



**DECISION ON ADMISSIBILITY AND MERITS**  
(delivered on 7 March 2003)

**Case no. CH/02/12421**

**Safija KULOVAC**

**against**

**THE FEDERATION OF BOSNIA AND HERZEGOVINA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 6 February 2003 with the following members present:

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

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 Article VIII(2) and XI of the Agreement and Rules and 52, 57 and 58 of the Chamber's Rules of Procedure:

## **I. INTRODUCTION**

1. This case concerns the applicant's eviction from an apartment in Sarajevo which she had been living in since 1996, however without any written contract. She complains of the fact that she has no legal recourse to stop the ordered eviction from her home. The applicant alleges a violation of her right to an effective remedy in connection with the right to respect for her home.

## **II. PROCEEDINGS BEFORE THE CHAMBER**

2. The application was received on 8 November 2002 and registered on the same day.
3. The applicant requested that the Chamber order the respondent Party, as a provisional measure, to take all necessary steps to prevent her eviction from the apartment in question.
4. The Chamber considered the request for provisional measures at its session on 9 November 2002 and decided to refuse the request. At the same time, the Chamber decided to transmit the application to the respondent Party for observations on the admissibility and merits under Articles 8 and 13 of the European Convention on Human Rights (hereinafter "the Convention").
5. The application was transmitted to the respondent Party on 14 November 2002 and the respondent Party submitted its observations on the admissibility and merits on 3 December 2002.
6. The applicant submitted additional information to the Chamber on 13 November 2002, 3 December 2002, and 20 January 2003.
7. The Chamber deliberated on the admissibility and merits of the application on 9 November 2002, 6 January 2003, and 6 February 2003, and it adopted this decision on the latter date.

## **III. ESTABLISHMENT OF THE FACTS**

8. The facts of the case as they appear from the applicant's submissions and the documents in the case file, are not in dispute, and may be summarised as follows.
9. At the time of her application, the applicant occupied an apartment at 18/III Josipa Vancaša in Sarajevo, where she had been living with her family since September 1996. The allocation right holder of the apartment is Centar Municipality. The applicant did not possess any document authorising her to occupy the apartment, although the applicant alleges that she had received the oral permission from the allocation right holder, Centar Municipality.
10. On 15 August 2001, the Canton Sarajevo Administration for Housing Affairs– Section Centar and Stari Grad, issued a certificate confirming that the pre-war occupancy right holder, D.A. had never filed a request for repossession of the apartment.
11. On 31 December 2001, the applicant filed a request with the owner of the apartment, Centar Municipality, for allocation of the apartment in question for permanent use.
12. On 27 September 2002, the Municipality Centar Service for the Administration of Housing Affairs issued a certificate stating that the applicant meets all the conditions for allocation of the apartment, and that her claim would be considered at one of the next sessions of the Commission for Allocation of Apartments. The certificate also noted that that the applicant and her family had occupied the apartment in question since September 1996.
13. On 17 October 2002, the Canton Sarajevo Administration for Housing Affairs, *ex officio*, issued a procedural decision confirming that the applicant uses the apartment in question without a legal basis and ordering the applicant to leave the apartment at 18/III Josipa Vancaša within 15 days

from the date of delivery of the procedural decision. The procedural decision also states that an appeal has no suspensive effect. In the explanatory part of the procedural decision, it is noted that the applicant uses the apartment in question without a legal basis, and that therefore, according to Article 3, paragraph 3 of the Law on Cessation (see paragraph 22 below), the applicant is required to vacate the apartment and is not entitled to alternative accommodation. Additionally, the procedural decision notes that on 30 April 1991 the applicant lived in Zupčići, Goražde Municipality, in her father's house as a member of the family household. The mentioned house was reconstructed by the International Rescue Committee. Furthermore, the applicant has a monthly income which is deemed sufficient for her to provide for her own housing needs.

14. On 7 November 2002, the applicant received a request from the Municipality Centar Service for the Administration of Housing Affairs to provide additional documentation regarding her request for allocation of the apartment for permanent use.

