 April 2009 and registered on 30 April 2009. The complaint of ██████████ (case no. 173/09) was introduced on 17 April 2009 and registered on 30 April 2009. The complaint of ██████████ (case no. 242/09) was introduced on 30 April 2009 and registered on the same date.

* Editorially revised, pursuant to Rule 47.2 of the Rules of Procedures, on 10 May 2012

2. On 28 May 2009, the Panel requested additional information from the complainant in relation to case no. 43/09. The Panel received the complainant's responses on 14 July and 15 September 2009.
3. On 12 June 2009, the Panel requested additional information from the complainant in case no. 54/09. The Panel received the complainant's response on 31 December 2009.
4. On 11 December 2009, the Panel requested further clarification from the complainant in relation to case no. 43/09. The Panel received the complainant's response on 19 January 2010.
5. On 23 December 2009, the Panel requested additional information from the complainant in relation to case no. 242/09. However, no response was received.
6. On 13 January 2010, the Panel requested additional information from the complainants in relation to cases nos. 114/09 and 173/09. However, no response was received.
7. On 26 February 2010, the Panel communicated case no. 54/09 to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility of the case. The SRSG provided his response on 8 April 2010.
8. On 3 March 2010, the Panel communicated case no. 43/09 to the SRSG for UNMIK's comments on the admissibility of the case. The SRSG submitted his response on 9 April 2010.
9. On 21 April 2010 and on 18 May 2010, the Panel forwarded UNMIK's comments on the admissibility of cases nos. 54/09 and 43/09 to the respective complainants, inviting them to reply if they wished to do so. The Panel received the complainant's response in relation to case no. 43/09 on 7 September 2010.
10. On 9 September 2010, the Panel decided to join case no. 43/09 with cases nos. 54/09, 114/09, 173/09 & 242/09, pursuant to Rule 20 of the Panel's Rules of Procedure.
11. On 27 September 2010, the Panel informed the complainant in case no. 54/09 of the decision to join the cases and reiterated its request for further information. On 29 September 2010, the Panel informed the complainants of the decision to join the cases and reiterated its request for further information to the complainants in cases nos. 114/09, 173/09, 242/09 respectively.
12. The Panel received the complainants' response in relation to case no. 173/09 and case no. 54/09 on 11 November and 8 December 2010 respectively.
13. On 2 March 2011, the Panel resent its request for further information to the complainant in case no. 173/09. The Panel received supplemental information from the complainant on 20 April 2011.
14. On 16 June 2011, the Panel communicated cases nos. 114/09, 173/09 and 242/09 and re-communicated cases nos. 43/09 and 54/09 to the SRSG following its decision to join the cases, as well as the receipt of additional information from the complainants in cases nos. 54/09 and 173/09.
15. On 28 July 2011, UNMIK provided its response on the admissibility of the complaints.

II. THE FACTS

16. The first complainant is ██████████ of ██████████ (case no. 43/09). The second complainant is ██████████ of ██████████ (case no. 54/09). The third complainant is a relative of ██████████ (case no. 114/09). The fourth complainant is ██████████ of ██████████ (case no. 173/09). The fifth complainant is ██████████ of ██████████ (case no. 242/09).
17. The first and the third complainants state that ██████████ (case no. 43/09) and Mr D. A. (case no. 114/09) disappeared en route to the Belačevac coal mine on 22 June 1998. According to the complainants, ██████████ and ██████████ left Raskovë/Raskovo village, Obiliq/Obilić Municipality, at about 6.40 a.m. in the same vehicle. They were allegedly stopped at a check-point set up by the Kosovo Liberation Army (KLA) near Caravodicë/Crkvena Vodica village, were abducted and taken in an unknown direction.
18. The second and the fourth complainant state that ██████████ (case no. 54/09) and ██████████ (case no. 173/09), along with ██████████, were also kidnapped by the KLA on 22 June 1998 en route to the Belačevac coal mine. According to the complainants, at about 7.00 ██████████ and ██████████ were travelling in the same vehicle with their colleagues ██████████, Mr S.S. and Mr F. S. They were subsequently stopped by 3 members of the KLA armed with guns. According to the statement subsequently provided by Mr S. S., the KLA members ordered Mr S.S. and Mr F. S., both Kosovo Albanians, to get off the vehicle. They were later released while their Kosovo Serbian colleagues were taken in an unknown direction.
19. The fifth complainant states that her husband, ██████████ (case no. 242/09), was an employee at the Electronic Power Company “Elektroprivreda” located nearby the Belačevac coal mine. He was also kidnapped on 22 June 1998 while travelling from his home to work.
20. The complainants state that the disappearance of their family members was reported to the Serbian Police and Ministry of Internal Affairs, the International Committee of the Red Cross, the OSCE and, upon their arrival in Kosovo, to KFOR and UNMIK.
21. In his comments on admissibility the SRSG states that a total of 9 individuals of Kosovo-Serbian ethnicity disappeared on 22 June 1998 whilst on their way to or from work in the proximity of the Belačevac coal mine. The SRSG states that the matter was initially referred to UNMIK Police on 29 December 1999 and that on 16 February 2000 the cases of all 9 individuals were transferred to the Central Criminal Investigation Unit of the UNMIK Police.
22. Specifically with regard to cases nos. 43/09 and 54/09, the SRSG states that several investigation activities were undertaken by the UNMIK Police in 2000, 2004 and 2005, and that in 2008 the aforementioned cases were sent to the Criminal Division of UNMIK Department of Justice (DOJ) for DOJ’s review. However, it appears that there is no information available on the follow-up actions carried out by the DOJ.
23. The whereabouts of ██████████ ██████████ ██████████ ██████████ ██████████ remain unknown to date.
24. 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. COMPLAINTS

25. The complainants complain about UNMIK's alleged failure to properly investigate the disappearances of [REDACTED] [REDACTED] [REDACTED] [REDACTED]. They also complain about the mental pain and suffering allegedly caused to themselves by this situation.
26. The Panel considers that the complainants may be deemed to invoke, respectively, a violation of the right to life of their family members, 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

27. Before considering the cases on the 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

28. The complainants allege in substance the lack of an adequate criminal investigation into the kidnapping of their family members.
29. In his comments, the SRSG does not raise any objection to the admissibility of this part of the complaints.
30. 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.
31. No other ground for declaring this part of the complaints inadmissible has been established.

Alleged violation of Article 3 of the ECHR

32. The complainants allege mental pain and suffering caused to themselves and their families by the situation surrounding the disappearance of their family members.
33. In his comments, the SRSG submits that, while the complainants state that they have suffered mental pain and anguish as a result of the disappearances, there is no express allegation that this fear and anguish were a result of UNMIK's response to the disappearances of [REDACTED] [REDACTED] [REDACTED]. For that reason, this part of the complaints is inadmissible as manifestly ill-founded.

34. 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).
35. 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.
36. 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.
37. 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