



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 5 November 1999)

Case no. CH/98/894

Dragan TOPIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 8 October 1999 with the following members present:

Mr. Viktor MASENKO-MAVI, Acting President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Mato TADIĆ

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the aforementioned application introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina. He is the holder of an occupancy right over an apartment in Prijedor, Republika Srpska. On 25 August 1994 the applicant was granted a permanent occupancy right over the apartment by the holder of the allocation right. On 9 April 1998 the Commission for the Accommodation of Refugees and Administration of Abandoned Property in Prijedor ("the Commission"), a department of the Ministry for Refugees and Displaced Persons ("the Ministry"), declared the applicant to be an illegal occupant of the apartment and ordered him to vacate it within three days under threat of forcible eviction. On 19 August 1998 this decision was delivered to him. On 21 August 1998 the applicant appealed against the decision. There has been no decision on this appeal to date. The applicant still occupies the apartment.
2. The case raises issues principally under Article 8 of the European Convention on Human Rights and under Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The applicant introduced his application to the Chamber on 21 August 1998. It was registered the same day.
4. The applicant requested that the Chamber order the respondent Party as a provisional measure to take all necessary steps to prevent his eviction from the apartment.
5. On 24 August 1998 the Vice-President of the Chamber ordered, pursuant to Rule 36(2) of the Rules of Procedure, the respondent Party to refrain from evicting the applicant from the apartment. The order stated that it would remain in force until the Chamber had given its final decision in the case, unless withdrawn by the Chamber before then.
6. On 18 September 1998, pursuant to Rule 49(3)(b) of the Rules of Procedure, the application was transmitted to the respondent Party for observations on its admissibility and merits. Under the Chamber's Order concerning the organisation of the proceedings in the case, such observations were due by 18 October 1998. However, no observations were received from the respondent Party.
7. On 8 December 1998 the applicant was requested to submit a written statement and any claim for compensation or other relief which he wished to make. This statement, which did not contain a claim for compensation, was received by the Chamber on 2 February 1999, outside the time-limit set by the Chamber. The applicant informed the Chamber that he had only received its letter of 8 December 1998 on 27 January 1999. The Chamber decided to accept his written statement and transmitted it to the Agent of the respondent Party for information.
8. The Second Panel deliberated upon the admissibility and merits of the application on 8 October 1999 and on the same date adopted this decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

9. The facts of the case as they appear from the applicant's submissions and the documents in the case file have not been contested by the respondent Party and may be summarised as follows.
10. The applicant occupies an apartment located at Pećani H-1/48, Prijedor, Republika Srpska ("the apartment"). On 25 August 1994 he was granted the occupancy right over the apartment by the holder of the allocation right, the Institute for the Protection of Male Children and Youths ("the Institute"), a public body in Prijedor. The previous holder of the occupancy right over the apartment, who had worked at the Institute, had left the Republika Srpska. The applicant entered into a contract with the relevant housing company.

11. On 9 April 1998 the Commission issued a decision under Article 10 of the Law on the Use of Abandoned Property (see paragraph 16 below) declaring the applicant to be an illegal occupant of the apartment (on the ground that he had entered it illegally) and ordering him to vacate it within three days under threat of forcible eviction. The applicant was not served with this decision until 19 August 1998. On this date the applicant was served with an announcement (“*Saopštenje*”) issued by the Commission. This standard-issue announcement stated that it had not been possible to serve the applicant with the decision of 9 April 1998 and that he could obtain a copy of it by calling personally to the offices of the Commission. The delivery of such a document constitutes delivery under the law of the Republika Srpska (see paragraphs 24-26 below). The announcement also contained handwritten text informing him that he should be present in the apartment from 9am on 25 August 1998 so that he could be evicted peacefully (i.e. without the need for police) in order to allow the family of a fallen soldier to enter into possession of the apartment.

12. On 21 August 1998 the applicant appealed against the Commission’s decision. He has not received any decision on this appeal to date. On the same day the Institute wrote to the Commission, stating that the applicant had been allocated the apartment in accordance with the law. The applicant still occupies the apartment.

B. Relevant legislation

1. The Law on the Use of Abandoned Property

13. The Law on the Use of Abandoned Property (Official Gazette of the Republika Srpska – hereinafter “OG RS” – no. 3/96; “the old law”) was adopted by the National Assembly of the Republika Srpska on 21 February 1996. It was published in the OG RS on 26 February 1996 and entered into force the following day. It establishes a legal framework for the administration of abandoned property. Accordingly, it defines what forms of property are to be considered as abandoned and sets out the categories of persons to whom abandoned property may be allocated. The provisions of the old law, insofar as they are relevant to the present case, are summarised below.

