



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 10 January 2003)

Case no. CH/02/9040

Neđeljko LATINVIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 6 December 2002 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice - President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
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. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, 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. This case concerns the attempts of the applicant to prevent his eviction from an apartment located in Banja Luka at 7B Radoja Domanovića. In 1992 the applicant concluded a contract on exchange with S.T and N.Z.. According to the contract, the applicant exchanged his apartment (over which he had the occupancy right) situated in Čelinac (a small town near Banja Luka) for S.T.'s, which the applicant currently uses in Banja Luka at 7B Radoja Domanovića. N.Z. acquired the applicant's apartment while S.T. acquired the apartment of N.Z. The owners of the three apartments approved the exchange. In March 1999 S.T. submitted a request for repossession of her pre-war apartment. In October 2000 the Ministry for Refugees and Displaced Persons in Banja Luka issued a decision confirming S.T.'s occupancy right over the apartment in Banja Luka and at the same time terminating the applicant's right to use it. The applicant was ordered to vacate the apartment.

2. The application raises issues with regard to the applicant's right to respect for his home under Article 8 of the European Convention on Human Rights (hereinafter "the Convention") and with regard to the right to an effective domestic remedy against violations of that right under Article 13 of the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was received and registered on 6 March 2002. The applicant requested that the Chamber order the respondent Party, as a provisional measure, to halt his eviction from the apartment he occupies.

4. On 13 March 2002 the President of the Second Panel issued an order for provisional measures, ordering the respondent Party to take all necessary steps to prevent the applicant's eviction until the Chamber has given its final decision in the case.

5. On 13 March 2002 the Chamber decided to transmit the case to the respondent Party for its observations under Articles 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention.

6. The respondent Party's observations were received on 3 April 2002, and were transmitted to the applicant for further observations.

7. The applicant's observations in reply were received on 22 April 2002.

8. On 12 July 2002 the Chamber requested further information from the applicant, who replied on 19 July 2002. On 12 July 2002 the Chamber also requested further information from the respondent Party, which replied on 30 July 2002. Further observations by the respondent Party were submitted on 8 October 2002.

9. On 9 October 2002 the Chamber held a public hearing in Sarajevo. The applicant was present in person and represented by his lawyer Mr. Martinović, the respondent Party by its Agent Mr. Dupor. The Organization for Security and Cooperation in Europe, Mission to BiH (OSCE), acting as *amicus curiae*, was represented by Ms. Lejla Mrkonja and Ms. Božana Vasković, National Legal Advisors. The Office of the High Representative, also acting as *amicus curiae*, was represented by Ms. Tanja Rakušić-Hadžić, Legal Officer, Ms. Gordana Osmančević, Property Officer.

10. On 18 October 2002 the Chamber received a written *amicus curiae* submission from OHR and OSCE, which was forwarded to the Parties on 29 October 2002.

11. The Second Panel deliberated on the case on 13 March 2002 and 7 June 2002. On the latter date it decided to relinquish jurisdiction over the case in favor of the plenary Chamber in accordance with Rule 24(b). The plenary Chamber deliberated on the admissibility and merits of the case on 6 September, 10 October, 9 November and 6 December 2002. On the latter date it adopted the present decision.

III. FACTS

12. On 3 September 1992, the applicant, who is a citizen of BiH of Serb origin, concluded a contract on exchange with S.T and N.Z. who are citizens of BiH of Bosniak origin. According to the contract, the applicant exchanged his apartment (over which he had the occupancy right) situated in Čelinac (a small town near Banja Luka) for the S.T.'s one which the applicant currently uses in Banja Luka at 7B Radoja Domanovića and N.Z. acquired the applicant's apartment while S.T. acquired the apartment of N.Z. The owners of the three apartments approved the exchange. S.T. has been evicted from N.Z.'s pre-war apartment and is currently living in Sweden. N.Z. lives in the apartment now.

13. On 9 March 1999, S.T. submitted a request for repossession of the apartment in Banja Luka at 7B Radoja Domanovića St.

