



DECISION ON THE MERITS

DELIVERED ON 11 MARCH 1998

in

CASE NO. CH/96/23

Fatima KALINČEVIĆ

against

Bosnia and Herzegovina

the Federation of Bosnia and Herzegovina

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 17 February 1998 with the following members present:

Michèle PICARD, President
Manfred NOWAK, Vice-President
Dietrich RAUSCHNING
Hasan BALIĆ
Rona AYBAY
Vlatko MARKOTIĆ
Želimir JUKA
Jakob MÖLLER
Mehmed DEKOVIĆ
Giovanni GRASSO
Miodrag PAJIĆ
Vitomir POPOVIĆ
Viktor MASENKO-MAVI
Andrew GROTRIAN

Peter KEMPEES, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the merits of the Application by Fatima Kalinčević against (1) Bosnia and Herzegovina and (2) the Federation of Bosnia and Herzegovina registered under Case No. CH/96/23;

Adopted the following Decision on the merits of the Application in accordance with Article XI of the Human Rights Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina and Rules 57 and 58 of its Rules of Procedure.

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina (hereinafter "BiH") of Bosniak descent. She resides in an apartment at Ulica Hakiye Kulenovića 18, apartment No. 48, in Sarajevo (hereinafter "the apartment"). She is represented by Mr Mehić Ismet, a lawyer practising in Sarajevo. The applicant's husband concluded a contract to purchase the apartment from the Yugoslav National Army (hereinafter "the JNA") in 1992. The applicant's case concerns the annulment of the contract by legislation in 1995 and her threatened eviction from the apartment and raises issues under Articles 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") and Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

2. The applicant introduced her application to the Human Rights Ombudsperson for BiH (hereinafter "the Ombudsperson") on 5 August 1996. The application was directed against BiH. The application was referred to the Chamber by Decision of the Ombudsperson dated 6 November 1996 taken under Article V paragraph 5 of the Human Rights Agreement (hereinafter "the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in BiH. In her letter referring the case to the Chamber the Ombudsperson suggested that the Chamber should consider issuing an interim measure preventing the eviction of the applicant from the apartment.

3. The application was received in the Registry of the Chamber on 11 November 1996. On 12 November 1996 the President of the Chamber decided to bring the application to the notice of the State of BiH, as respondent Party, and to request it not to evict the applicant from the apartment pending the Chamber's consideration of the case. The Chamber considered the case on 12 December 1996. The Chamber noted that certain of the applicant's complaints involved matters which might be within the responsibility of the Federation of BiH (hereinafter "the Federation") and decided to treat the application as one directed against both the State of BiH and the Federation. It decided to bring the application to the notice of both respondent Parties and to invite them, in accordance with Rule 49 (3) (b) of its Rules of Procedure, to submit written observations on the admissibility and merits of the application. Both respondent Parties were requested to deal in their observations with a number of specific questions. The Chamber also requested the Federation, as a provisional measure, not to evict the applicant from the apartment pending its consideration of the case.

4. The time limit for the submission of the respondent Parties' observations expired on 3 March 1997 without any observations having been submitted. By letters dated 5 March 1997 the respondent Parties were reminded of the time limit set. On 21 March 1997 the Chamber considered the state of proceedings in the case and decided that if no observations were received it would proceed with its examination of the admissibility of the case at its next session on the basis of the documents in the file. No observations were received from either respondent Party. On 6 June 1997 the Chamber declared the application admissible in so far as it related to alleged violations of the applicant's human rights since 14 December 1995.

5. Pursuant to Rule 53 paragraph 3 of its Rules of Procedure the Chamber decided to invite both respondent Parties to submit written observations on the merits of the case before 18 August 1997. Neither respondent Party responded to this invitation. On 4 November 1997 the Chamber decided to give both respondent Parties a further opportunity to submit written observations on the merits of the case, taking into account its decision on the merits of the case of *Bulatović v. State and Federation of BiH*, which had been adopted on 3 November 1997 and was delivered on 7 November 1997. The respondent Parties were invited to submit such observations before 28 November 1997 and were informed that if no such observations were received the Chamber might decide to proceed with its examination of the merits of the case on the basis of the documents in the file. Neither respondent Party submitted any observations. By letter dated 28 November 1997 the applicant's representative informed the Chamber that the applicant had no further observations to make and that she maintained her application.

