



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 10 December 1999)

Case no. CH/98/710

D.K.

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 2 November 1999 with the following members present:

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

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 29(2), 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina. Since January 1995, he lived in an apartment in Kozarska Dubica, Republika Srpska with his family. On 16 December 1997 he and his wife entered into a contract with C.Š., the wife of the holder of the occupancy right over the apartment. Under this contract, the applicant and his wife would support C.Š. during her lifetime. The husband of C.Š. had died and under the applicable law she was entitled to become the holder of the occupancy right over the apartment, but had not taken the required legal steps to do so. In return for taking care of her, the applicant and his family were entitled to reside in the apartment and would, according to the contract, become the owners of it upon the death of C.Š. She died on 23 December 1997.

2. On 28 May 1998 the Secretariat for Administrative Affairs of the Municipality of Kozarska Dubica ("the Secretariat") declared the applicant to be an illegal occupant of the apartment and ordered him to vacate it within fifteen days under threat of forcible eviction. The applicant appealed against this decision to the competent organ. He also made an application to the Chamber. On 18 June 1998 the Vice-President of the Chamber ordered the respondent Party as a provisional measure to take all necessary steps to prevent the eviction of the applicant from the apartment. However, on 27 July 1998, in violation of this order, he was evicted from the apartment together with his family.

3. The case raises issues principally under Article 8 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was introduced to the Chamber on 18 June 1998 and registered on the same day. The applicant requested that the Chamber order the respondent Party as a provisional measure to take all necessary action to prevent his eviction from the apartment.

5. On 18 June 1998 the Vice-President of the Chamber ordered, pursuant to Rule 36(2) of its Rules of Procedure, the respondent Party to take all necessary steps to prevent the eviction of 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 it was withdrawn by the Chamber before then.

6. On 8 and 27 July 1998 the Municipality of Kozarska Dubica submitted observations on the application to the Chamber. The Chamber decided not to accept these observations as they had not been submitted by the Agent of the respondent Party.

7. On 8 December 1998 the Chamber decided, pursuant to Rule 49(3)(b), to transmit the application 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 8 January 1999. No observations were received from the respondent Party within that time-limit.

8. On 18 January 1999 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 17 February 1999.

9. On 17 February 1999 the observations of the respondent Party were received, outside the time-limit set by the Chamber. The Chamber decided to accept these observations regardless of this fact and on 5 March 1999 transmitted them to the applicant for his observations. No such observations have been received from the applicant.

10. The Second Panel of the Chamber deliberated upon the admissibility and merits of the application on 8 July and 9 September 1999. On 9 September 1999, in accordance with Rule 29(2), it relinquished jurisdiction in favour of the plenary Chamber as the case raises a serious question as

to the interpretation of the Agreement.

11. On 5 October and 2 November 1999 the plenary Chamber deliberated on the admissibility and merits of the application. On the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

12. The facts of the case as they appear from the submissions of the Parties and the documents in the case-file may be summarised as follows.

13. The applicant lived with his family in an apartment located at Milana Tepića No. 64 in Kozarska Dubica, Republika Srpska. On 19 December 1997, he and his wife entered into a contract with Ms. C.Š., the wife of the holder of the occupancy right over the apartment. Her husband had died and under the Law on Housing Relations (see paragraph 17 below) she was entitled to succeed into the occupancy right over the apartment. However, she had not taken the formal steps required for her to so succeed. The main terms of the contract of 19 December 1997 were that the applicant and his wife would support Ms. C.Š. during her lifetime and, in return, they were entitled to reside in the apartment and would become the owners of it upon her death. Ms. C.Š. died on 23 December 1997.

14. On 28 May 1998 the Secretariat ordered the applicant to vacate the apartment within fifteen days, under threat of forcible eviction. The reasoning for this decision was that the applicant was an illegal occupant of the apartment. The decision stated that there was a right of appeal against this decision to the Executive Board of the Municipality of Kozarska Dubica. The applicant did not appeal to this body, but instead to the Ministry for Urbanism, Housing-Communal Affairs, Civil Engineering and Town Planning ("the Ministry"), which is in fact the competent body to decide on such an appeal. On 1 February 1999 the Ministry decided to return the matter to the first instance organ for review, on the ground that the procedural requirements of national law had not been met during the original proceedings. The Chamber has not been informed of whether there has been any further decision by the Secretariat.