15. On 8 November 2002, the applicant filed an appeal against the procedural decision of the Canton Sarajevo Administration for Housing Affairs of 17 October 2002. Those proceedings are still pending.

16. On 13 November 2002, the Canton Sarajevo Administration for Housing Affairs issued a Conclusion authorising the execution of the procedural decision of 17 October 2002. Accompanying the Conclusion was a letter informing the applicant that an eviction was scheduled for 9 December 2002.

17. On 7 January 2003, the Chamber requested the respondent Party to provide information as to who was using the apartment since the eviction of the applicant.

18. On 20 January 2003, the applicant informed the Chamber that she left the apartment in question on the day of the eviction, and is now renting an apartment in Sarajevo.

#### **IV. RELEVANT DOMESTIC LAW**

##### **A. The Law on the Cessation of the Application of the Law on Abandoned Apartments**

19. The Law on the Cessation of the Application of the Law on Abandoned Apartments ("the Law on Cessation") entered into force on 4 April 1998 and has been amended on several occasions thereafter (Official Gazette of the Federation of Bosnia and Herzegovina nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01 and 15/02). The Law on Cessation repealed the former Law on Abandoned Apartments.

20. According to the Law on Cessation, the competent authorities may make no further decisions declaring apartments abandoned (Article 1). All administrative, judicial and other decisions terminating occupancy rights based on regulations issued under the old law are invalid. Nevertheless, decisions establishing a right of temporary occupancy shall remain effective until revoked in accordance with the Law on Cessation.

21. All occupancy rights or contracts on use made between 1 April 1992 and 7 February 1998 were cancelled (Article 2, paragraph 3). A person occupying an apartment on the basis of a cancelled occupancy right or decision on temporary occupancy is to be considered a temporary user (Article 2, paragraph 3). A temporary user who does not have other accommodation available to him or her has the right to a new contract on use, or an extension of the temporary use of the apartment, when the occupancy right of the former occupancy right holder is cancelled or the claim rejected (Article 2, paragraph 4).

22. Article 3, paragraph 3 provides that a person using the apartment without a legal basis shall, *ex officio*, be evicted immediately, or at the latest within 15 days, and the competent authority shall not be obliged to provide alternative accommodation to such persons.

**B. The Law on Housing Relations**

23. The Law on Housing Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina, nos. 14/84, 12/87, 36/89; Official Gazette of the Republic of Bosnia and Herzegovina, no. 2/93; Official Gazette of the Federation of Bosnia and Herzegovina, nos. 11/98, 38/98 12/99 and 19/99), in Article 11, provides that a contract on use shall establish the lawfulness of the use of the apartment, when the contract on use was concluded in accordance with the appropriate act, provided that the said act represents a valid legal ground for occupation of the apartment.

**C. The General Framework Agreement for Peace in Bosnia and Herzegovina – Annex 7, Agreement on Refugees and Displaced Persons**

24. Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina, entitled Agreement on Refugees and Displaced Persons, deals with refugees and displaced persons. Article I paragraph 1 of Annex 7 provides that:

“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 the 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. ...”

**V. COMPLAINTS**

25. The applicant alleges violations of her right to an effective remedy under Article 13 of the Convention, in connection with her right to respect for her home under Article 8 of the Convention.

**VI. SUBMISSIONS OF THE PARTIES**

**A. The respondent Party**

26. In its observations of 3 December 2002, the respondent Party did not contest any of the facts as the applicant had presented them.

27. As to the admissibility of the application, the respondent Party considers the application premature, pointing out that the applicant filed an appeal to the second instance body against the procedural decision ordering her to move out of the apartment, and in case of a negative outcome in the proceedings on the appeal, she could initiate an administrative dispute.

*Article 8 of the Convention*

28. The respondent Party notes that the question at issue is whether the apartment concerned at Josipa Vancaša street no. 18/III is the applicant's “home”, within the meaning of Article 8 of the Convention. The respondent Party alleges that it has information that the competent department in Centar Municipality requested the Office of the High Representative for its legal opinion as to how to resolve such cases; specifically, how to proceed when there is no claim for repossession and the occupancy right holder left the apartment prior to the relevant date of 30 April 1991. The respondent Party considers the legal opinion of the Office of the High Representative to be decisive in determining whether or not the apartment can be considered the applicant's “home”. As the Office of the High Representative has not provided its legal opinion, the respondent Party considers the application as premature, as the applicant should have waited for this legal opinion.

*Article 13 of the Convention*

29. With regard to Article 13 of the Convention, the respondent Party points out that the applicant had the possibility to appeal the first instance decision, which she did. The outcome of those proceedings will depend on the well-foundedness of the appeal. The respondent Party holds that as a system of appeals is in place and available to the applicant, there has been no violation under Article 13 of the Convention.

**B. The applicant**

30. The applicant states that she considers the apartment in question her home, and has lived there since September 1996 with the oral permission of the allocation right holder, Centar Municipality. The applicant also points out that upon her request to be allocated the apartment for permanent use, she had received information from Centar Municipality that she met all the conditions. Later she was requested to submit certain documentation related to her housing situation, which she did.

31. The applicant alleges that her human rights are violated because the eviction will be carried out without a court decision or appropriate court proceedings in accordance with human rights standards. Specifically, the applicant alleges that the fact that her appeal does not stop the eviction calls into question the effectiveness of the remedies available to her.

32. In her appeal of the procedural decision of 17 October 2002 to the Cantonal Ministry for Housing Affairs, the applicant states that the facts were not correctly established. Firstly, she alleges that she uses the apartment with the permission of Centar Municipality. Secondly, she alleges that her father's house was rebuilt specifically for use by three persons in her father's family, and she is not one of them. The applicant also alleges that Article 3, paragraph 3 of the Law on Cessation was incorrectly applied to her because the pre-war occupancy right holder had never filed a claim to repossess the apartment.

**VII. OPINION OF THE CHAMBER****A. Admissibility**

33. 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. Applicable to this case, under Article VIII(2)(a) of the Agreement, the Chamber shall consider, "whether effective remedies exist, and the applicant has demonstrated that they have been exhausted ...."

34. The Chamber notes that the applicant filed the application while her appeal of the first instance decision was still pending. However, the main issue raised in the application is related to the scheduled eviction, and the fact that neither does her appeal prevent the eviction, nor is a court procedure required to implement the eviction. The applicant alleges that this shortened administrative procedure to execute an eviction is in violation of her right to an effective remedy and her right to respect for her home. As the applicant has shown that she had no remedy available to prevent her eviction, further administrative and court proceedings are futile as with regard to the implementation of the scheduled eviction. For this reason, the Chamber considers the application admissible.

35. As there are no other grounds for declaring the application inadmissible, the Chamber declares the application admissible with regard to Articles 8 and 13 of the Convention.

**B. Merits**

36. Under Article XI of the Agreement the Chamber must in the present decision address the question whether the facts found 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 recognized human rights and fundamental freedoms”, including the rights and freedoms provided for in the treaties listed in the Appendix to the Agreement.

37. The Chamber has considered the present case under Articles 8 and 13 of the Convention.

**1. Article 8 of the Convention**

38. Article 8 of the Convention provides as follows:

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

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.”

**a) Is the applicant’s apartment a “home” within the meaning of the Convention?**

39. The applicant and her family had been living in the apartment in question since September 1996. Her legal relationship with the apartment is not determinative of whether or not it can be considered her home; therefore, the fact that she is an “illegal occupant” according to the Law on Cessation, does not make it any less her “home” within the meaning of the Convention. The Chamber concludes that the apartment in question was her home for the purposes of Article 8 of the Convention.

**b) Is there an interference by a public authority with the exercise of the applicant’s right to respect for her “home”?**

40. The Canton Sarajevo Administration for Housing Affairs issued a procedural decision ordering the applicant to leave the apartment in 15 days. Thereafter, a conclusion on enforcement was issued authorising the implementation of that procedural decision, and an eviction was ordered for 9 December 2002. The procedural decision and resulting eviction clearly constitute an interference within the meaning of Article 8 of the Convention.

41. 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 Article 8 of the Convention. 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. Therefore, a proper balance needs to be achieved between the legitimate aim pursued and the means employed.

**c) Is the interference lawful?**

42. 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 of Human Rights 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 (see CH/02/9130, *Samardžić*, decision on admissibility and merits delivered on 10 January 2003, paragraph 46).

43. The interference in question was in accordance with the Law on Cessation, Article 3, paragraph 3, which requires housing bodies to, *ex officio*, evict occupants using the apartment

without a legal basis, and in accordance with Article 8, which provides that an appeal shall not stop the enforcement of a decision. Notwithstanding the fact that the applicant claims that she had an oral contract, the Chamber notes that she had no written contract on use in accordance with Article 11 of the Law on Housing Relations (see paragraph 23 above). The applicant also alleges that Article 3, paragraph 3 was incorrectly applied in her case because it is not applicable to unclaimed apartments. However, the Chamber does not agree with this interpretation. The provision makes no distinction as to whether the apartment is claimed or not. The Chamber finds that the proceedings ordering the eviction were lawful.

**d) Does the interference pursue a legitimate aim?**

44. The respondent Party did not provide any observations relating to the substance of the applicability of Article 8 of the Convention in this case.

45. The Chamber notes that the right of displaced persons and refugees to repossess and return to their pre-war property is a central objective of the Dayton Peace Agreement. It further notes that the Law on Cessation 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.

46. The Chamber refers to the *amicus curiae* submission of the Organisation for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina (“the OSCE”), dated 5 November 2002, submitted in a similar case pending before the Chamber (see case no. CH/02/8939, *M.H.*, decision on admissibility and merits, adopted 6 February 2003) which outlines the purposes of the particular provisions in the Law on Cessation relevant to the facts at hand. The OSCE submits that the provisions in the Law on Cessation authorising such an eviction are aimed at protecting the “rights and freedoms of others”,

“The “others”, in this case, are the thousands of pre-conflict owners and occupancy right holders of the properties involved, which should have been returned to them years ago according to the property laws. The practical, (though not legally valid) excuse for this failure is lack of alternative accommodation. Because unclaimed apartments are the most inherently appropriate and readily available form of alternative accommodation (see section III.B.1, below), there is a direct link between the public purpose of protecting the right of pre-conflict owners to repossess their property and the challenged procedure for securing unclaimed apartments as alternative accommodation. In practice, every unclaimed apartment that is made available translates into at least one and possibly numerous repossessions of property of refugees and displaced persons” (CH/02/8939, *M.H.*, decision on admissibility and merits, adopted 6 February 2003, paragraph 41, quote from the OSCE Submission of 5 November 2002, p. 4).

47. Thus, despite the fact that the apartment was unclaimed, and the applicant’s eviction was not facilitating the return of the pre-war occupancy right holder to the apartment, the apartment should nevertheless be used to provide much-needed alternative accommodation for persons who are legally entitled. This will in turn facilitate the return of displaced persons and refugees to their pre-war homes. The Chamber can accept that this is a legitimate aim of the legal provisions in question.

**e) Is the interference necessary in a democratic society?**

48. The Chamber must consider whether the interference in question strikes the proper balance between the aim of protecting the “rights and freedoms of others”, and the applicant’s right to respect for her home. This analysis should take into account (i) the urgency of the legitimate interest pursued, (ii) the burden placed on the applicant and (iii) the procedural safeguards afforded to the applicant. In balancing these elements the Chamber will also take into due account the margin of appreciation the respondent Party enjoys in this area of social policy.