6. The Chamber considered the case on 1 December 1997 and decided to draw up its decision on the merits of the case. It further deliberated on the merits of the case and it adopted the present decision on 17 February 1998.

III. ESTABLISHMENT OF THE FACTS

7. The facts of the case as they appear from the submissions of the applicant and the documents in the case-file have not been contested by either respondent Party and may be summarised as follows.

8. The applicant and her husband held an occupancy right over the apartment, which was social property over which the JNA exercised jurisdiction. The applicant's husband, Radomir Kalinčević, is of Serbian descent and is a retired member of the JNA. On 10 February 1992 he entered into a written contract with the JNA for the purchase of the apartment. This contract was entered into under the Law on Securing Housing for the JNA (SL SFRJ No. 84/90), which provided that the holder of an occupancy right residing in an apartment of the JNA Housing Fund could purchase the apartment on the basis of a contract with the authority responsible for the apartment, on certain prescribed conditions (for further details of this and other relevant law see the Chamber's Decision on the Merits of the case of *Bulatovic v. State and Federation of BiH*, paras 7 - 15). On 12 February 1992 the applicant's husband paid the purchase price of 504,442 Yugoslav Dinars due under the contract.

9. In the course of 1992 the applicant's husband and their two children left Sarajevo for the United Kingdom. The applicant remained in the apartment.

10. On 15 January 1993 the applicant and her husband started civil proceedings before the Court of First Instance in Sarajevo, seeking a declaratory judgement recognising them as legal owners of the apartment and an order directing the Land Registry to register them as such. On 3 February 1995 the Presidency of the Republic of BiH issued a Decree with legal force amending the Law on the Resources and Financing of the Army of the Republic of BiH. This Decree (SL RBH 5/95) provided that, for the protection of the housing fund of the army, until the issue of the Law on Housing in the Republic, courts and other authorities should adjourn proceedings relating to the purchase of apartments under the Law on Securing Housing for the JNA. This Decree came into force on 10 February 1995. No decision has been issued in the applicants' civil action, which was adjourned under this Decree.

11. On 22 December 1995 the Presidency of the Republic of BiH issued a Decree with legal force (SL RBH 50/95) amending the Law on the transfer of the resources of the FSFRJ into the property of the Republic of BiH. This provided that contracts for the sale of apartments and other property concluded on the basis of *inter alia* the Law on Securing Housing for the JNA were invalid. This Decree came into force on 22 December 1995. It was adopted as law by the Assembly of the Republic of BiH by the Law on the Ratification of Decrees issued on 18 January 1996 (SL RBH 2/96).

12. On 30 April 1996 the applicant left Sarajevo with the intention of visiting her husband and children in the United Kingdom. While in Slovenia awaiting the issue of a visa, she was informed that the person to whom she had temporarily entrusted the apartment had been evicted by the military authorities on 12 July 1996. The applicant returned to Sarajevo on 20 July 1996 and found a note on the door to the effect that the apartment had been allocated to a member of the army. The applicant removed a lock which had been placed on the door and entered the apartment, where she has resided since. On 24 July 1996 a representative of the army visited the apartment with the person to whom it had supposedly been allocated. He informed the applicant that the apartment had been declared abandoned and that she should move out the same day. On 25 July 1996 the applicant attended a meeting with army officials at which she was again informed that the apartment had been declared abandoned and that she must leave it. At these meetings the applicant and her representative argued that there was no lawful ground for declaring the apartment to be abandoned.

