



**DECISION ON REQUEST FOR REVIEW and
ON MOTION FOR THE RENEWAL OF PROCEEDINGS**

**Cases nos. CH/97/60, CH/98/276,
CH/98/287, CH/98/362 and CH/99/1766**

**Andrija MIHOLIĆ, Božo ČORAPOVIĆ,
Milorad ĆIRIĆ, Dušan RISTIĆ and Mihailo BUZIĆ**

against

**BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 February 2002 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. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the respondent Party's request for a review of the decision of the Plenary Chamber on the admissibility and merits of the aforementioned case;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina as well as Rules 63-66 of the Chamber's Rules of Procedure:

I. FACTS AND COMPLAINTS

1. In its decision on admissibility and merits of 7 December 2001 the Plenary Chamber found that the Federation of Bosnia and Herzegovina had violated the applicants' right to peaceful enjoyment of their possessions within the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights and discriminated against them in the enjoyment of that right. The Federation of Bosnia and Herzegovina was ordered to take all necessary steps swiftly, and in any event not later than 7 June 2002, by way of legislative or administrative action, to render ineffective the annulments of the purchase contracts of all five applicants and to swiftly, and in any event not later than 7 March 2002, allow three of the applicants to regain possession of their apartments.

II. SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER

2. On 7 December 2001 the plenary Chamber's decision was delivered in pursuance of Rule 60 of the Chamber's Rules of Procedures. On 7 January 2002 the Federation of Bosnia and Herzegovina submitted a "motion for the renewal of the proceedings in the cases" (hereinafter "motion for the renewal of proceedings").

3. On 4 and 8 February 2002 the plenary Chamber considered the motion by the Federation of Bosnia and Herzegovina and adopted the present decision.

III. OPINION OF THE CHAMBER

4. Before considering the merits of the motion, the Chamber must decide whether to accept it, taking into account the relevant provisions of the Agreement and its Rules of Procedure.

5. The Chamber notes that the arguments advanced by the Federation in its motion for the renewal of proceedings can be divided into two categories. Firstly, the Federation submits that it is aware that pursuant to Article X(2) of the Agreement decisions by the Plenary Chamber are not subject to review. However, the Federation argues that the Chamber should renew the proceedings for the consideration of the applications because of serious flaws in the composition of the Chamber when it decided on the applications. Secondly, the Federation submits arguments as to why the Chamber erred in its decision on admissibility and merits. With respect to the latter category of arguments, the Chamber finds that the Federation's motion must, notwithstanding its title, be classified as a request for review within the meaning of Article X(2) of the Agreement. The Chamber will address these two parts of the Federation's motion in turn.

A. As to the motion for the renewal of proceedings

6. The Chamber notes that the Agreement and the Chamber's Rules of Procedure do not provide for "motions for the renewal of proceedings". The only remedy against a decision of the Chamber provided for in the Agreement and the Chamber's Rules of Procedure, limited to Panel decisions, is the request for review. Nonetheless, the Chamber recognises that most legal systems provide for a mechanism by which cases concluded by a final and binding decision can be re-opened under certain exceptional circumstances, *e.g.* Rule 80 of the Rules of the European Court of Human Rights. The Chamber will therefore consider whether the Federation's motion for the renewal of proceedings would justify such an extraordinary re-opening of the cases.

1. Arguments relating to the disqualification of a Member of the Chamber

7. The Federation in essence advanced two grounds on which it argues that the composition of the Chamber when it decided on the applications was so seriously flawed as to justify a re-opening of the cases. The first argument is that one Member of the Chamber should have been disqualified from deciding on the applications because (i) he violated the duty of confidentiality, to which he was bound by his solemn declaration under Rule 3 of the Chamber's Rules of Procedure, by leaking a copy of the Chamber's decision to the Republika Srpska Ministry of Defence, and (ii) he had a personal interest

in the cases or acted as advisor to one of the Parties, in violation of Rules 21 and 23 of the Rules of Procedure.