15. On 15 June 1998 the Secretariat issued a conclusion scheduling the applicant's eviction for 19 June 1998. This eviction was not carried out. On 24 July 1998 the Secretariat issued a further conclusion, scheduling the applicant's eviction for 27 July 1998. He has informed the Chamber that he was evicted on this date.

B. Relevant legislation

1. The Human Rights Agreement (Annex 6)

16. Article X of the Agreement, entitled "Proceedings before the Chamber", reads, insofar as relevant, as follows:

"1. ... The Chamber shall have the power to order provisional measures...
(...)

5. The Parties undertake to provide all relevant information to, and to cooperate fully with the Chamber."

2. Law on Housing Relations

17. The Law on Housing Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 14/84) sets out the categories of persons who are considered to be members of the household of the holder of an occupancy right over an apartment. These persons include the occupancy right holder's spouse, children and certain relatives by birth and marriage. Such persons are entitled to succeed to the occupancy right upon, *inter alia*, the death of the holder of the

occupancy right. In addition, persons who have entered into a contract under which they will support the holder of the occupancy right during his or her lifetime and who have lived in the apartment pursuant to such a contract for a minimum of five years are considered to be members of the household of the holder of the occupancy right.

18. The members of the household are required to inform the holder of the allocation right over the apartment in writing of the successor.

19. The law was amended by the Law on Amendment of the Law on Housing Relations (Official Gazette of the Republika Srpska no. 19/93). This law removed persons who resided in an apartment pursuant to a contract for lifetime support from the category of persons who are members of the household of an occupancy right holder. On 27 October 1999, this amendment was revoked by Article 1 of the Law on Cessation of Articles of the Law on Amendments and Additions to the Law on Housing Relations, which was passed by the High Representative to Bosnia and Herzegovina.

IV. COMPLAINTS

20. The applicant does not make any specific allegations of violations of any of his human rights as protected by the Agreement. The application appears to raise an issue under Article 8 of the Convention.

V. SUBMISSIONS OF THE PARTIES

21. The respondent Party, in its observations of 17 February 1999, claims that the application is inadmissible for failure to exhaust the domestic remedies available to the applicant. It claims that the application was lodged while the domestic administrative proceedings were still pending.

22. The respondent Party also claims that the application is inadmissible as manifestly ill-founded. This is because the applicant had no legal right to occupy the apartment. His contract with the wife of the holder of the occupancy right over the apartment is not sufficient under national law to entitle him to have the occupancy right over the apartment transferred to him. Therefore he has no right capable of protection under the Agreement.

23. The applicant maintains his complaint.

VI. OPINION OF THE CHAMBER

A. Admissibility

24. 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.

25. 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.

26. As the Chamber noted in the *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 35 (previously Article 26) of the Convention, 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 of the personal circumstances of the applicants.

27. The Chamber notes that the applicant was evicted from the apartment on 27 July 1998, while his appeal to the Ministry was pending. On 1 February 1999 the Ministry decided to return the matter to the first instance organ for review. There is no indication that such a decision has been made to date. Accordingly this remedy cannot be considered to be an effective one within the meaning of Article VIII(2)(a) of the Agreement.

28. The Chamber further finds that no other ground for declaring the case inadmissible has been established. Accordingly, the case is to be declared admissible.

B. Merits

29. 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

30. The applicant did not specifically allege a violation of his rights as protected by Article 8 of the Convention. However, the Chamber raised it *proprio motu* when transmitting the case to the respondent Party for its observations on the admissibility and merits of the application. Article 8 reads, insofar as relevant, as follows:

“1. Everyone has the right to respect for..., his home...

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.”

31. The Chamber notes that the applicant lived in the apartment from January 1995 until his eviction in July 1998. It is therefore clear that the apartment is to be considered as the applicant’s “home” for the purposes of Article 8 of the Convention. This is unchanged by the fact that under the law of the Republika Srpska the applicant had no right to reside in the apartment at the time of his eviction. Article 8 of the Convention does not require the existence of a legal basis under national law for the place where a person lives to be considered to be his or her home. The Chamber considers that the eviction of the applicant from his home on 27 July 1998, in accordance with the conclusion of the Secretariat, constituted an “interference by a public authority” with that right.