13. On 26 July 1996 the applicant appealed to the General Staff of the Army against the decision to declare the apartment abandoned. She contended that the decision was based on incorrectly established facts and an incorrect application of the law. She also pointed out that she had not been supplied with a copy of the decision or details of its date and number and submitted that it was unclear on what ground the apartment had been declared abandoned. She has received no response to this appeal and has not been supplied with a copy of the decision declaring the apartment abandoned. The applicant and her representative also complained orally on 26 July 1996 to the Commission for Human Rights in the Presidency of the Republic of BiH. It is stated in the application that the representative of the Commission invited an official of the Army to attend and demanded that the decision should be revoked and the applicant's rights respected. The applicant submitted a written complaint to the Commission on the same day.

14. On 2 August 1996 a representative of the Army came to the apartment with three military police to evict the applicant. After representations by the applicant and her representative the eviction was not carried out. The applicant remains in the apartment under threat of eviction.

IV. FINAL SUBMISSIONS OF THE PARTIES

A. The Applicant

15. The applicant maintains that the annulment of the contract for the purchase of the apartment, the adjournment of the court proceedings instituted by herself and her husband, the decision to declare the apartment abandoned and her threatened eviction, have involved violations of her rights under Articles 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention.

B. The Respondent Parties

16. Neither respondent Party has made any submissions.

C. The Ombudsperson

17. In her decision referring the case to the Chamber the Ombudsperson found that the case raised issues under the Articles of the Convention invoked by the applicant.

V. OPINION OF THE CHAMBER

18. In terms of Article XI paragraph 1 (a) of the Agreement the Chamber must, in the present decision, address the question whether the facts found indicate a breach by either of the respondent Parties of their obligations under the Agreement.

A. The Annulment of the Purchase Contract

19. The applicant has first complained of the annulment, by the Decree of 22 December 1995 later adopted as law, of the contract entered into by her husband for the purchase of the apartment. The Chamber has considered this complaint under Article 1 of Protocol No. 1 to the Convention, which is in the following terms:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

20. The Chamber first recalls that it has already held, in previous decisions, that the contractual rights held by persons who had contracted to purchase JNA apartments under contracts similar to the contract at issue in the present case, constituted "possessions" for the purposes of Article 1 of Protocol No. 1. It also held that the effect of the Decree of 22 December 1995 was that such persons were "deprived of ..(their).. possessions" for the purposes of Article 1 (see Decisions delivered on 7 November 1997 in *Medan and Others v. State and Federation of BiH* and *Bulatović v. State and Federation of BiH*).

21. In the present case the applicant was not herself a party to the contract entered into by her husband. However she was the joint holder of the occupancy right over the apartment and had an apparently valid claim to be registered, together with her husband, as an owner of the apartment on the basis of the contract. She sought to assert this claim in the civil proceedings which she instituted together with her husband. The effect of the Decree of 22 December 1995 was to deprive her of that claim. The Chamber recalls that, as it pointed out in its decision in the *Medan* case (*sup. cit.* see para. 33 of the Decision), the European Court of Human Rights has held that rights which may be subject to challenge in court proceedings, as well as claims for compensation requiring court proceedings to make them effective, may be "possessions" for the purposes of Article 1 of the Protocol. In particular in the case of *Stran Greek Refineries v. Greece* it held that an arbitral award which was the subject of challenge in the Court of Cassation was a "possession" (1994 Series A No. 301 para. 62). In the case of *Pressos Compania Naviera v. Belgium* it held that claims to compensation under the law of tort were "possessions", (1995 Series A No. 332, para. 31). Similarly, in the Chamber's opinion, the applicant's claim to be registered as owner of the apartment together with her husband should be regarded as a "possession" within the meaning of Article 1. The effect of the Decree of 22 December 1995 was that the applicant was deprived of that "possession".

22. In the *Medan* and *Bulatović* cases the Chamber held that the Decree of 22 December 1995 might in principle be regarded as pursuing a legitimate aim in so far as it was aimed at putting all holders of occupancy rights on an equal footing as regards their rights to purchase their apartments. It held, however, that there was no reasonable relationship of proportionality between the means employed, namely retroactive legislation depriving the applicants of their possessions without compensation, and the end sought to be realised (see *Medan* Decision *sup. cit.* paras. 36 - 37; *Bulatović* Decision, paras. 37 - 38). It concluded that there had been violations of Article 1 of Protocol No. 1 in each case. It also found that the Federation was responsible for these violations in respect that the Decree of 22 December 1995 was recognised and applied as part of its law (*Medan* Decision para. 38; *Bulatović* Decision para. 39) and that the State of BiH was also responsible in respect that the law in question had been passed by institutions of the State (*Medan* Decision, paras. 44 - 47; *Bulatović* Decision, paras. 49 - 52).