8. The Chamber notes that while the Federation has in fact submitted evidence indicating that the Republika Srpska Ministry of Defence was in possession of a copy of the Chamber's decision on admissibility and merits more than a week before its delivery, it has not established any appreciable connection between this regrettable leak of confidential information and the Member whose disqualification it now, *ex post facto*, seeks. Moreover, the Chamber notes that even if it had been established or only made credible that a Member leaked information on an adopted but not yet delivered decision to a third party, this fact would fall short of justifying re-opening the case.

9. As to the assertion that one of the Members had a personal interest in the applications, the Chamber notes that the Federation has not submitted any argument or evidence to support this assertion.

10. Regarding the argument that the same Member should not have taken part in the deliberations and the voting in the applications, on the ground that he advised one of the Parties, the Federation submits that this Member, after the delivery of the decision, congratulated some of the applicants and advised them as to the next steps to take in order to obtain enforcement of the decision in their favour. The Chamber notes that Rule 21(1)(b) of the Chamber's Rules of Procedure provides that:

"Members shall not take part in the examination of an application before the Chamber, where they ...(b) have participated in any decision on the facts on which the application is based as adviser to any of the parties or as a member of any tribunal or body of enquiry."

The Chamber observes that, even assuming the allegations of the Federation were accurate, the conduct of the Member of the Chamber referred to has nothing to do with the ground for disqualification under Rule 21(1)(b). This Rule relates to the situation in which a Member of the Chamber happens to have advised one of the Parties on the matter of the application before the application was brought before the Chamber, and not to the possibility that a Member might give a Party advice after the Chamber has delivered a final and binding decision.

2. Arguments relating to the fact that the Chamber decided the case in plenary

11. The second set of arguments in support of the motion to renew the proceedings can be summarised in the assertion that the Chamber purposefully considered the case in plenary so as to deprive the respondent Parties of the possibility to appeal against the decision. According to the Federation, the Chamber thereby violated the European Convention on Human Rights and put itself in contradiction with the practice of the European Court of Human Rights in Strasbourg.

12. Firstly, the Chamber notes that the fact that an application may be decided by the plenary Chamber in first instance, thereby depriving the parties of the possibility to request review of the decision, cannot be said to be in violation of any right enshrined in the Convention and the Protocols thereto. Article 2 paragraph 1 of Protocol No. 7 to the Convention specifically provides for the right of appeal in criminal matters only. It states that "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal". The proceedings before the Human Rights Chamber are not criminal proceedings and a respondent Party found to be in violation of the Agreement has not been convicted of a criminal offence. Accordingly, this provision is irrelevant to the proceedings before the Chamber.

13. Secondly, as to the alleged violation of the procedure of the European Court of Human Rights, the Chamber observes that it is under no obligation to follow the procedure of that Court. Annex 6 to the Dayton Peace Agreement, establishing the Chamber, provides in Article II(2)(a) that "the Human Rights Chamber shall consider, ...: (a) alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto". Articles X and XII of Annex 6 to the Dayton Peace Agreement provide for the Chamber to develop fair and effective procedures for the adjudication of applications. The import of these two provisions is that the Chamber shall apply the European Convention on Human Rights

insofar as it defines the rights protected, but that it shall apply the Agreement and the Rules of Procedure adopted thereunder in all questions concerning the procedure before the Chamber. Any argument that the Chamber violated provisions of the European Convention on Human Rights prescribing the procedure to be followed before the European Court of Human Rights is therefore necessarily ill-founded.

14. As to compliance with the provisions governing the proceedings before the Chamber, pursuant to Article X of the Agreement the Chamber shall normally sit in panels. Also, according to Rule 29 paragraph 1 of the Chamber's Rules of Procedure "applications shall normally be referred to a Panel". The word "normally" implies that there are certain situations in which an application may be considered by the Plenary Chamber without having been previously decided on by a Panel. Rule 29 paragraphs 2, 3, and 4 of the Chamber's Rules of Procedure provide for these situations. Particularly relevant to the case at hand, Rule 29 paragraph 2 provides:

"Where a case pending before a Panel raises a serious question as to the interpretation of the Agreement or of any of the international agreements referred to in it, or where the resolution of a question before a Panel might have a result inconsistent with previous jurisprudence of the Chamber, the Panel may at any time before taking a final decision relinquish jurisdiction in favour of the Plenary Chamber."