14. Articles 2 and 11 define “abandoned property” as real and personal property which has been abandoned by its owners or users and which is entered in the register of abandoned property. Types of property which may be declared abandoned include apartments (both privately and socially owned) and houses.

15. Article 3 states that abandoned property is to be temporarily protected and managed by the Republika Srpska. To this end, the Ministry is obliged, in Article 4, to establish commissions to carry out this task. Article 6 states that these commissions shall issue decisions on the allocation of abandoned property. The preparation of registers of abandoned property is to be carried out by the appropriate administrative bodies in each municipality.

16. Article 10 states that if a person enters into possession of abandoned property without a decision of the appropriate commission, that commission shall issue a decision ordering the person to leave the property concerned. An appeal may be lodged to the Ministry by the recipient within three days of its receipt. The lodging of an appeal to the Ministry does not suspend the execution of the decision.

17. Article 15 reads as follows:

“Abandoned apartments, houses and other abandoned housing facilities shall be allocated exclusively to refugees and displaced persons and persons without accommodation as a result of war activities, in accordance with the following priorities:

1. to the families of killed soldiers
2. war invalids with injuries in categories I-V
3. war invalids with injuries in categories V-X
4. qualified workers of whom there is a lack in the Republika Srpska.”

18. Article 15A (which was inserted into the old law by an amendment of 12 September 1996) adds a further category of persons to this list. This category is bearers of state honours, deputies of the National Assembly of the Republika Srpska and other officials of the Republika Srpska who have the status of refugees or displaced persons.

2. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property

19. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property (OG RS no. 38/98; "the new law") establishes a detailed framework for persons to regain possession of property considered to be abandoned under the old law. It entered into force on 19 December 1998 and puts the old law out of force.

20. Article 2 of the new law was amended by the Law on Amendments to the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, which was contained in a decision of the High Representative of 13 April 1999. The amended text reads as follows:

"All administrative, judicial, and other decisions enacted on the basis of the regulations referred to in Article 1 of this law in which rights of temporary occupancy have been created shall remain effective until cancelled in accordance with this law.

Any occupancy right or contract on use made between 1 April 1992 and 19 December 1998 is cancelled. A person who occupies an apartment on the basis of an occupancy right which is cancelled under this Article shall be considered a temporary user for the purposes of this law.

A temporary user referred to in the previous paragraph who does not have other accommodation available to him/her has a right to a new contract for use of the apartment, if the occupancy right of the former occupant terminates under Article 16 of this law or if a claim of the former occupant to repossess the apartment is rejected by the competent authority in accordance with this law.

An occupancy right holder to an apartment as of 1 April 1992, who agreed to the cancellation of his or her occupancy right in exchange for another occupancy right which is cancelled under this Article, is entitled to make a claim for repossession of his or her former apartment in accordance with this Law."

3. The Law on General Administrative Procedures

21. The Law on General Administrative Procedures (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 47/86) was taken over as a law of the Republika Srpska. It governs all administrative proceedings. The provisions of this law, insofar as they are relevant to the present case, are summarised below.

22. Article 2 states that a law may, in exceptional cases, provide for a different administrative procedure than that provided for in the Law on General Administrative Procedures. Under Article 3, all issues that are not regulated by a special law are to be dealt with under the Law on General Administrative Procedures.

23. Article 8 reads as follows:

"(1) Before making a decision a party has to be given the opportunity to express his or her opinion on all the facts and circumstances that are of importance in making an administrative decision.

(2) A decision may be made without hearing the opinion of a party only if provided by law."

24. Articles 81 - 98 regulate delivery of decisions. Delivery is to be carried out personally to the

person named in the decision. Exceptions are provided for in certain circumstances, for example where the person named in the decision cannot be located. Article 83(1) reads as follows:

“As a rule, delivery shall be to the home or workplace of the person named in the decision”

25. Article 84 states that if the person concerned is not present in his or her home or workplace, a member of his or her household or a person employed in the same office may receive the decision. Article 85 states that if delivery is not possible in accordance with the provisions of Article 84, the decision is to be returned to the deciding organ. It also provides for the appointment of a representative to receive a decision on behalf of a person who cannot be located. Article 86 allows for an exceptional delivery procedure to be used after unsuccessful attempts to deliver the decision in accordance with the above procedure. It allows a decision to be sent to the relevant local municipal organ. An announcement may be placed on the door of the home of the person named in the decision, stating where the decision may be collected. The date of the delivery is deemed to be the date of the placing of the notice on the door of the home of the person named in the decision.