*i. The urgency of the legitimate aim pursued*

49. The OSCE reports that as of September 2002 nearly 100,000 property claims remain unresolved, which represents “up to 100,000 families who still remain displaced and unable to repossess their pre-war homes” (OSCE submission of 5 November 2002, p. 10, submitted in case no. CH/02/8939, *M.H.*, decision on admissibility and merits, adopted 6 February 2003). The Chamber recalls that the housing authorities are obligated to provide alternative accommodation to those legally entitled to it, although lack of alternative accommodation should not prevent the enforcement of a decision granting the pre-war occupancy right holder or owner the right to return to their home. In practice however, the Chamber is aware that housing authorities are reluctant to implement a decision if it requires evicting a family who is entitled to alternative accommodation, when no alternative accommodation is available. This lack of alternative accommodation is the primary obstacle in the resolution of the outstanding property claims. As the OSCE states,

“...Every unclaimed apartment made available is a precious resource, allowing additional cases to be solved with minimum budgetary expenditure and maximum speed. In turn, each case solved brings BiH one step closer to resolving its greatest ongoing human rights violation and allows one family to freely exercise its Annex 6 and 7 right.

Granting suspensive effect to an appeal of a housing authority determination of multiple occupancy could have the effect of nullifying the provisions allowing housing officials to use unclaimed apartments as alternative accommodation. Most temporary users could be expected to appeal (particularly if doing so would allow them to remain in the unclaimed apartment) and the appeals process in the Federation can last for months and even years“ (see case no. CH/02/8939, *M.H.*, decision on admissibility and merits, adopted 6 February 2003, paragraph 62, quoting from OSCE Submission of 5 November 2002, p. 7).

50. The Chamber concludes that there is a pressing and extensive social need for unclaimed apartments to be used as alternative accommodation to facilitate the resolution of the outstanding claims for repossession.

*ii. The burden placed on the applicant*

51. In balancing the burden to the applicant of the eviction with the “rights and freedoms of others”, the Chamber recalls that under national laws, the applicant had no right to remain in the apartment. Although the applicant claims that she received the oral consent of the allocation right holder, the Chamber attaches great importance to the fact that the applicant never obtained any authorisation to occupy the apartment which is legally relevant or in accordance with the legal provisions, (i.e. a written contract on use). The Chamber also recalls that in the procedural decision ordering her eviction, the Canton Sarajevo Administration for Housing Affairs, while not required to, also considered the particular situation of the applicant, namely that her 1991 family house had been rebuilt in Goražde, and that her monthly income is sufficient for her to provide for her own accommodation.

*iii. The procedural safeguards afforded to the applicant*

52. The Chamber notes that the applicant was not provided any procedural safeguards or opportunity to be heard before her eviction, and that the Law on Cessation does not provide that a temporary user be heard before an order to vacate the apartment is issued.

*iv. Conclusion*

53. The Chamber considers that the particular legislation in question, allowing the *ex officio* determination of the status of the applicant as an “illegal occupant” of an unclaimed apartment, and barring the suspensive effect of her appeal against that determination, are all measures which serve the significant public interest of providing alternative accommodation in order to resolve the thousands of outstanding housing claims in the most efficient manner possible. Given the margin of appreciation afforded to the respondent Party in this area of social policy, the Chamber concludes that the aim pursued and the means employed are on the whole proportional, and that, therefore,



there has been no violation of the applicant's right to respect for her home under Article 8 of the Convention.

## **2. Article 13 of the Convention**

54. 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."

55. At the outset, the Chamber recalls that it is not necessary for the applicant to show an actual violation of one of her Convention rights; it is sufficient that she has an arguable claim that such a violation has occurred (see case no. CH/97/40, *Galić*, decision of 12 June 1998, Decisions and Reports 1998, p. 149 et seq., paragraph 53 et seq., with further reference to case law of the European Court). As the present applicant had an arguable claim that the right to respect for her home had been violated, the Chamber will consider whether her rights under Article 13 of the Convention were violated in connection with her claim under Article 8 of the Convention, although it has not found a violation of Article 8 in isolation.

56. The jurisprudence of the European Court reveals several principles related to Article 13 of the Convention which may be relevant to the facts at hand. As set forth in *Aydin v. Turkey*, (Eur. Ct. HR, judgment of 25 September 1997, *Reports of Judgments and Decisions* 1997, paragraph 103) Article 13 of the Convention "guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention." No single remedy must entirely satisfy the requirements of Article 13 of the Convention, but the aggregate of remedies provided for under domestic law must do so (Eur. Ct. HR, *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A, no.61, paragraph 113).

57. In the present case, the applicant argues that, although she has filed an appeal against the procedural decision ordering her eviction, the non-suspensive effect of her appeal violates her rights under Article 13 of the Convention. The Chamber notes that it has already determined that the legislation in question, including its effects on the applicant, is compatible with the substantive provisions of the Convention. The applicant has the right to appeal the procedural decision and, *ex post facto*, the applicant could bring an action in court seeking remedies if it was later determined that she was wrongfully evicted from the apartment in question. In this manner, the applicant's rights could be fully restored to her. This being the case, the Chamber concludes that in the aggregate, the applicant has sufficient remedies available to her within the meaning of Article 13 of the Convention.

58. In light of the above, the Chamber concludes that the applicant's rights under Article 13 of the Convention have not been violated.

## **VIII. CONCLUSION**

59. For the reasons given above, the Chamber, decides as follows:

1. unanimously to declare the application admissible with regard to Articles 8 and 13 of the European Convention on Human Rights;
2. by 10 votes to 3, that the Federation of Bosnia and Herzegovina has not violated the applicant's right to respect for her home under Article 8 of the European Convention on Human Rights;
3. unanimously, that the Federation of Bosnia and Herzegovina has not violated the applicant's right to an effective remedy under Article 13 of the European Convention on Human Rights.

(signed)  
Ulrich GARMS  
Registrar of the Chamber

(signed)  
Michèle PICARD  
President of the Chamber

Annex      Partly dissenting opinion of Mme. Michèle Picard

## ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mme. Michèle Picard.

### PARTLY DISSENTING OPINION OF MME. MICHELE PICARD

I disagree with the majority of the Chamber for the following reasons:

According to the Law on Cessation, all occupancy rights obtained over socially-owned abandoned properties during the armed conflict and until 1998, are automatically cancelled. Nevertheless, the occupants have the possibility to obtain a new contract or an extension of their temporary right to use the apartment if they have no other accommodation available, as long as the pre-war occupancy right holder has not filed a claim for repossession. These provisions were issued to allow pre-war occupancy right holders to return to their pre-war homes and, by doing so, to reverse the "ethnic cleansing" that occurred during the armed conflict. In such cases, when there is a pre-war occupancy right holder, the Chamber has always been of the opinion that the eviction proceedings of the "illegal" or temporary occupants could be entirely dealt with at the administrative level instead of the judicial level, because otherwise it would not have been possible to achieve this aim. Indeed, the courts have not been functioning efficiently, and it would have taken years for displaced persons to return to their pre-war homes if a court decision was required. The efficiency of the process appeared more important to the Chamber than the procedural safeguards. This opinion is disputable, especially considering the amount of time that has elapsed since the end of the armed conflict, but I agree with it in light of the factual situation.

In the case of *Kulovac*, the applicant was *ex officio* found to be an illegal occupant, with no right to alternative accommodation. In accordance with Article 3 paragraph 3 of the Law on Cessation, the applicant was denied the right to remain in the apartment. In the case of *M.H.*, the applicant was found to be a multiple occupant with no right to alternative accommodation. The applicant was denied the right to remain in the apartment on the basis of Articles 11 and 18d of the Law on Cessation, which provide that a multiple occupant is a person who uses the apartment although a member of his/her family household is in possession of his/her 1991 home or a person who has a member of his/her family household with accommodation anywhere in the territory of the Federation of Bosnia and Herzegovina. In such cases, only the administrative authorities are entitled to evict the multiple or illegal occupants. These provisions are aimed at preventing abuses and expediting the return process, given that there are not enough apartments to house everybody in need of housing. These vacated apartments are then to be used as alternative accommodation for those in need of housing in accordance with the Law on Cessation.