32. 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 above-mentioned *Onić* decision, paragraph 48). There will be a violation of Article 8 if any one of these conditions is not satisfied.

33. On 18 June 1998 the Vice-President of the Chamber ordered the respondent Party as a provisional measure to take all necessary steps to prevent the eviction of the applicant from the apartment. This order was stated to remain in force until the Chamber’s final decision in the case unless withdrawn at an earlier stage. The order had not been withdrawn on the date of the applicant’s eviction, 27 July 1998. Accordingly it was still in force at that time.

34. The Chamber’s order was issued under Article X(1) of the Agreement (see paragraph 16 above). Article X(5) of the Agreement requires the Parties to cooperate fully with the Chamber.

35. The Agreement is directly applicable in the legal system of Bosnia and Herzegovina and its

constituent entities and binding upon all of their authorities. Therefore the respondent Party was obliged, under the Agreement, to comply with the Chamber's order.

36. The eviction of the applicant from the apartment he occupied was in violation of that order and Article X of the Agreement (see paragraph 16 above). A violation of an order for provisional measures cannot be considered to be "in accordance with the law" as required by paragraph 2 of Article 8 of the Convention.

37. In the aforementioned circumstances the Chamber concludes that Article 8 of the Convention has been violated, given that the interference with the applicant's right to respect for his home was not "in accordance with the law" as required by paragraph 2 of Article 8.

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

38. The applicant did not specifically allege a violation of his rights as protected by Article 1 of Protocol No. 1 to the Convention. However, the Chamber raised it *proprio motu* when transmitting the case to the respondent Party for its observations on the admissibility and merits of the application. Article 1 of Protocol No. 1 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."

39. The Chamber must first consider whether the applicant's rights under the contract with the wife of the holder of the occupancy right over the apartment constituted a "possession" within the meaning of Article 1 of Protocol No. 1. The Chamber has previously noted that the European Court of Human Rights has given a wide interpretation to the concept of "possessions", holding that it covers a wide variety of rights and interests having economic value (see case no. CH/96/28, *M.J.*, decision on admissibility and merits delivered on 3 December 1997, paragraph 32, Decisions on Admissibility and Merits 1996–1997). The Chamber has also held that an occupancy right over an apartment constitutes a "possession" within the meaning of Article 1 of Protocol No. 1 (see case no. CH/97/46, *Kevešević*, decision on the merits delivered on 10 September 1998, paragraphs 72 and 73, Decisions and Reports 1998).

40. The Chamber notes that the applicant and his wife entered into a contract with C.Š., the wife of the holder of the occupancy right over the apartment (see paragraph 13 above). The contract stated that they were to become the owners of the apartment after her death. Until that time, they were entitled to reside in the apartment and were required to take care of her. However, under the appropriate law in force in the Republika Srpska (see paragraph 17 above), such contracts are incapable of establishing a right to succeed into an occupancy right over an apartment. This is due to the fact that the law of the Republika Srpska requires that a person reside in an apartment in pursuance of a contract for lifetime support for a minimum of five years before he or she can be considered to be a member of the household of the holder of the occupancy right over the apartment. The applicant had not lived in the apartment for this length of time.

41. In addition, as C.Š. did not actually own the apartment, the contract could not grant the applicant and his wife any right of ownership over the apartment. The rights of the applicant and his wife under the contract were, according to the law of the Republika Srpska, limited to the right to reside in the apartment during the lifetime of C.Š. Thus, at the time of his eviction from the apartment, the applicant had no protected right over the apartment.

42. Accordingly, the applicant did not have any right that could be considered to constitute a "possession" over the apartment within the meaning of Article 1 of Protocol No. 1 to the Convention and it follows that there has been no violation of that provision.

VII. REMEDIES

43. 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.

44. The applicant did not request the Chamber to award him any monetary compensation or other relief. The respondent Party did not submit any observations on the issue of remedies.