26. Under Article 247 a decision on an appeal must be made within two months of the lodging of such appeal.

4. The Law on Administrative Disputes

27. Under Articles 3 and 18 of the Law on Administrative Disputes (OG RS no. 12/94), the Supreme Court of the Republika Srpska has general jurisdiction over administrative disputes. Under Article 25(1), if an administrative organ does not issue a decision on an appeal within 60 days of its being lodged, the applicant may lodge a reminder to the organ. If no decision is issued within 7 days of the lodging of such a reminder, the applicant may initiate an administrative dispute.

5. The Decree on Court Taxation

28. Tariff 23 of the Decree on Court Taxation (OG RS no. 7/97), issued on 2 April 1997, prescribes a fee of 1,000 Yugoslav Dinars (“YUD”) (approximately 60 Convertible Marks – *Konvertibilnih Maraka*, “KM” – at current rates) for the lodging of an administrative dispute before the Supreme Court of the Republika Srpska.

IV. COMPLAINTS

29. The applicant complains of violations of his right to respect for family life and of his right to property. He also complains of the fact that the lodging of an appeal against the decision of the Commission does not have any suspensive effect.

V. SUBMISSIONS OF THE PARTIES

30. The respondent Party has not made any submissions regarding the application.

31. The applicant maintains his complaint. He states that there have not been any further attempts to evict him since the issuing of the provisional order by the Vice-President of the Chamber.

VI. OPINION OF THE CHAMBER

A. Admissibility

32. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

33. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist

and whether the applicant has demonstrated that they have been exhausted. The Chamber notes that the respondent Party has not suggested that there is any “effective remedy” available to the applicant for the purposes of Article VIII(2)(a) of the Agreement.

34. The applicant lodged an appeal to the Ministry against the decision of the Commission of 9 April 1998. However, the lodging of such an appeal does not have any suspensive effect.

35. The Chamber notes that there has been no decision on this appeal to date. It would have been open to the applicant to commence administrative proceedings before the Supreme Court of the Republika Srpska in respect of the failure of the Ministry to issue a decision on his appeal. Before doing so, he would have had to lodge a reminder with the Ministry, which he has not done. The Ministry would then have a seven day period in which to issue a decision. Following the expiry of that period, the applicant could then have initiated an administrative dispute before the Supreme Court. However, the fee required for the initiation of such a dispute is YUD 1,000.

36. As the Chamber noted in the case of *Onić* (case no. CH/97/58, decision on admissibility and merits delivered on 12 February 1999, paragraph 38, Decisions January-July 1999) referring to the approach taken by the European Court of Human Rights in relation to the corresponding requirement in Article 26 of the Convention (presently Article 35 of the Convention, as amended by Protocol No. 11) the remedies available to an applicant must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. In addition, when applying the rule on exhaustion, it is necessary to take realistic account not only of the existence of formal remedies in the legal system concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.

37. The Chamber considers that the non-suspensive effect of the appeal lodged by the applicant against the decision of the Ministry of 9 April 1998 raises the question whether there is an effective remedy available to the applicant. Also the size of the fee he would have had to pay to initiate an administrative dispute before the Supreme Court must be taken into account in this regard. These factors, together with the fact that the respondent Party did not seek to argue that there was any effective remedy available to the applicant, leads the Chamber to conclude that no such remedy was in fact available to him.

38. The Chamber does not consider that any other ground for declaring the case inadmissible has been established. Accordingly, the case is declared admissible in respect of Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

B. Merits

39. Under Article XI of the Agreement the Chamber must next address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement the Parties are obliged to “secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms”, including the rights and freedoms provided for in the Convention and the other treaties listed in the Appendix to the Agreement.

1. Article 8 of the Convention

40. The applicant alleges a violation of his right to respect for family life. The Chamber has interpreted this as referring to his right to respect for his home, as guaranteed by Article 8 of the Convention. This provision reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

41. The Chamber notes that the applicant has lived in the apartment since August 1994, when he was allocated the occupancy right over it by the Institute, the holder of the allocation right. It is therefore clear that the apartment is to be considered as his “home” for the purposes of Article 8 of the Convention.

42. The Chamber has already held that the threatened eviction of a person from his home constitutes an “interference by a public authority” with the exercise of the right to respect for his home (see case no. CH/96/31, *Turčinović*, decision on the merits delivered on 11 March 1998, paragraph 20, Decisions and Reports 1998). The decision of the Commission declaring the applicant an illegal occupant of the apartment and ordering him to vacate it within three days under threat of forcible eviction therefore constitutes an “interference by a public authority” with that right.

43. In order to examine whether this interference has been justified under the terms of paragraph 2 of Article 8 of the Convention, the Chamber must examine whether it was “in accordance with the law”, served a legitimate aim and “was necessary in a democratic society” (see the aforementioned decision in *Onić*, paragraph 38). There will be a violation of Article 8 if any one of these conditions is not satisfied.

44. The Chamber notes that Article 2 of the old law requires a property to be entered into the records of abandoned property before it can be allocated to a person within the categories set out in Article 15. The respondent Party has not provided any evidence that any such entry was made in respect of the apartment in the present case. Nor is there any other indication available to the Chamber that such an entry was made.

45. Therefore, it has not been established that the requirements of the old law were adhered to in the present case. Accordingly, the attempts of the Commission to get the applicant to vacate the apartment cannot be considered to have been “in accordance with the law” within the meaning of paragraph 2 of Article 8 of the Convention. In these circumstances, it is not necessary to examine whether the other requirements under that provision have been met.

46. Accordingly, the Chamber considers that there has been a violation of the applicant’s rights as guaranteed by Article 8 of the Convention.

2. Article 1 of Protocol No. 1 to the Convention

47. The applicant alleges a violation of his right to property. This complaint falls to be considered under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

“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.”

48. The Chamber must first consider whether the applicant’s occupancy right over the apartment constitutes a “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention. The Chamber notes that the applicant was granted a permanent occupancy right over the apartment by the Institute, the holder of the allocation right, on 25 August 1994. However, Article 2 of the new law, as amended (see paragraph 20 above), cancels all such occupancy rights and states that they shall be considered to be of a temporary nature.

49. The Chamber has previously considered whether the rights of a person in substantively similar circumstances as the present applicant’s constitute “possessions” within the meaning of Article 1 of Protocol No. 1 (see case no. CH/98/1495, *Rosić*, decision on admissibility and merits

delivered on 10 September 1999, paragraphs 55-61). The Chamber held that a temporary occupancy right constitutes a “possession” as there is a possibility for the occupant to be eligible for a permanent right if he satisfies the conditions set out in Article 2 of the new law, as amended.

50. Having established that the applicant’s right to occupy the apartment constitutes a possession, the Chamber next finds that the decision of the Commission declaring the applicant to be an illegal occupant of the apartment and ordering him to vacate it interfered with his right to peaceful enjoyment of that possession within the meaning of the first sentence of Article 1 of Protocol No. 1.

51. The Chamber must therefore examine whether this interference can be justified. For this to be the case, it must be in the public interest and subject to conditions provided for by law.

52. The Chamber notes that the decision ordering the applicant’s eviction from the apartment was not in accordance with the old law (see paragraphs 43-45 above). Accordingly, the requirements of national law have not been adhered to and therefore the interference was not “subject to conditions provided for by law” as required by Article 1 of Protocol No. 1.

53. Accordingly, there has been a violation of the applicant’s rights as protected by Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

54. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures.

55. The Chamber notes that in accordance with its order for the proceedings in the case the applicant was afforded the possibility of claiming compensation or other relief. He did not do so, but requests that the eviction procedure against him be terminated.

56. The Chamber notes that the old law has been put out of force by the adoption of the new law. However, this does not of itself remove the threat to the applicant that he would be evicted, as the new law does not put out of force decisions ordering evictions under the old law.

57. The Chamber therefore considers it appropriate to order the respondent Party to revoke the decision of the Commission of 9 April 1998 ordering the eviction of the applicant from the apartment in question and to allow the applicant to remain in possession of the apartment, subject to the terms of the new law.

VIII. CONCLUSION

58. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;
2. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 9 April 1998 declaring the applicant an illegal occupant and ordering him, under threat of eviction, to vacate the apartment he currently occupies constitutes a violation of his right to respect for his home within the meaning of Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;
3. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 9 April 1998 declaring the applicant an illegal occupant and ordering him, under threat of eviction, to vacate the apartment he currently occupies,

constitutes a violation of his right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. unanimously, to order the Republika Srpska to take all necessary steps to revoke the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 9 April 1998 and to allow the applicant to enjoy undisturbed occupancy of the apartment in accordance with the terms of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, as amended; and

5. unanimously, to order the Republika Srpska to report to it by 5 February 2000 on the steps taken by it to comply with the above order.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Viktor MASENKO-MAVI
Acting President of the Second Panel