



The Human Rights Advisory Panel

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DECISION

Date of adoption: 12 August 2011

Cases Nos. 90/09 and 103/09

Olivera VITOSEVIĆ and Arsenije VITOSEVIĆ

against

UNMIK

The Human Rights Advisory Panel, sitting on 12 August 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 (HRAP),

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint of Mrs Olivera Vitošević (case no. 90/09) was introduced on 8 April 2009, and that of Mr Arsenije Vitošević (case no. 103/09) on 13 April 2009. Both complaints were registered on 30 April 2009.
2. On 9 December 2009, the Panel requested additional information from both complainants. No response to those requests was received.
3. On 24 October 2009, in accordance with Rule 20 of the Panel's Rules of Procedure, the Panel decided to join the cases.

4. On 8 December 2010 the Panel repeated the request for additional information to the complainants. Consequently, on 13 December 2011, Mrs Olivera Vitošević, on behalf of both complainants, provided a response which was received by the Panel on 14 December 2010.
5. On 25 March 2011, the Panel communicated the joined cases to the Special Representative of the Secretary-General (SRSG), for comments on the admissibility of the complaints. On 18 June 2011, UNMIK provided its response.

II. THE FACTS

6. The complainants state that their son, Mr Srđan Vitošević, went missing on 17 July 1998. On that day, at around 1800 hrs, he left the Serbian quarters of Rahovec/Orahovac, where he resided, in his car, going towards a pharmacy in the center of Rahovec/Orahovac.
7. The complainants explain that after their son left his residence, shooting started in the town. Their son was allegedly taken by members of the Kosovo Liberation Army (KLA). His vehicle was later found in Rahovec/Orahovac, damaged in the front, but without visible traces of blood inside.
8. Mrs Vitošević informed the Panel that a number of other persons were also kidnapped around the same time. One of them managed to escape and the other one was released. These persons told her that they had seen her son in the KLA detention centre in Malishevë/Mališevo. In 2005, a friend told her that he had seen Srđan and Srđan's cousin in Albania, working on loading and unloading goods, and that their names were changed.
9. The complainants state that they reported the disappearance of their son to the District Public Prosecutor in Prizren, the International Committee of the Red Cross (ICRC) in Prishtinë/Pristina, and (on 20 July 1998) the ICRC headquarters in Geneva, but to date received no response. Mrs Olivera Vitošević states that she has also lodged a criminal complaint regarding the disappearance of her son with the UNMIK International Prosecutor of the District Public Prosecutor's office in Prizren sometime in 2002 or 2003 and has given a statement in the UNMIK Office in Mitrovica in 2004 or 2005.
10. 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 COMPLAINTS

11. The complainants complain about UNMIK's alleged failure to properly investigate the disappearance of their son and about the fear, mental pain and suffering caused by this situation.
12. The Panel considers that the complainants may be deemed to invoke, respectively, a violation of the right to life of their son, guaranteed by Article 2 of the European

Convention on Human Rights, 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

13. 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

14. The complainants allege in substance the lack of an adequate criminal investigation into the disappearance of their son.
15. In his comments, the SRSG does not raise any objection to the admissibility of this part of the complaints.
16. 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.
17. No other ground for declaring this part of the complaints inadmissible has been established.

Alleged violation of Article 3 of the ECHR

18. The complainants allege mental pain and suffering caused to them by the situation surrounding the disappearance of their son.
19. In his comments, the SRSG argues that, while the complainants state that they have 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 Srđan Vitošević. For that reason, this part of the complaints is inadmissible as manifestly ill-founded.
20. 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).

21. 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.
22. 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.
23. 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