14. On 27 October 2000 the Ministry for Refugees and Displaced Persons in Banja Luka ("the Ministry") issued a decision confirming S.T.'s occupancy right over the apartment in Banja Luka. The decision terminated the applicant's right to use the apartment, ordered him to vacate it within 90 days and established that he was not entitled to alternative accommodation.

15. On 24 May 2001 the applicant initiated proceedings before the First Instance Court in Banja Luka asking for recognition of the validity of the above mentioned contract on exchange. These proceedings are still pending.

16. On 22 August 2001 the Ministry issued a conclusion on enforcement scheduling the applicant's eviction for 5 September 2001. The eviction was not carried out on that day.

17. On 5 September 2001, the Administrative Inspector within the Ministry for Administration and Self-Governance issued a procedural decision postponing the eviction and instructing the offices of the Ministry in Banja Luka and in Čelinac to synchronise their work in order to achieve contemporaneous repossession of the pre-war apartments for the applicant and S.T.

18. On 18 February 2002, the Administrative Inspector withdrew his order of 5 September 2001 postponing the eviction.

19. On 26 February 2002 the applicant was informed that the eviction had been re-scheduled for 14 March 2002.

20. On 11 March 2002, the Ministry for Refugees and Displaced Persons of Republika Srpska, following a request by the applicant, issued a recommendation to its Department competent for Banja Luka to postpone the eviction scheduled for 14 March 2002 until the conclusion of civil proceedings before the Court of First Instance in Banja Luka. The Ministry stated that, in view of the provisions of Article 2a paragraph 5 of the Law Amending the Law on Cessation of the Application of the Law on Use of Abandoned Property, it "propose(d) that you postpone the eviction pending the conclusion of the civil proceedings before the Court of First Instance in Banja Luka". The recommendation further stated that the order of the Administrative Inspector dated 18 February 2002 was withdrawn as a consequence of the coming into force of the provisions of Article 2a paragraph 5 of the Law, his actions in this respect thus being no longer necessary.

21. On 13 March 2002 the Chamber issued an order for provisional measures, ordering the respondent Party to take all necessary steps to prevent the applicant's eviction until the Chamber has given its final decision in the case.

IV. RELEVANT LEGAL PROVISIONS

A. Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina (“Annex 7”)

22. Article I paragraph 1 of Annex 7 reads:

“All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.”

B. The Republika Srpska Law on the Cessation of the Application of the Law on the Use of Abandoned Property

23. The Republika Srpska Law on the Cessation of the Application of the Law on the Use of Abandoned Property entered into force on 19 December 1998 (Official Gazette of the Republika Srpska, Nos. 38/98, 12/99, 31/99 and 65/01).

24. Article 2 of the Law states in relevant part:

“(…) 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.

(…) An occupancy right holder to an apartment as at 1 April 1992, who agreed to the cancellation of his/her occupancy right and who subsequently received another occupancy right which is cancelled under this Article, is entitled to make a claim for repossession of his/her former apartment in accordance with this Law.”

25. Article 16 states:

“A claim for repossession of the apartment may be filed within 16 months from the date of entry into force of this Law.

If the occupancy right holder does not file a claim within the time limit referred to in the previous paragraph, his/her occupancy right shall be cancelled”.

26. On 29 December 2001 amendments to the Law imposed by the High Representative on 4 December 2001 entered into force (OG RS 65/01). Among these amendments, a new Article 2a was inserted, which applies in all cases where contracts on exchange of socially owned property were concluded between 1 April 1992 and 19 December 1998. According to the first sentence of paragraph 5 of Article 2a, whenever there is a dispute as to the validity of the contract on exchange, the authorities are obliged to suspend the proceedings and refer the parties to a court for resolution.

Article 2a reads in full:

“The provisions of this Law shall also apply to contracts on exchange of apartments, where the exchange took place between 1 April 1992 and 19 December 1998 in accordance with the Law on Housing Relations (RS OG 19/93, 22/93, 12/99 and 31/99) (hereinafter “ZOSO”).