23. The Chamber considers that the reasons which it stated in the *Medan* and *Bulatović* decisions are equally applicable to the present case and concludes that the annulment of the contract by the Decree in question, together with the resulting annulment of the applicant's claim to be registered as owner of the apartment, violated her rights under Article 1 of Protocol No. 1 to the Convention and that the State and the Federation of BiH are both responsible for that violation.

B. Compulsory Adjournment of the Applicant's Civil Action

24. The applicant complains that the civil proceedings that she instituted, together with her husband, with a view to obtaining recognition of her rights as owner of the apartment and registration as such in the land registry, have been compulsorily adjourned by virtue of the Decree of 3 February 1995 (see para. 10 above). The Chamber has considered this complaint under Article 6 of the Convention, which, so far as material, is in the following terms:

“In the determination of his civil rights and obligations....everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

25. The applicant's situation as regards the adjournment of her court proceedings is essentially the same as that of the applicants in the Medan and Bulatović cases. In those cases the Chamber found that the compulsory adjournment, under the same Decree, of court proceedings instituted by the applicants with a view to obtaining recognition of their rights as purchasers of JNA apartments, had involved continuing unjustified interference, since the Agreement came into force on 14 December 1995, with their right of access to court as guaranteed by Article 6. It also found that the applicants' right to a hearing within a “reasonable time” had been violated and that the Federation was responsible for the violations found (see Medan Decision *sup. cit.* paras. 39 - 41; Bulatović Decision paras. 40 - 42).

26. In the present case the Chamber finds, for the same reasons, that the applicant's rights of access to court and to a hearing within a reasonable time have been violated, since 14 December 1995, by the Federation.

C. The Existence of an Effective Remedy

27. Having reached the conclusion that Article 6 of the Convention has been thus violated, the Chamber finds it unnecessary, for the reasons which it stated in the Medan and Bulatović decisions (paras. 42- 43 and 43 - 44 of the decisions respectively) also to consider, under Article 13 of the Convention, whether the applicant has been denied an effective remedy in relation to her complaint concerning the annulment of the contract.

D. The Threatened Eviction of the Applicant

28. The applicant also complains that she has been threatened with eviction on the ground that the apartment has been declared to be abandoned. In the decision on the admissibility of the case the Chamber found that issues arose under Articles 6, 8 and 13 of the Convention and under Article 1 of Protocol No. 1 to the Convention in relation to this complaint. The Chamber has first considered this complaint under Article 1 of Protocol No. 1.

29. The Chamber notes firstly that according to the uncontested statement of the applicant she was not provided with a copy of any decision declaring the apartment to be abandoned. It is therefore impossible to ascertain from the documents available what, if any, legal basis there was for the army officials' statements to the effect that the apartment had been declared to be abandoned. Despite their obligations under Article X paragraph 5 of the Agreement to “co-operate fully with the Chamber” neither respondent Party has participated in the proceedings before the Chamber. The Federation in particular has not sought to justify the actions of the army authorities either in terms of the human rights provisions invoked or in terms of the domestic law relating to abandoned property. In these circumstances the Chamber cannot find any legal justification for the authorities' actions, which appear to be wholly arbitrary. That reason in itself leads the Chamber to conclude that the interference with the applicant's right to peaceful enjoyment of her possessions constituted by the threatened eviction was unjustified and in breach of her rights under Article 1 of Protocol No. 1.

30. In addition, however, the applicant's situation appears to be similar to that of the applicant in the Bulatović case (see paras. 45 - 48 of the Bulatović Decision) in that the threatened eviction is a consequence of the authorities' refusal to recognise the rights of the applicant and her husband to be registered as owners of the apartment as a result of the purchase contract.

31. The Chamber concludes therefore that the threatened eviction of the applicant constitutes an additional and serious violation of her rights under Article 1 of Protocol No. 1 to the Convention, for which the Federation is responsible. Having reached that conclusion it finds it unnecessary in the particular circumstances of the case to examine this aspect of the case under any of the other Articles of the Convention which it has referred to.

VI. REMEDIES

32. Under Article XI paragraph 1(b) of the Agreement the Chamber must address in its Decision the question what steps shall be taken by the respondent Party or Parties in question, in this case the State and Federation of BiH, to remedy the breaches of the Agreement which it has found.

33. The breach of Article 1 of Protocol No. 1 which the Chamber has found in relation to the annulment of the contract and the resulting annulment of the applicant's claim to be registered as owner of the apartment, arose from the legislation already referred to. The State is responsible for having passed that legislation, but the matters which it deals with are now within the responsibility of the Federation, which recognises and applies the legislation. In these circumstances the Chamber considers that it is the responsibility of the Federation to take the necessary legislative or administrative action to render ineffective the annulment of the contract. It will therefore make an order against the Federation to that effect. It is also appropriate to order the Federation not to evict the applicant from the apartment and to lift the compulsory adjournment of the court proceedings instituted by the applicant and her husband. The Chamber will also order the Federation to report to it within two months of the date of public delivery of the present decision on the steps taken by it to give effect to this decision.

34. The Chamber further considers it appropriate to allow the applicant to submit, within three months of the date of the public delivery of the present decision, any claims she wishes to put forward against either respondent Party for monetary relief or other remedies within the scope of Article XI paragraph 1 (b) of the Agreement.

VII. CONCLUSIONS

35. For the reasons given above the Chamber:

- 1. **Decides** by thirteen votes against one that the passing of legislation providing for the retroactive annulment of the contract for the purchase of the applicant's apartment involves a violation by Bosnia and Herzegovina of the applicant's rights under Article 1 of Protocol No. 1 to the Convention and that Bosnia and Herzegovina is thereby in breach of its obligations under Article I of the Agreement;
- 2. **Decides** by thirteen votes against one that the recognition and application within the Federation of the legislation providing for the retroactive nullification of the contract involves violation by the Federation of Bosnia and Herzegovina of the applicant's rights under Article 1 of Protocol No. 1 to the Convention and that the Federation is thereby in breach of its obligations under Article I of the Agreement;
- 3. **Decides** unanimously that the continuing adjournment since 14 December 1995 of the civil proceedings instituted by the applicant and her husband involves violation by the Federation of the applicant's rights to access to court and to a hearing within a reasonable time as guaranteed by Article 6 of the Convention and that the Federation is thereby in breach of its obligations under Article I of the Agreement;
- 4. **Decides** unanimously that the threatened eviction of the applicant involves an additional violation by the Federation of her rights under Article 1 of Protocol No. 1 to the Convention and that the Federation is thereby in breach of its obligations under Article I of the Agreement;

- 5. **Decides** by thirteen votes against one to **order** the Federation to take all necessary steps by way of legislative or administrative action to render ineffective the annulment of the contract imposed by the Decree of 22 December 1995 and the Law of 18 January 1996;
- 6. **Decides** unanimously to **order** the Federation of Bosnia and Herzegovina to lift the compulsory adjournment of the court proceedings instituted by the applicant and her husband and to take all necessary steps to secure the applicant's right of access to court;
- 7. **Decides** unanimously to **order** the Federation of Bosnia and Herzegovina not to evict the applicant from the apartment;
- 8. **Decides** unanimously to **order** the Federation of Bosnia and Herzegovina to report to it before 11 May 1998 on the steps taken by it to give effect to this decision;
- 9. **Decides** unanimously to reserve for further consideration the question whether any other remedies should be ordered against either respondent Party and to allow the applicant to submit before 11 June 1998 any claim she wishes to put forward in that respect.

(signed) Peter KEMPEES
Registrar of the Chamber

(signed) Michèle PICARD
President of the Chamber