15. Three of the five applications involved in the present case were originally before the Chamber's two Panels. However, the Panels decided to relinquish jurisdiction to the Plenary in accordance with Rule 29 (see paragraph 9 of the decision on admissibility and merits). It has been the Chamber's consistent practice to decide cases in Plenary when the applications raise a new issue of general importance in the interpretation of the Human Rights Agreement. The *Miholić and Others* cases were the first cases before the Chamber in which the applicants are prevented from registering ownership over the apartments they purchased by the combined application of Article 39e of the Law on Sale of Apartments with an Occupancy Rights and of Article 3a of the Law on Cessation of Application of the Law on Abandoned Apartments. That the question whether the Federation thereby violated Article 1 of Protocol No. 1 to the Convention and discriminated against the applicants "raises a serious question as to the interpretation of the Agreement or of any of the international agreements referred to in it", in the words of Rule 29(2), is among others demonstrated by the Federation's motion for the renewal of proceedings, which exceeds thirty pages in length.

16. Although, as stated above (paragraph 14), the Chamber is in no way bound by the procedural rules in the European Convention on Human Rights and by the Rules of the European Court of Human Rights, it notes that the above-mentioned provisions of the Agreement and of the Chamber's Rules of Procedure are very similar to the rules governing the proceedings before the European Court. Under Article 27 (1) of the European Convention on Human Rights "the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges". Pursuant to Article 30 of the European Convention on Human Rights "where a case pending before a Chamber raises serious questions affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with the judgement previously delivered by the Court, the Chamber may, at any time before it has rendered its judgement, relinquish jurisdiction in favour of the Grand Chamber unless one of the Parties to the case objects". The procedure provided for in Article 30 of the Convention is further elaborated in Rule 72 of the Rules of Court. Under Article 44 (1) the judgement of the Grand Chamber shall be final, regardless of whether the case was decided by the Grand Chamber on appeal or directly without a previous decision by one of the Chambers of the Court. The only significant difference between the procedure before the Court and the procedure before the Chamber in this respect therefore lies in the fact that, before the Court, Parties may by way of an objection prevent a case from being dealt with in first instance before the Grand Chamber. Although this procedural requirement does not apply in proceedings before it, the Chamber observes that nothing prevented the Federation from suggesting the consideration of the applications before a Panel before the delivery of the decision on admissibility and merits. At the latest on the day of the public hearing in the cases, i.e. on 4 July 2001, four months before the adoption of the decision by the Chamber, the Federation was aware that the case was before the plenary Chamber.

3. Conclusion on the motion for the renewal of proceedings

17. The Chamber concludes that the arguments supporting the Federation's motion for the renewal of the proceedings do not justify re-opening consideration of the applications, on which the Chamber has rendered a final and binding decision.

B. As to the arguments pertaining to the Chamber's decision on admissibility and merits

18. Article X(2) of the Agreement provides for review proceedings only when an application has been decided by a Panel, as, in fact, recognised by the Federation in its motion for the renewal of proceedings. Accordingly, the Chamber has already twice decided that the Chamber's Rules of Procedure "only provide for a review, in certain defined circumstances, of decisions issued by a Panel" and "do not provide for any review of decisions of the plenary Chamber in any circumstances" (see case no. CH/96/21, *Čegar*, Decision on Request for Review, adopted on 15 July 1998, Decisions and Reports 1998, paragraph 22, and case no. CH/97/76, *Softić*, Decision on Request for Review, adopted on 7 December 2001). The plenary Chamber's decisions are final and binding. The Chamber therefore decides not to accept the motion for the renewal of proceedings insofar as it is, in fact, a request for review.

19. The Chamber notes that the decision on admissibility and merits became final and binding on the date of its delivery. The time-limits for compliance set in that decision accordingly remain unchanged.

IV. CONCLUSIONS

20. For the above reasons the Chamber, by 12 votes to 1, decides

**TO REJECT THE MOTION FOR THE RENEWAL OF PROCEEDINGS; and
NOT TO ACCEPT THE REQUEST FOR REVIEW.**

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber