



# *The Human Rights Advisory Panel*

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## **DECISION**

**Date of adoption: 16 December 2011**

**Case No. 296/09**

**D.S.**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 16 December 2011, with the following members present:

Mr Marek NOWICKI  
Mr Paul LEMMENS  
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, including through electronic means, in accordance with Rule 13 § 2 of its Rules of Procedure, decides as follows:

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

1. The complaint was introduced on 29 May 2009 and registered on 2 June 2009.
2. On 9 December 2009, the case was communicated to the Special Representative of the Secretary-General (SRSG), for UNMIK's comments on admissibility. On 30 April 2010 UNMIK provided its response.
3. On 29 December 2010, the Panel requested additional information from the complainant. However, no reply has been received.

4. On 4 March 2011, the Panel asked the SRSG whether UNMIK could comment on information published in the media, which could have some bearing on the case. UNMIK provided its response on 24 March 2011.
5. On 19 April 2011, the Panel communicated the case to the SRSG for UNMIK's comments on admissibility. On 29 July 2011, the Panel received UNMIK's response.

## **II. THE FACTS**

6. The complainant is the wife of Mr D.S. She states that in the afternoon of 22 June 1999 Mr D.S. was routinely returning from his workplace at the "Amortizeri" factory in Lipjan/Lipljan. He safely arrived at his sister's house in Lipjan/Lipljan, stayed there for about two hours and then drove away in his car, apparently heading for his home in Rubovc/Rabovce village of the Lipjan/Lipljan municipality. He never reached home and his whereabouts remained unknown until 2004, when his mortal remains were identified and returned to the family.
7. The complainant submits that M. D.S. disappearance was reported to the Yugoslav Red Cross, KFOR, UNMIK, UNMIK Police and some other organisations and individuals. However, she states that nobody really helped.
8. 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**

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

## **IV. THE LAW**

11. 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**

12. The complainant alleges in substance the lack of an adequate criminal investigation into the disappearance of Mr D.S.

13. The SRSG does not provide comments on the admissibility of this part of the complaint. However, he notes that no documentation attached to the complaint demonstrates that notice of the matter was received by any office in the UNMIK system.
14. 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.
15. No other ground for declaring this part of the complaint inadmissible has been established.

### **Alleged violation of Article 3 of the ECHR**

16. The complainant alleges mental pain and suffering caused to her by the situation surrounding the abduction and murder of her husband.
17. The SRSG does not provide comments on the admissibility of this part of the complaint.
18. 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 (HRAP), *Zdravković*, no. 46/08, decision of 17 April 2009, § 41).
19. 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 the passivity of the authorities and the absence of information given to the complainant may also be indicative of inhuman treatment of the complainant by the authorities (see HRAP, *Mladenović*, no. 99/09, decision of 11 August 2011, § 22).
20. However, where the disappeared person is later found dead, the applicability of Article 3 of the ECHR is in general limited to the distinct period during which the member of the family sustained uncertainty, anguish and distress appertaining to the specific phenomenon of disappearances (see, e.g., 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).

21. In this respect, the question arises whether the complaint has been filed in time. Section 3.1 of UNMIK Regulation No. 2006/12 states that the Panel “may only deal with a matter ... within a period of six months from the date on which the final decision was taken”. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the complainant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act, or its effect on or prejudice to the complainant (ECtHR (Grand Chamber), *Varnava and Others v. Turkey*, nos. 16064/90 and others, judgment of 18 September 2009, § 157). Where the complaint relates to a continuing situation, which has come to an end, the six-month time limit starts to run from the date on which the situation has come to an end.
22. The Panel notes that the mortal remains of Mr. D.S. were identified and returned sometime in 2004. It is at that moment that the period during which an issue could arise under Article 3 of the ECHR came to an end. For the purpose of Section 3.1 of UNMIK Regulation No. 2006/12, the six-month time limit therefore started to run from that date.
23. The complaint was filed with the Panel on 29 May 2009, after the expiration of the six-month period.
24. The Panel therefore must conclude that this part of the complaint falls outside the time-limit set by Section 3.1 of UNMIK Regulation No. 2006/12.

**FOR THESE REASONS,**

The Panel, unanimously,

- **DECLARES ADMISSIBLE THE COMPLAINT RELATING TO THE RIGHT TO LIFE;**
- **DECLARES INADMISSIBLE THE REMAINDER OF THE COMPLAINT.**

Andrey ANTONOV  
Executive Officer

Marek NOWICKI  
Presiding Member