In the event that each party to the contract on exchange filed a claim for repossession before the expiry of the deadline set out in Article 16, the competent authority shall process the

claims according to this Law. Notwithstanding, the competent authority in each municipality shall deem the exchange valid, if both parties give a statement reconfirming the contract on exchange, and shall revalidate the contracts on use pursuant to Article 27 paragraph 2, point 4 of this Law.

In the event that neither party to the contract on exchange filed a claim for repossession before the expiry of the deadline set out in Article 16, the competent authority in each municipality shall revalidate the contracts on use pursuant to Article 27 paragraph 2, point 4 of this Law.

In the event that only one party to the contract on exchange filed a claim for repossession before the expiry of the deadline set out in Article 16, the competent authority shall inform in writing the corresponding competent authority in the municipality where the exchanged apartment is located of the claim. The receiving competent authority shall then deem a claim to have been filed, before the expiry of the deadline set out in Article 16, for the exchanged apartment within its jurisdiction and process the claim according to the law.

In case of a dispute as to the validity of the contract on exchange, the competent authority shall suspend proceedings and shall refer the parties to the competent court according to the provision of the Law on General Administrative Procedures (SFRJ OG 47/86; taken over by Article 12 of the Constitutional Law on Implementation of the Constitution of the Republika Srpska, RS Official Gazette, No. 21/92) regulating preliminary issues, in order to rule on the allegation. Notwithstanding the provisions of the Law on Civil Procedures (SFRJ OG 4/77; taken over by Article 12 of the Constitutional Law on Implementation of the Constitution of the Republika Srpska, RS Official Gazette, No. 21/92), the burden of proof shall lie upon the party claiming to have acquired rights to the apartment through the contract on exchange to establish that the transaction was conducted voluntarily and in accordance with the law. Where one of the exchanged apartments is located in the territory of another republic of the former SFRY, the burden of proof shall lie upon the party claiming that the contract on exchange was not conducted voluntarily and in accordance with the law to demonstrate that the status of the parties prior to the exchange shall be restored.”

V. COMPLAINTS

27. The applicant alleges violations of his rights as protected by Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention. The applicant also complains of violations of his “right to appeal” and remedies at his disposal and of his right to a fair trial.

VI. SUBMISSIONS OF THE PARTIES

A. The Republika Srpska

28. According to its observations of 29 March 2002 the respondent Party is of the opinion that the application before the Chamber is premature, since proceedings are pending before the First Instance Court in Banja Luka. Therefore domestic remedies available to the applicant to confront his forcible eviction from the apartment in Banja Luka have not been exhausted, as required by Article VIII paragraph 2(a) of the Agreement.

29. The respondent Party further states that in the present case the Ministry for Refugees and Displaced Persons – Department in Banja Luka, suspended the proceedings in accordance with the provisions of the Law on General Administrative Procedure until conclusion of the proceedings instituted by the applicant before the Court of First Instance in Banja Luka. It concludes that the Ministry for Refugees and Displaced Persons – Department in Banja Luka took into account the new legal situation pursuant to the entry into force of the new Article 2a of the Law on Cessation of the Application of the Law on Use of Abandoned Property, resulting in suspension of the forcible eviction of the applicant from the apartment in Banja Luka until the conclusion of civil proceedings before the

domestic court. In this respect, the respondent Party submits that domestic remedies have been effective in protecting the applicant.

B. The applicant

30. In his reply to the respondent Party's observations of 22 April 2002, the applicant contests the arguments of the respondent Party and argues that only the Chamber's Order for Provisional Measures prevented his eviction. He states that, despite the Chamber's order for provisional measures, and the entry into force of Article 2a, there were still attempts to evict him.

31. As to the respondent Party's submission that the application before the Chamber is premature since there is an action filed with the First Instance Court in Banja Luka, the applicant points out that although the action was filed on 24 May 2001, the first hearing has still not been officially scheduled.

32. For these reasons the applicant requests the Chamber not to withdraw its order for provisional measures until either the conclusion of the proceedings before the Chamber or before the regular court.

C. Submissions of the Organization For Security and Cooperation in Europe – Mission to BiH and of the Office of the High Representative as *amici curiae*

33. OSCE and OHR made joint *amicus curiae* submissions both orally at the public hearing and in writing.

34. The *amici curiae* argue that automatic suspension of eviction proceedings, when a court dispute concerning the validity of the exchange contract has been filed in accordance with Article 2a, is obligatory. The legislator has allocated the burden of proof in exchange contract cases so as to reflect the assumption that most wartime exchanges were concluded under duress and therefore invalid. On the other hand, the law requires case-by-case court consideration of the validity of wartime exchanges, rather than annulling them all *ex lege*. This indicates the legislator's assumption that some wartime exchanges were valid. In these cases, failure to suspend would cause an effectively wrongful eviction that would not be remedied until the court decision upholding the contract becomes valid (*pravosnažno*). Cancellation of all contracts *ex lege*, and the consequent possibility of the parties to revalidate only those contracts on exchange where agreement of both parties exists, would cause legal insecurity, since an exchanged property in numerous instances was subsequently disposed of, to a third party.

35. *Amici curiae* further submitted, regarding socially owned property as in the present case, that those who repossess should not be entitled to privatize their apartments pending court determination of the validity of the exchange. It is unclear whether legal safeguards to prevent such purchase are sufficient and whether legal safeguards are sufficient to prevent those who have repossessed from missing the deadline to request purchase because of the pending dispute. As it is not possible to predict the outcome of the court proceedings and assume that the court would find such contracts invalid in each case, it would be unreasonable to allow immediate repossession before the completion of the court procedure.

36. *Amici curiae* further drew the Chamber's attention to the question whether the automatic suspension of evictions required by Article 2a applies in cases where the preliminary issue of the validity of the exchange contract was no longer pending before the administrative organ when Article 2a entered into force, i.e. the procedural decision on the pre-war occupancy right holder's right to repossess was issued before 29 December 2001. They pointed out that Article 2a came into force on 29 December 2001 and that it does not have retroactive effect. Thus, Article 2a would only apply to situations where the decision on the merits by the administrative body was not issued yet. In that case, Article 2a will prevent the administrative body from making a decision since there is a preliminary issue and therefore the parties should go to the courts. However, in cases like the applicant's, where the administrative decisions on property return were issued before 29 December 2001, the *amici curiae* pointed out that the applicability of Article 2a is problematic, since the

decisions on the merits was completed and became final in the administrative procedure before the entry into force of Article 2a. The *amici curiae* submit that the obligation to suspend proceedings in Article 2a cannot be invoked in such situations. They further state that although the Law on General Administrative procedure provides possibilities for suspension and interruption or termination of enforcement, none of those legal provisions applies in the present case, unless the party goes to the court and requests a provisional measure.

37. The *amici curiae* concluded that as of 29 December 2001 there are two situations. Firstly, situations where the decision on the repossession of an occupancy right or private property was not yet made and thus the procedure before the administrative body was not yet completed. In these cases the administrative body should suspend the procedure and instruct the parties to go to the court in accordance with Article 2a. Secondly, situations where the decision was already issued prior to 29 December. As a consequence, the occupancy right was confirmed or private property ordered to be returned and the decision on the merits became final in the administrative procedure. Suspension of enforcement in this category of cases, to which the applicant's case belongs, could only be obtained through a Court.

38. The *amici curiae* stated that it is also a question of interpretation of the word "final". Article 265 of the Law on General Administrative Procedures, which relates to the suspension of enforcement, regulates situations where the administrative enforcement can be either terminated (obustavljeno) or suspended (prekinuto, odnosno odloženo), and decisions issued before Article 2a came into force, before 29 December 2001, became final in administrative procedure. Further, the *amici curiae* pointed out that Article 2a does not speak of the suspension of the eviction, but of the suspension of the administrative procedure. The wording of Article 2a was taken from the provisions on preliminary issues in the Law on General Administrative Procedure, and a preliminary issue is a situation where the administrative body cannot issue a decision on the merits because there is another legal question pending and a court needs to solve the issue.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Exhaustion of domestic remedies

39. 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.

