DECISION ON THE ADMISSIBILITY

of

CASE No. CH/ 96/3

Branko MEDAN

against

Bosnia and Herzegovina

the Federation of Bosnia and Herzegovina

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 4 February 1997 with the following members present:

Peter GERMER, President
Jakob MÖLLER, Vice-President
Dietrich RAUSCHNING
Adam ZIELINSKI
Hasan BALIĆ
Rona AYBAY
Vlatko MARKOTIĆ
Želimir JUKA
Mehmed DEKOVIĆ
Manfred NOWAK
Michèle PICARD

Andrew GROTRIAN, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the Application by Branko MEDAN against (1) Bosnia and Herzegovina and (2) the Federation of Bosnia and Herzegovina submitted on 3 July 1996 by the Human Rights Ombudsperson for Bosnia and Herzegovina under Article V paragraph 5 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina and registered on 12 July 1996 under Case No. CH/96/3.

Takes the following Decision on the Admissibility of the Application under Article VIII paragraph 2 of Annex 6 to the General Framework Agreement.

I. THE FACTS

The facts of the case as they appear from the decision of the Ombudsperson referring the case to the Chamber and from the documents in the case-file, may be summarised as follows:

The applicant is a citizen of Bosnia and Herzegovina. He is a retired officer of the Yugoslav National Army (JNA). He resides in an apartment at 102 Azize Šećerbegović Street formerly 38 Ivana Krndelja St.), Sarajevo ("the apartment").

The applicant had an occupancy right in the apartment, which was social property over which the JNA exercised jurisdiction. On 6 February 1992 the applicant paid the JNA 320.000 Yugoslav dinars to purchase the apartment under the Law on Securing Housing for the Yugoslav National Army of 29 December 1990 (Official Gazette 84/90). This law gave the holders of occupancy rights in JNA apartments the right to purchase their apartment, subject to certain conditions. On 15 February 1992 a temporary prohibition on the sale of such apartments was imposed by Decree with legal force of the Socialist Republic of Bosnia and Herzegovina (Official Gazette 4/92). On 4 March 1992 the applicant entered into a written contract for the purchase of the apartment.

On 15 July 1994 a Decree with legal force was issued by the Presidency of the Republic of Bosnia and Herzegovina laying down the conditions for the validity of contracts for the purchase of real estate. Written contracts concluded before the decree entered into force were to be valid either if the contracting parties had completely or predominantly fulfilled their obligations arising from the contract or if the parties' signatures were verified by a competent court within six months after the Decree came into force. On 7 September 1994 the applicant raised civil proceedings in the Court of First Instance in Sarajevo (Osnovni sud II), requesting the court to declare that he was owner of the apartment. On 3 February 1995 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with legal force (OG 5/95) requiring courts and other organs of the state to adjourn all proceedings relating to purchase contracts for *inter alia* JNA apartments under the Law on Securing Housing for the JNA. On 10 February 1995 the Court of First Instance issued a decision adjourning the applicant's case. The decision stated that no special appeal was allowed against this decision.

On 22 December 1995 the Presidency of the Republic of Bosnia and Herzegovina issued a Decree with legal force providing *inter alia* that contracts concluded on the basis of the law on Securing Housing for the JNA were invalid. On 8 and 9 January 1996 the Parliamentary Assembly of the Republic of Bosnia and Herzegovina adopted this Decree as law, (OG 2/96 R. BiH).

II. COMPLAINTS OF THE APPLICANT

In his application to the Human Rights Ombudsperson the applicant has complained that his property rights have been disregarded. He complains of the decision to adjourn his court case and also complains that it is not possible for him to appeal to a court to realise his rights under the Constitution.

In her decision referring the case to the Chamber the Ombudsperson has found that the case raises issues under Article 6 and 13 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention.

III. PROCEEDINGS BEFORE THE CHAMBER

The case was referred to the Chamber under Article V para. 5 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina by decision of the Human Rights Ombudsperson dated 3 July 1996.

The Chamber considered the case on 15 August 1996. It then **decided**, in accordance with Provisional Rule 1 of its Provisional Rules of Procedure, to transmit the case to both respondent Parties for information and also to request both Governments to submit written observations on the admissibility and merits of the case, before 30 September 1996.

The Chamber requested each Government to include in their observations all relevant information as to the facts of the case and the applicable national law. It also requested them to deal with the following questions in particular, namely:

-(i) whether the length of proceedings, since the entry into force of the Dayton Agreement on 14 December 1995, in the civil action brought by applicant has exceeded a "reasonable time" for the purposes of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, ("the Convention");

-(ii) whether the continued adjournment of the proceedings since 14 December 1995 has involved a denial of the applicant's right of access to a court for the purposes of Article 6(1) of the Convention;

-(iii) whether the alleged retroactive nullification of the applicant's contract for the purchase of an apartment by Decree dated 22 December 1995 infringed his rights under Article 1 of Protocol No. 1 to the Convention, which guarantees *inter alia* the right to "peaceful enjoyment of his possessions...";

-(iv) whether any "effective remedy" is available to the applicant, for the purposes of Article 13 of the Convention, in respect of (a) the alleged retroactive nullification of the applicant's contract and (b) the continuing adjournment of the civil proceedings.