45. The Chamber notes that it has found a violation of the applicant's right to respect for his home as protected by Article 8 of the Convention, due to his being evicted in violation of the order for provisional measures preventing such eviction. The Chamber considers that, in most such cases, an appropriate order would be to reinstate the applicant into the property concerned without delay. However, such an order would not be appropriate in the present case, as the Chamber has found that the applicant's contract does not any longer confer upon him any right to reside there. Accordingly, it considers that the finding of a violation of the applicant's rights as guaranteed by Article 8 of the Convention constitutes a sufficient remedy.

VIII. CONCLUSION

46. For the above reasons, the Chamber decides,

1. by 10 votes to 3, to declare the application admissible;
2. by 9 votes to 4, that the eviction of the applicant from the apartment he previously occupied 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 application does not disclose a violation of the applicant's right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention; and
4. by 12 votes to 1, that the finding of a violation of the applicant's rights as guaranteed by Article 8 of the Convention constitutes a sufficient remedy.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains a separate dissenting opinion of Messrs. Jakob Möller and Vitomir Popović.

DISSENTING OPINION OF MESSRS. JAKOB MÖLLER AND VITOMIR POPOVIĆ

While the failure of the respondent Party to comply with the order for provisional measures issued by the Vice-President of the Chamber on 18 June 1998 under Article X(1) of the Agreement constitutes a serious breach by the respondent Party of its obligations to cooperate fully with the Chamber (cf. Article X(5) of the Agreement), we are unable to agree with the majority that this failure constitutes a violation of Article 8 of the Convention. Our reasons are set out below:

1. Article X of the Agreement concerns the proceedings before the Chamber. It empowers the Chamber, *inter alia*, to order provisional measures, to appoint experts and to compel the production of witnesses and evidence. These procedural steps can be taken at any stage in the proceedings, but it is in the nature of an order for provisional measures that it would normally be issued at the initial stage of the proceedings on the strength of the information, often scant, contained in the applicant's initial submission and without any adversary proceedings. Such an order would aim at preventing a violation of a right, or a continued violation of a right, should there turn out to be a protected right in the first place. It is not intended to create a protected right that otherwise would not exist.

2. Article X(1) does not state the grounds or specify the circumstances which would justify an order for provisional measures. Rule 36(2) of the Chamber's Rules of Procedures clarifies that provisional measures can be ordered under Article X of the Agreement "in the interest of the parties or the proper conduct of the proceedings". It must be presumed that the "interest" sought to be protected is a genuine one based in law, but not merely a fictitious interest outside the law. Unavoidably, there may be a risk that an order for provisional measures issued on the basis of scant or wrong information may turn out to be unwarranted. Accordingly, the Chamber may at any stage lift an order for provisional measures if further information obtained reveals that it was not justified in the beginning.

3. As to the grounds and circumstances that would justify an order for provisional measures in the interest of an applicant, or to ensure that a meaningful consideration of a case can take place, the following, *inter alia*, come to mind:

- when an apparent protected right would otherwise risk serious damage;
- when the consequences would otherwise be particularly onerous;
- to prevent irreparable harm;
- to prevent evidence being tampered with or destroyed; and
- the need to impound evidence or put assets in escrow.

4. In the present case, the order for provisional measures aimed at preventing the applicant's eviction from the apartment where he lived. The right sought to be protected was the applicant's right to respect for his home and the enjoyment of that right without unlawful interference by public authority (cf. Articles 8(1) and 8(2) of the Convention). The order was issued at the beginning of the proceedings on the strength of the information provided by the applicant, who claimed to have concluded a contract entitling him to become "the owner" of the apartment. This claim turned out to be fictitious.

5. During the proceedings it transpired that the applicant in fact did not have a protected right to continue to live in the apartment in question after the death of the occupancy right holder, with whom he had concluded a life support contract one week earlier. While this does not excuse the failure of the respondent Party to comply with the order for provisional measures of 18 June 1998, there is no indication that the eviction of the applicant was not carried out in accordance with the provisions of the domestic law in force, nor has it been shown that the interference was inconsistent with the other requirements, set out in Article 8(2) of the Convention.

6. In the light of the above, we conclude that the interference complained of by the applicant does not reveal a violation of Article 8 of the Convention.

(signed)
Jakob MÖLLER

(signed)
Vitomir POPOVIĆ