40. The respondent Party submits that the application should be rejected since the applicant failed to exhaust available domestic remedies (see paragraph 28 above). The applicant argues that the remedies available could not be considered as "effective" within the meaning of the Agreement.

41. The Chamber finds it useful to distinguish between the exhaustion of available remedies against the threat of eviction (right to respect for the applicant's home under Article 8 of the Convention) and remedies against the deprivation of the occupancy right over the apartment which the applicant obtained by the exchange contract (right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention).

a) Remedies against the alleged violation of the applicant's right to respect for his home

42. The Chamber notes that notwithstanding the entry into force of Article 2a of the Law on Cessation of the Application of the Law on Use of Abandoned Property on 29 December 2001, which provision is ambiguous and lends itself to different interpretations (see paragraph 56 below), the applicant's eviction was scheduled for 14 March 2002. It was under those circumstances that the Chamber decided to issue its order for provisional measures on 13 March 2002, the day before the eviction.

43. The respondent Party argues that the Ministry for Refugees and Displaced Persons – Department in Banja Luka, suspended the proceedings in accordance with the provisions of the Law on General Administrative Procedure until conclusion of the proceedings instituted by the applicant before the Court of First Instance in Banja Luka on 24 May 2001. The respondent Party also submits that the Ministry for Refugees and Displaced Persons – Department in Banja Luka took into account the new legal situation pursuant to the entry into force of the new Article 2a, resulting in suspension of the forcible eviction of the applicant from the apartment in Banja Luka until the conclusion of civil proceedings before the domestic court. It also notes the Ministry for Refugees and Displaced Persons recommendation of 11 March 2002 stating that, in view of the provisions of Article 2a paragraph 5, it proposed to the administrative body to postpone the eviction pending the conclusion of the civil proceedings before the Court of First Instance in Banja Luka.

44. The Chamber observes, however, that on 11 March 2002 the Ministry for Refugees and Displaced Persons of RS only issued a recommendation to the Banja Luka Department of the Ministry to postpone the eviction scheduled for 14 March 2002. Since then, nine months have passed and, although de facto no eviction has taken place, the Banja Luka Department of the Ministry has not formally issued any decision revoking or suspending the conclusion on permission of enforcement of 22 August 2001. The threat of eviction, therefore, would appear to remain imminent.

45. The Chamber thus is of the opinion that the applicant does not have effective remedies at his disposal.

b) Remedies against the alleged violation of Article 1 of Protocol No. 1 to the Convention

46. As to the applicant's complaint of a violation of his rights as protected by Article 1 of Protocol No. 1 to the Convention, the Chamber notes that the applicant's complaint is premature as the proceedings concerning the validity of the exchange contract (and thus the applicant's rights over the apartment he occupies) are still pending before the First Instance Court in Banja Luka. Accordingly, the domestic remedies have not been exhausted as required by Article VIII(2)(a) of the Agreement. The Chamber therefore decides to declare the application inadmissible in this part.

c) Admissibility with regard to the alleged violation of Article 6

47. As to the applicant's complaint under Article 6, the Chamber notes that he has failed to explain in what respect the proceedings before the Court of First Instance in Banja Luka violate his right to a fair hearing within a reasonable time. Therefore, the Chamber finds that this part of the application is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare the application inadmissible in this part.

2. Conclusion as to admissibility

48. The Chamber finds that no other ground for declaring the cases inadmissible has been established. Accordingly, the Chamber declares the application admissible in relation to Articles 8 and 13 of the Convention. The Chamber declares the remainder of the application inadmissible.

B. Merits

49. 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.

50. The applicant complains that his rights as contained in Article 8 and 13 of the Convention have been violated.

1. Article 8 of the Convention

51. Article 8 of the Convention provides 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.

52. It is undisputed that the applicant has been living in the apartment at 7B Radoja Domanovića in Banja Luka since the end of 1992. It has thus become the applicant's home for the purposes of Article 8 of the Convention. The order of the Banja Luka Department of the Ministry to vacate the apartment therefore undoubtedly constitutes an interference with his right to respect for his home, insofar as it can be established that there was a threat of forcible execution of that order.