The Chamber also informed each Government that it would wish to receive as part of their observations, any observations they might have in relation to:

-(i) their responsibility for the matters complained of in view, in particular, of the allocation of responsibilities as between Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina under Annex 4 to the Dayton Agreement;

-(ii) the competence of the Chamber *ratione temporis*;

-(iii) the admissibility of the application under the criteria set out in Article VIII para 2. (a) - (d) of Annex 6 to the Dayton Agreement;

It further requested each Government, in the event that they contended that effective remedies existed for the matters complained of, to identify the remedies concerned with precision, identifying the court or other authority relied on and the legal basis on which a remedy could be sought.

Neither Government has submitted any observations on the case or requested any extension of the time-limit set.

IV. THE LAW

The applicant complains that his property rights in the JNA apartment which he contracted to purchase have not been respected and also complains of the adjournment of his court case and of the alleged absence of any effective remedies.

Before considering the case on its merits the Chamber must decide, pursuant to Article VIII para. 2 of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, whether to accept the case, taking into account the admissibility criteria set out in Article VIII para. 2.

The Chamber first notes that the applicant's complaints relate in part to events which took place before 14 December 1995, when the Agreement set out in Annex 6 came into force. In accordance with generally accepted principles of law the Agreement cannot be applied retroactively (see Case No. CH/96/1, *Matanović v. Republika Srpska* , Decision of 13 September 1996). The Chamber must therefore confine its examination of the case to considering whether the applicant's rights have been violated since that date. In so far as the applicant complains of the continuing adjournment of his court case after 14 December 1995, the continuing absence of an effective remedy after that date and the alleged retroactive annulment of his contract by a law passed since 14 December 1995 his complaints are within the Chamber's competence and are not incompatible with the Agreement *ratione temporis* for the purposes of para. 2(c) of Article VIII of the Agreement.

The Chamber has next considered whether for the purposes of para. 2(a) of Article VIII of the Agreement, any "effective remedy" was available to the applicant in respect of his complaints in so far as they are within its competence *ratione temporis*. In relation to this question the Chamber refers to the principles applied by the European Court of Human Rights in relation to the rule as to exhaustion of domestic remedies under Article 26 of the European Convention on Human Rights. In particular in the case of Akdivar v. Turkey (Judgement of the Grand Chamber dated 16 September 1996) the Court stated:

"Under Article 26 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness "(para. 66)

As regards the burden of proof the Court also stated:

"In the case of exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy ...was in fact exhausted or for some reason inadequate or ineffective in the particular circumstances...or that there existed special circumstances absolving him or her from the requirement..."(ibid., para. 68).

In para. 69 of the Judgement the Court further emphasised that the application of the domestic remedies rule "must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up." Accordingly, the Court said, it must be applied "with some degree of flexibility and without excessive formalism" and it is necessary to "take realistic account not only of the existence of formal remedies in the legal system ....but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants".

In the present case the Chamber notes that neither of the respondent Parties has suggested that any effective alternative remedy was available to the applicant. In the circumstances of the case the Chamber does not consider it established that any effective remedy was in practice available and finds that there is no obstacle to the admissibility of the application under para. 2(a) of Article VIII of the Agreement.

In the Chamber's opinion the case raises issues under Articles I and II of Annex 6 to the General Framework Agreement which require examination of the case on its merits. In particular the following questions arise under the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is referred to in Article I and Article II (a) of Annex 6, namely:

-(i) whether the length of proceedings since 14 December 1995 in the civil action brought by the applicant has exceeded a "reasonable time" for the purposes of Article 6(1) of the Convention;

-(ii) whether the continued adjournment of the proceedings since 14 December 1995 has involved a denial of the applicant's right of access to a court under Article 6(1) for the purpose of having his civil claim determined on its merits;

-(iii) whether the alleged retroactive nullification of the applicant's contract for the purchase of an apartment by Decree dated 22 December 1995 infringed his rights under Article 1 of Protocol No. 1 to the Convention, which guarantees *inter alia* the right to "peaceful enjoyment of his possessions...."

-(iv) whether any "effective remedy" is available to the applicant, for the purposes of Article 13 of the Convention, in respect of (a) the alleged retroactive nullification of the applicant's contract and (b) the continuing adjournment of the civil proceedings.

The Chamber further notes that complex questions of fact and law may arise in relation to the question of the responsibility of the two respondent Parties for the matters complained of by the applicant having regard to their respective responsibilities under the Constitution set out in Annex 4 to the General Framework Agreement and the transition to the constitutional system thereby introduced. The question whether either or both of the respondent Parties is responsible for any violation of the applicant's rights should therefore be determined in an examination of the merits of the case.

In these circumstances the Chamber finds that the application cannot be regarded as manifestly ill-founded so far as directed against either Party. No other ground of inadmissibility under Article VIII para. 2 of the Agreement is established, and the case must therefore be declared admissible.

V. DECISION

For the above reasons The Chamber, without prejudging the merits, decides unanimously to declare the case admissible in so far as it relates to the claims:

-1. That the continuing adjournment since 14 December 1995 of the applicant's civil proceedings has violated Article 6 of the Convention;

-2. That the applicant's contract to purchase his apartment has since 14 December 1995 been retroactively annulled in breach of Article 1 Protocol No. 1 to the Convention;

-3. That no effective remedy is available to the applicant in respect of the above claims and that there is therefore a breach of Article 13 to the Convention.

(signed) Andrew GROTRIAN
Registrar of the Chamber

(signed) Peter GERMER
President of the Chamber