The cases of *Kulovac* and *M.H.* differ from previous decisions of the Chamber in that there is no pre-war occupancy right holder who wishes to return to the apartments at issue. Consequently, the decisions taken by the administration involve completely its own assessment of the facts, that is, the determination of whether the applicant is a multiple or illegal occupant and the subsequent allocation of the apartment as alternative accommodation. This is the first time that the Chamber has assessed the compatibility of these procedures with the European Convention on Human Rights (the "Convention").

In practice, it is neither clear nor precisely defined how the administration should decide which apartments, among the unclaimed ones, should be vacated by multiple or illegal occupants and thereafter allocated to third parties in need of housing as alternative accommodation. There are no adversarial proceedings, nor any opportunity for the temporary occupant to be heard before the court or to seek suspension of his or her eviction. In fact, there is no control at all over these decisions.

I am of the opinion that these evictions violate Article 8 of the Convention because of the lack of proportionality of such procedures in a democratic society.

There is no doubt, as the Chamber has found, that there has been an interference with the applicants' rights to their home. As to the lawfulness of this interference, it is, in my mind,

questionable. Although it is clear that the law provides for such administrative procedures, the quality of the national legal rules vis-à-vis the Convention is not ensured, as it does not eliminate any risk of arbitrariness. But, notwithstanding this aspect, above all I believe that such procedures are not necessary in a democratic society. While I concede that these interferences pursue a legitimate aim, that is to provide alternative accommodation to those in need, I am concerned that there are no provisions in the law affording adequate and effective safeguards against the abuse of the administration. The housing authorities have been granted exceedingly wide powers, as they have exclusive competence to make the determinations of who constitute multiple or illegal occupants and to implement the evictions, without any judicial decision or adversarial proceedings. The total absence of any control, that is the requirement of a judicial decision, makes the interferences with the applicants' rights disproportionate to the legitimate aim pursued (see *mutatis mutandis*, *Klass v. Germany*, judgment of 6 September 1978, Series A no. 28, paragraph 55; and *Funke v. France*, judgment of 25 February 1993, Series A no. 256-A).

In the present decisions, the Chamber agrees with the opinion of the OSCE as *amicus curiae* that the urgency of the legitimate aim should prevail over the procedural safeguards, as "allowing appeals suspending evictions would have the effect of nullifying the provisions allowing housing officials to use unclaimed apartments as alternative accommodation", because the "appeals process in the Federation can last for months and even years" and because the housing authorities are in general reluctant to evict families entitled to alternative accommodation when no alternative accommodation is available. In my mind, the fact that the courts do not function properly is not grounds to give unlimited powers to the administrative organs. This is particularly so when one knows that the administrative organs are themselves potentially corrupt, and when the returns process has only become possible due to intense pressure from the international community. It would have been more in accordance with the Convention to provide for a specific short judicial adversarial proceeding in these matters with a deadline for the courts to decide the cases expeditiously, as such procedures exist in most other countries.

Concerning these two cases, it is important to note that, before the armed conflict, one of the applicants was living with her parents and the other was married and living with her mother-in-law. Her husband died during the armed conflict, and now she is alone and unemployed. Both applicants have been evicted in order to provide alternative accommodation for families in need, but it is in fact impossible to control whether their apartments have been used for that purpose. In fact, M.H. was evicted on 14 June 2002, and apparently the apartment was given to another family only in January 2003. The urgency of the eviction does not appear evident to me. As for Kulovac, she left the apartment in December 2002, and she has informed the Chamber that the apartment was allocated in December 2002, but to persons not entitled to alternative accommodation. Although I have no more information about these facts, I believe that if there had been judicial proceedings where a judge would have decided to evict the applicants in order to allocate the apartments as alternative accommodation to specific families, then these doubts clouding the whole process would not be possible.

In conclusion, I believe that after seven years, it is time now for Bosnia and Herzegovina to apply the Convention. I also take note that no reservations or interpretative declarations were made with regard to Article 8 of the Convention in relation to the housing laws when the instrument of ratification was deposited with the Council of Europe in July 2002.

(signed)  
Michèle Picard