(a) Whether the applicant was under an imminent threat of eviction

53. The Chamber recalls that the applicant's eviction was scheduled for 14 March 2002. The Chamber further recalls that on 11 March 2002 the Ministry for Refugees and Displaced Persons of RS recommended to the Banja Luka Department of the Ministry that, in view of the provisions of Article 2a paragraph 5, the administrative body postpone the eviction pending the conclusion of the civil proceedings before the Court of First Instance in Banja Luka. The Chamber however, points out that it is unclear whether such recommendation has any legal binding character. As a matter of fact, the Banja Luka Department of the Ministry failed to act upon the Ministry's recommendation and the conclusion on permission of enforcement against the applicant remains in force, its implementation being blocked only by the Chamber's order for provisional measures. The Chamber thus concludes that there is an interference with the applicant's right to home.

54. The Chamber recalls that the conditions upon which a state may interfere with the right to respect for one's home are set out in the second paragraph of Art. 8. It must accordingly be determined whether the interference in question satisfied the conditions in paragraph 2, that is to say was "in accordance with the law", in the interests of one or more of the legitimate aims listed, and "necessary in a democratic society" for achieving them. Further, a proper balance needs to be achieved between the legitimate aim pursued and the means employed.

(b) Is this threat of eviction "in accordance with the law"?

55. The Chamber observes that domestic legality is a necessary condition for the justification of an interference with Article 8 of the Convention and that in order to be "in accordance with law" the interference complained of must have a legal basis and the law in question must contain a measure of protection against arbitrariness by public authorities. The European Court has considered that the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law.

56. The Chamber notes that the Banja Luka Department of the Ministry proceeded on the assumption that Article 2a is not applicable to the applicant's case and scheduled the eviction. In the proceedings before the Chamber, the respondent Party has not taken any clear stance as to the applicability of Article 2a. *Amici curiae* interpret Article 2a in the sense that it should not apply in the present case, since the decision on the merits in the administrative proceedings became final before the entry into force on 29 December 2001 of the 4 December 2001 amendments. Therefore, interpreting Article 2a in the light of the provisions on preliminary issues in the Law on General Administrative Procedure, Article 2a would not cover enforcement proceedings (see paragraphs 30-33 above). Thus, following the interpretation both of the *amici curiae* and of the Banja Luka Department of the Ministry as to the applicability of Article 2a, the administrative body felt it was not under an

obligation to suspend the enforcement proceedings until the court dispute over the validity of the exchange is finalised.

57. The Chamber provisionally concludes that the continuation of the enforcement proceedings against the applicant could be regarded as in accordance with the ordinary domestic laws. However, in interpreting domestic law it is necessary to take into account the provisions of the Convention. The Chamber will therefore revert to this question later in the decision (see paragraph 69 below).

c) Whether the interference with the applicants rights pursues a legitimate aim under paragraph 2 of Article 8, i.e. 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

58. The Chamber notes that the right of displaced persons and refugees to repossess and return to their pre-war property is one of the central objectives of the Dayton Peace Agreement. It further notes that the Republika Srpska Law on the Cessation of the Application of the Law on the Use of Abandoned Property is based on the recognition that the failure to return property to rightful owners or occupancy right holders represents a violation of the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention. The Law acknowledges that return of property is essential to the creation of durable solutions for refugees and displaced persons. This can take the form of either actual return to the property or sale of the property in order to finance one's own local integration elsewhere, through purchase or rental of a home that does not belong to someone else.

59. On these grounds, the Chamber finds that the recognition of the pre-war occupancy right holder's right to repossess the apartment and the consequential order to the applicant to vacate it are supported by a legitimate aim, i.e. "the protection of the rights and freedoms of others".

d) Is the interference necessary in a democratic society for the protection of the rights and freedoms of others, i.e. is there a proper balance between the legitimate aim pursued and the means employed?

60. Thus, the question before the Chamber is whether the interference with the applicant's right is "necessary in a democratic society", in other words, whether the respondent Party strikes the right balance between the "protection of the rights and freedoms of others", in this case S.T., and the applicant's right to respect for his home by ordering the applicant to vacate the apartment, and evicting him in case of non-compliance, before the dispute about the validity of the contract pending before the competent court is solved.

61. The Chamber notes that paragraph 5 of Article 2a of the Republika Srpska Law on the Cessation of the Application of the Law on the Use of Abandoned Property, in allocating the burden of proof as to the voluntariness of the exchange contract on the applicant, contains a presumption that war-time exchanges were concluded under duress.

62. The Chamber also notes that the Constitutional Court of Bosnia and Herzegovina in its decision in case No. U 15/99 declared null and void an exchange contract because of duress, as evidenced by the general war situation. It stated that: "in the context of the General Framework Agreement, the objective of eliminating the effects and traces of ethnic cleansing is considered to be of such primary importance as to affect in some cases the validity of legal transactions which would otherwise have satisfied the requirements under private law". The rationale was found in Annex 7 of the Dayton Peace Agreement, and the important aim of "the return of refugees and displaced persons to their places of origin and to their previous homes". The Constitutional Court also based its decision on the general presumption that, during the war period, exchange contracts "were concluded under the influence of the individuals' vulnerable position as members of an ethnic minority at a time when a policy of ethnic cleansing was being pursued in large parts of Bosnia and Herzegovina."

63. The Chamber accepts that there is a general presumption of lack of voluntariness and freedom of choice for transactions concluded during the critical period. However, this presumption is

rebuttable and still requires a case by case approach in establishing duress or lack thereof. It is exactly because there is a presumption of duress and not a cancellation of all contracts *ex lege* that court proceedings are needed. Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina indeed suggests that exchange contract cases should be dealt with on an individual basis, assessing the particular circumstances of each case. For this task Annex 7 even provides for the establishment of a body, the CRPC, that among other tasks is mandated to decide on individual claims “where the property has not voluntarily been sold or otherwise transferred since April 1, 1992 (...)” (Article XI of Annex 7). Further, the CRPC “shall not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing.” (Article XII Annex 7). CRPC, however, has chosen to delegate determination of the validity of post 1 April 1992 transfers to the local courts.

64. For individuals that did not claim through CRPC but only through the administrative process, as in the present case, the Republika Srpska Law on the Cessation of the Application of the Law on the Use of Abandoned Property, following the same interpretation of Annex 7 of the Dayton Peace Agreement, provides in paragraph 5 of Article 2a for an assessment of duress on a case by case basis through the courts.

65. The applicant initiated proceedings before the First Instance Court in Banja Luka on 24 May 2001 in order to obtain a court ruling on the validity of the contract on exchange he concluded. These proceedings are still pending. Meanwhile, the administrative enforcement proceedings against the applicant have been proceeding as if this court action had not been filed.

66. The Chamber also observes that under the current legal framework, it is unclear whether the pre-war occupancy right holder, once he has regained possession of the apartment, could seek to privatize the exchanged apartment immediately upon repossession. In case the courts later upheld the exchange contract, the prior purchase, if successful, would then have to be annulled in a further court proceeding before the valid exchange contract could be implemented.

67. The Chamber notes that if execution is not suspended (including the eviction) pending the court decision there may be some risk that the pre-war occupancy right holder could privatize the exchanged apartment. The RS Law on Privatization of State-Owned Apartments (RS Official Gazette, no. 11/00, 18/01, and 35/01) sets out entitlements of occupancy right holders to purchase their socially owned apartments. Article 37, paragraph 2 of the Law states, inter alia, that occupancy right holders who left the apartment between 30 April 1991 and 19 December 1998 and subsequently repossessed their properties have the right to purchase it within one year of repossession. Other provisions seem to set out general deadlines and conditions to seek purchase that could be interpreted as limiting the possibility of purchase (see e.g. Articles 13, 9 paragraph 2 and 37). Nevertheless, given the element of vagueness of these provisions, there is a risk that, without suspension, a party to a disputed exchange contract might repossess, purchase, and register ownership in the land books prior to a court decision on the validity of the exchange contract. This risk is heightened by widespread evidence in Bosnia and Herzegovina of past failure to respect legal provisions on revalidation and purchase of apartments that have necessitated the current sweeping revalidation review process. The risk that S.T., if reinstated into possession of the apartment, could privatize and sell it to a third party, increases the burden placed on the applicant by the administrative enforcement notwithstanding the pending court dispute.

68. The Chamber finds that the continuation of the enforcement proceedings against the applicant, aiming at evicting him from the apartment he has been living in for ten years, without any consideration of the court dispute initiated by him to show the validity of the contract in his case, coupled with the risk of privatization of the apartment under dispute, fails to strike a fair balance between the protection of the rights of the pre-war occupant and those of the applicant.

69. The Chamber also notes that according to Article II(2) of the Constitution of BiH: “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law”. This constitutional provision implies that administrative and judicial bodies should attempt to interpret the laws so as to make their application compatible with the

Convention. If such interpretation is not possible, they should directly apply the Convention in priority over any other law. In the present case, an extensive interpretation of the first sentence of paragraph 5 of Article 2a, so as to cover also the applicant's case, was possible. Such an interpretation would have brought the application of that provision in the applicant's case in line with Article 8 of the Convention. The Chamber observes that, in light of the Article II(2) of the Constitution, this would have been the correct interpretation of the law. The Chamber therefore concludes that the failure to interpret the first sentence of paragraph 5 of Article 2a so as to cover also the applicant's case, and to accordingly suspend the applicant's eviction, was not "in accordance with the law".

70. The Chamber therefore decides that there has been a violation of Article 8 of the Convention.

2. Article 13 of the Convention

71. Article 13 of the Convention provides as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

72. The applicant also complains that his rights under Article 13 have also been violated. The Chamber, however, in view of the conclusions it has reached in relation to Article 8 of the Convention referred to above, finds it unnecessary to examine the application in relation to Article 13 of the Convention.

VIII. REMEDIES

73. 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 established breaches of the Agreement. In this regard the Chamber shall consider issuing orders to cease and desist, monetary relief, as well as provisional measures.

74. The Chamber notes that it has found a violation of the applicant's right to respect for his home as guaranteed by Article 8 of the Convention.

75. The Chamber further notes that according to Article II(2) of the Constitution of Bosnia and Herzegovina, "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law". This constitutional provision implies that administrative and judicial bodies should make an effort to interpret laws so as to make their application compatible with the Convention. In the present case, an extensive interpretation of the first sentence of paragraph 5 of Article 2a was possible, which would have brought that provision in line with Article 8 of the Convention. In light of the Constitutional provision, this was the correct interpretation of the law and enforcement proceedings should have been suspended pending the court decision.

76. In these circumstances, the Chamber finds it appropriate to order the respondent Party to take necessary action to ensure that in the applicant's case all administrative proceedings, including enforcement proceedings, are suspended pending the decision of the judiciary as to the validity of the exchange contract.

IX. CONCLUSIONS

77. For the above reasons, the Chamber decides:

1. unanimously, that the application is admissible against the Republika Srpska with respect to the complaints under Articles 8 and 13 of the Convention;

2. unanimously, that the remainder of the application is inadmissible;

3. by 12 votes to 1, that the Republika Srpska has violated the right of the applicant to respect for his home as guaranteed by Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that it is not necessary to examine whether there has been a violation of the applicant's rights protected by Article 13 of the European Convention on Human Rights;

5. by 12 votes to 1, to order the Republika Srpska to take necessary action to ensure that in the applicant's case all administrative proceedings, including enforcement proceedings, are suspended pending the decision of the judiciary as to the validity of the exchange contract;

6. unanimously, to order the Republika Srpska to report to the Chamber by 10 March 2003 on the steps taken to comply with this decision.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber