DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/01/7510

Matija ĆOSIĆ

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 1 November 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned application introduced to the Human Rights Chamber for Bosnia and Herzegovina 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;

Noting that the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Commission") has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 ("the 2003 Agreement") to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement, and Rules 50, 54, 56, and 57 of the Commission's Rules of Procedure:

I. INTRODUCTION

1. The application concerns the applicant's attempts to enter into possession of his pre-war apartment located at Harmani H-5 in Bihać, the Federation of Bosnia and Herzegovina, over which he held the occupancy right. The proceedings upon the applicant's repossession request were concluded in a final and binding manner in accordance with the provisions of the previous Article 3a of the Law Cessation of Application of the Law on Abandoned Apartments ("the Law on Cessation"). The applicant was denied the right to repossess the apartment based on the fact that he was not a citizen of the Socialist Republic of Bosnia and Herzegovina on 30 April 1991, and that on the same day he served in the Yugoslav National Army ("JNA").

2. The application appears to raise issues in connection with Articles 6 and 8 of the European Convention on Human Rights ("the Convention"), Article 1 of Protocol No. 1 to the Convention, and discrimination.

II. PROCEEDINGS BEFORE THE CHAMBER AND THE COMMISSION

3. The application was introduced to the Chamber on 17 May 2001 and registered on the same day.

4. On 19 July 2004 the application was transmitted to the Federation of Bosnia and Herzegovina in connection with Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention, separately and in conjunction with discrimination in the enjoyment of these rights under Article II(2)(b) of the Agreement. The application was not transmitted to Bosnia and Herzegovina, and throughout this decision the term "respondent Party" in the singular refers to the Federation of Bosnia and Herzegovina.

5. On 20 August 2004 the Federation of Bosnia and Herzegovina submitted its observations on the admissibility and merits and on 14 September 2004 submitted additional information. On 13 October 2004 and 26 October 2004 the respondent Party submitted additional written observations. All of these submissions were forwarded to the applicant. The applicant submitted written responses on 7 September 2004, 11 October 2004, and 29 October 2004, which were also forwarded to the respondent Party.

6. On 9 September 2004 and 1 November 2004 the Commission deliberated on the admissibility and merits of the application, and on the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

7. The applicant states that he was a professional member of the JNA since 1973, and as such was transferred to Bihać in 1976. The applicant is the pre-war occupancy right holder over an apartment located at Ulica Harmani H-5/II no. 7 (formerly Avnoj H-5) in Bihać, the Federation of Bosnia and Herzegovina. The applicant and his family moved into this newly-built apartment in 1991, on the basis of the 14 August 1991 decision of the Bihać Garrison Housing Fund. Prior to that, he was an occupancy right holder over another apartment in Bihać.

8. The applicant was a member of the Army of the Republic of Bosnia and Herzegovina ("RBiH Army") from 15 April 1992 until 15 June 1993 when he left Bihać and joined his family in Croatia. The applicant provided documentation from the RBiH Army supporting this.

9. The respondent Party states that the applicant and his family abandoned the apartment on 25 December 1992, at which time it was allocated to a member of the RBiH Army, Mr. A.H., and his family.

10. On 4 January 1993 the applicant concluded a sub-tenancy agreement with Mrs. M.Ž., his mother-in-law for her to use the apartment for an unspecified period of time.

11. On 2 February 1993 the applicant obtained consent (*saglasnost*) from the Bihać Garrison Commander to lease the apartment for an indefinite period of time.

12. The applicant states that in April 1993 he agreed that Mr. A.H. and his family could reside in the apartment together with Mrs. M.Ž. The applicant states that at the end of the war Mr. A.H. moved out because his house in a neighbouring village was repaired. After that, the applicant alleges, the Bihać Garrison allocated the apartment to a member of the Army of Bosnia and Herzegovina, Mr. M.M., who lives in the apartment to this day.

13. On 23 June 1996 the Headquarters of the Republic of Bosnia and Herzegovina Army (*Republika Bosna i Hercegovine, Generalštab Armije, Uprava za kadrovske i pravne poslove, Odsjek vojnostambenog fonda*) issued a procedural decision declaring the apartment permanently abandoned. The decision noted that the applicant abandoned the apartment on 25 December 1992 when it was allocated to Mr. A.H. and that the applicant did not return to the apartment in the time limit as provided for in Article 10 of the Law on Abandoned Apartments.

14. On 11 September 1998 the applicant filed a repossession request for the apartment to the Service for Reconstruction and Housing-Utilities Affairs of the Municipality Bihać ("the Service", *Služba obnove i stambeno-komunalnih poslova*).

15. On 25 June 1999 the Una Sana Cantonal Ministry for Internal Affairs (*Unsko Sanski Kanton, Kantonalni Ministarstvo unutrašnijh poslova*) issued a procedural decision authorizing the entry of the applicant's birth on 17 February 1951 in Hrtkovici, Vojvodina, the Socialist Federal Republic of Yugoslavia, into the birth records in the municipality of Bihać and into the citizenship records.

16. Having not obtained any response from the administrative organs regarding his repossession request, on 18 November 1999 the applicant also submitted a repossession request for the apartment to the Commission for Real Property Claims of Displaced Persons and Refugees ("CRPC"). The applicant states that he has never received a response from the CRPC regarding this request.

17. On 5 September 2000 the Service issued a procedural decision rejecting the applicant's repossession request for the apartment as ill-founded on the grounds of Article 3a, paragraph 1 of the Law on Cessation (see paragraph 31 below). The Service noted the following: The applicant was a member of the former JNA on 30 April 1991, and he was born in Hrtkovici, Vojvodina, such that on 30 April 1991 he was not a citizen of the Socialist Republic of Bosnia and Herzegovina. While the Service also noted that the applicant had obtained a procedural decision on citizenship on 25 June 1999, it held that the retroactive entry into the birth records is not relevant for the implementation of Article 3a of the Law on Cessation. The Office for Birth Records (*Matičnom uredu u Bihaću*) issued a confirmation on 9 June 2000 that the applicant was not registered a citizen of the Socialist Republic of Bosnia and Herzegovina on 30 April 1991. The Service concluded that the applicant could not be considered a refugee or displaced person according to Article 3a of the Law on Cessation, and it therefore refused his repossession request.

18. On 19 September 2000 the applicant filed an appeal against the 5 September 2000 procedural decision before the Una-Sana Cantonal Ministry for Urban Planning, Construction and Environmental Protection ("the Ministry"). The applicant asserted that the procedural decision was ill-founded and discriminatory against him. He contested the fact that he was not a citizen of the Socialist Republic of Bosnia and Herzegovina. He argues that, by his uninterrupted stay in Bosnia and Herzegovina of 15 years, he should have been, by the force of law, considered a citizen. He also points out that prior to the armed conflict he had been married for 13 years to a citizen of

Bosnia and Herzegovina, he has two children who are citizens of Bosnia and Herzegovina, and he was included in the 1992 voters' list.

19. On 23 October 2000 the Ministry issued a procedural decision rejecting the applicant's appeal as ill-founded. The Ministry held that it was absolutely undisputed that the applicant was not a citizen of the Socialist Republic of Bosnia and Herzegovina on 30 April 1991, and the fact that he was later registered in the citizenship records of Bosnia and Herzegovina is irrelevant. The Ministry found that the first instance organ properly established the facts, and properly determined that he has no right to repossess the apartment according to Article 3a of the Law on Cessation.

20. The applicant did not initiate an administrative dispute, and therefore the 23 October 2000 procedural decision became final and binding.

21. On 18 March 2004 the applicant submitted a request to renew the proceedings because the amended Article 3a of the Law on Cessation no longer contains the ground upon which his repossession request was rejected.

22. On 20 April 2004 the Ministry issued a procedural decision rejecting the applicant's request to renew the proceedings. The Ministry stated that Article 246 of the Law on Administrative Proceedings (see paragraph 37 below) lists the reasons for which final administrative proceedings may be renewed, and the fact that the substantive law was amended is not among them. The applicant initiated an administrative dispute against the 20 April 2004 procedural decision before the Cantonal Court in Bihać, and these proceedings are still pending.

23. On an unknown date, Mr. M.M., who presently lives in the apartment was permitted, without any written procedural document, to move into the apartment. The respondent Party states that it was allocated to him as alternative accommodation (*sekundarni smještaj*) as a member of the Federation of Bosnia and Herzegovina Army.

IV. RELEVANT LEGISLATION

A. Relevant legislation of the Republic of Bosnia and Herzegovina

1. Law on Abandoned Apartments

24. On 15 June 1992 the Presidency of the then Republic of Bosnia and Herzegovina issued a Decree with Force of Law on Abandoned Apartments (Official Gazette of the Republic of Bosnia and Herzegovina ("OG RBiH") nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95, and 33/95). The Parliament of the Republic of Bosnia and Herzegovina approved this Decree on 17 June 1994 and renamed the Decree the "Law on Abandoned Apartments". The Law governed the declaration of abandonment of certain categories of socially owned apartments and their re-allocation.

25. Article 2 set forth that apartments were to be considered abandoned if the pre-war occupancy right holder and his family members left the apartment, even if temporarily. If the pre-war occupancy right holder failed to resume using the apartment within the applicable time limit laid down in Article 3 (i.e. before 6 January 1996), he or she was regarded as having abandoned the apartment permanently.

26. According to Article 10, as amended, the failure to resume using the apartment within the time limit was to result in the deprivation of the occupancy right. The resulting loss of the occupancy right was to be recorded in a decision by the competent authority.

B. Relevant legislation of the Federation of Bosnia and Herzegovina

1. The Law on Cessation of the Application of the Law on Abandoned Apartments

27. The Law on Cessation of the Application of the Law on Abandoned Apartments ("Law on Cessation") entered into force on 4 April 1998 and has been thereafter amended (Official Gazette of the Federation of Bosnia and Herzegovina ("OG FBiH") nos. 11/98, 38/98, 12/99, 18/99, 27/99, 43/99, 31/01, 56/01, 15/02, and 29/03). The Law on Cessation repealed the former Law on Abandoned Apartments.

28. According to the Law on Cessation, the competent authorities may make no further decisions declaring apartments abandoned (Article 1, paragraph 2). All administrative, judicial and other decisions terminating occupancy rights based on regulations issued under the Law on Abandoned Apartments are null and void (Article 2, paragraph 1).

29. 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).

30. The occupancy right holder of an apartment declared abandoned, or a member of his or her household, has a right to return to the apartment in accordance with Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Article 3, paragraphs 1 and 2).

31. The former Article 3a, paragraphs 1 and 2, which was in force between 4 July 1999 and 1 July 2003, provided as follows:

> "As an exception to Article 3, paragraphs 1 and 2 of this Law, regarding apartments declared abandoned on the territory of the Federation of Bosnia and Herzegovina at the disposal of the Federation Ministry of Defence, the occupancy right holder shall not be considered a refugee if on 30 April 1991 he or she was in active service in the SSNO [Federal Secretariat for National Defence] – JNA (i.e. not retired) and was not a citizen of the Socialist Republic of Bosnia and Herzegovina according to the citizenship records, unless he or she had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the former Socialist Federal Republic of Yugoslavia before 14 December 1995.
>
> "A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee if he or she remained in the active military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995, or if he or she has acquired another occupancy right outside the territory of Bosnia and Herzegovina."

32. The present Article 3a, which came into force on 1 July 2003, provides as follows:

> "As an exception to Article 3, paragraphs 1 and 2 of the Law, regarding apartments declared abandoned on the territory of the Federation of Bosnia and Herzegovina at the disposal of the Federation Ministry of Defence, the occupancy right holder shall not be considered a refugee nor have the right to repossess the apartment if after 19 May 1992, she or he remained in the active service as a military or civilian personnel of any armed forces outside the territory of Bosnia and Herzegovina, unless she or he had residence approved to him or her in the capacity of a refugee, or other equivalent protective status, in a country outside the former Socialist Federal Republic of Yugoslavia before 14 December 1995.
>
> "A holder of an occupancy right from paragraph 1 of this Article will not be considered a refugee or have the right to repossess the apartment in the Federation of Bosnia and Herzegovina, if she or he has acquired another occupancy right or other equivalent right

from the same housing fund of the former JNA or newly-established funds of armed forces of states created on the territory of the former Socialist Federal Republic of Yugoslavia."

33. Article 5, paragraphs 1-3, as amended, provides as follows:

"A claim for repossession of the apartment must be filed within fifteen mont hs from the date of entry into force of this Law.[1]

"Exceptionally, the deadline for submission of claims for repossession of apartments under Article 2, paragraph 5 and Article 18b, paragraph 1 of this Law, and Article 83a, paragraph 4 of the Law on Amendments to the Law on Taking Over of the Law on Housing Relations (Official Gazette of FBiH no. 19/99) shall be 4 October 1999.

"If the occupancy right holder does not file a claim to the competent administrative authority, to a competent court, or to the Commission for Real Property Claims of Displaced Persons and Refugees ("CRPC"), within the appropriate time limit, or a request for enforcement of a CRPC decision within the deadline specified in the Law on Implementation of CRPC Decisions (FBiH OG 43/99 and 5/00) the occupancy right is cancelled."

34. According to Article 6, paragraph 1, as amended, the competent authority shall decide upon a claim for repossession within 30 days starting from the date when the claim was submitted. The competent authority shall decide upon the claim in the chronological order in which the claim was received, unless specified otherwise in law.

35. Article 18d, paragraph 6, as amended, reads:

"Exceptionally, in respect of apartments at the disposal of the Ministry of Defence, where an occupancy right to an apartment is cancelled in accordance with Article 5[2] or Article 12,[3] or where the claim is finally rejected in accordance with this Law, the competent body of the Ministry of Defence may issue a new contract on use to a temporary user of an apartment in cases where she or he is required to vacate the apartment under this Law to enable the return of a pre-war occupancy right holder or purchaser of the apartment, provided that her or his housing needs are not otherwise met."

2. Instruction on Application of the Law on Cessation of the Application of the Law on Abandoned Apartments

36. The Instruction on Application of the Law on Cessation of the Application of the Law on Abandoned Apartments ("Instruction on Application of the Law on Cessation") was published in the Official Gazette of the Federation of Bosnia and Herzegovina nos. 43/99 and 56/01. Point 23 provides as follows:

"The rules and procedures in the Law and this Instruction concerning allocation of abandoned apartments not claimed in accordance with the applicable deadline shall also apply to apartments at the disposal of the Federation Ministry of Defence, subject to the following variations as explained in point 24 of this Instruction."

Point 24, as amended, provides:

"(i) The temporary user of an apartment at the disposal of the Federation Ministry of Defence may be entitled to a new or revalidated contract on use if the requirements of Article 2, paragraph 4 of the Law and Articles 18c and 18d of the Law are met. In such cases, the body which issued the contract shall be authorised to revalidate a

[1] That is to say before 4 July 1999.
[2] If the pre-war occupancy right holder failed to file a request for repossession of his or her pre-war apartment before 4 July 1999.
[3] If the pre-war occupancy right holder over an apartment failed to file a request for eviction of the current occupant of the apartment within 30 days after the deadline for the vacation of the apartment had expired.

cancelled contract on use in accordance with points 10 and 11 of this Instruction, following any procedures which are necessary to ensure that the requirements of the Law and this Instruction are met, including among others that the housing needs of the temporary user are not otherwise met under point 24(ii) of this Instruction and that the temporary user has no other accommodation available to him or her under point 9 of this Instruction.

"(ii) In other cases, the responsible military housing body may issue a new contract on use of an apartment which is unclaimed or for which a claim is finally rejected to a temporary user who is currently occupying an apartment at the disposal of the Federation Ministry of Defence, who is required to vacate that apartment pursuant to the provisions of this Law to enable the return of a pre-war occupancy right holder or purchaser of the apartment, provided that his or her housing needs are not otherwise met, as explained by the Law and this Instruction.

"(iii) All bodies dealing with apartments at the disposal of the Federation Ministry of Defence shall co-operate with competent international and local bodies to ensure that apartments are not used in violation of the Law by people whose housing needs are otherwise met. This co-operation shall include making available information on past and present use of apartments which are at the disposal of the Federation Ministry of Defence."

3. The Law on Administrative Proceedings

37. Article 246 of the Law on Administrative Proceedings (OG FBiH, nos. 2/98 and 48/99) specifies the reasons for which it is possible to renew the administrative proceedings, as follows:

"Proceedings concluded by a decision or conclusion against which there are no legal remedies in the administrative proceedings (final in the administrative sense) shall be renewed:

"(1) if a new fact has been discovered, or a possibility found for using new evidence which could alone, or in relation to already presented and used evidence, lead to a different solution, if those facts, i.e., evidence has been presented or used in the former proceedings;

"(2) if the decision was made on the basis of false identification documents or false witness or expert testimony, or if the consequences of a criminal act punishable by law occurred;

"(3) if the decision is based on the judgement issued in criminal proceedings or in financial offences, and that verdict was lawfully annulled;

"(4) if the decision favourable for the party was based on untrue allegations of the party, which misled the body which conducted the proceedings;

"(5) if the decision of the body which conducted the proceedings was based on some previous issue, and the competent body later resolved that issue in a significantly different manner;

"(6) if an official person, who according to the law should have been exempted, participated in the decision-making;

"(7) if the decision was made by an official person of the competent body who was not authorised to make such decision;

"(8) if the Panel which made the decision was not formed of the composition foreseen by the law or if the Panel did not meet the prescribed majority;

"(9) if a person, who was supposed to participate in the capacity of a party, was not given the possibility to participate in the proceedings;

"(10) if a party was not represented by a legal representative, and according to the law he or she was required to be represented;

"(11) if a person who participated in the proceedings was not given the possibility to use his or her language, under the conditions from Article 16 of this Law."

38. Article 253 concerning requests for renewal of proceedings provides as follows:

"(1) When the body, which is responsible for decision making on the request for renewal receives a request, it shall be bound to examine whether the request is timely and presented by the authorized person, and whether the circumstances on which the request is based are probable.

"(2) If the conditions from paragraph 1 of this Article have not been fulfilled, the competent body shall issue a decision rejecting the request.

"(3) If the conditions from paragraph 1 of this Article have been fulfilled, the competent body shall examine whether the circumstances, i.e., the evidence presented as the reasons for renewal are such that they could lead towards a different solution, and if established that they are not, it shall issue a decision rejecting the proposal."

V. COMPLAINTS

39. The applicant complains that his right to his home in connection with Article 8 of the Convention has been violated, and his right to freedom of movement because, to the extent that his apartment is not returned to him, he and his family cannot return to Bosnia and Herzegovina. The applicant asserts that the domestic organs have discriminated against him despite his service in the RBiH Army in Bihać. In his application, the applicant also states that his right to citizenship on 30 April 1991 has been violated.

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

40. The respondent Party submitted its observations on the admissibility and merits of the application on 20 August 2004, in a joint submission with three other applications. As to the admissibility of the application, the respondent Party proposes that the application should be declared inadmissible for non-exhaustion of domestic remedies because the applicant failed to initiate an administrative dispute against the 23 October 2000 procedural decision of the Ministry.

41. As to the merits, the respondent Party asserts that it has not violated Articles 6 and 8, nor Article 1 of Protocol No. 1 to the Convention, nor Article II(2)(b) of the Agreement. With regard to Article 6 of the Convention, the respondent Party holds that its organs issued timely decisions in the applicant's case, and the applicant did not avail himself of available remedies; therefore, the respondent Party has not violated the applicant's rights protected by Article 6. With regard to Article 8 of the Convention, the respondent Party states that its organs have determined that the apartment was not the applicant's "home", and for this reason his repossession requests were denied. The respondent Party proposes that the Commission reject the repossession request in a similar manner as the Chamber did in CH/97/60 *et al., Miholić and others* (decision on admissibility and merits delivered on 7 December 2001, Decisions July-December 2001) with regard to the repossession request of the applicants Ćirić and Čorapović, as explained in paragraph 177 of that decision. With respect to Article 1 of Protocol No. 1 to the Convention, the respondent Party notes that the applicant did not exhaust all of the available domestic remedies and that the proceedings regarding the renewal of the proceedings are still pending. With regard to discrimination, the

respondent Party states that the applicant did not provide any evidence or explanation of the alleged discrimination.

B. The applicant

42. The applicant maintains the claims set out in his application. He points out that he did not abandon the apartment but that he rented it and obtained the permission from the Commander in Bihać to do so. The apartment was therefore never abandoned, and it should not have been declared abandoned. The applicant asserts that it is unimaginable that the country that he defended now denies him the right to his apartment. As to the procedural decisions, the applicant states that both the first and second instance procedural decisions are illogical. First, as to service in the JNA on 30 April 1991, he points out that on that date military persons of all ethnicities in the former Yugoslavia were considered to be in the JNA. As to his lack of citizenship on 30 April 1991, he asserts that this requirement is absurd, when he, at that time, had lived in Bihać for almost 13 years, and had a wife and two children who were citizens of Bosnia and Herzegovina. The applicant also submitted his identity card issued on 20 January 1992 by the Socialist Republic of Bosnia and Herzegovina and his passport issued on 29 December 1993 by the Embassy of Bosnia and Herzegovina in Zagreb, Croatia.

43. With respect to the respondent Party's assertion that he has not exhausted the domestic remedies, the applicant states that he was not able to initiate an administrative dispute against the second instance procedural decision because of limited financial means. Since 1993 he and his family have been living in Croatia on limited financial means. The applicant also points out that his wife and children obtained refugee status in Croatia upon their arrival, but by the time he arrived in 1993 this possibility no longer existed for persons fleeing from Bosnia and Herzegovina.

44. The applicant concludes that the respondent Party is responsible for his family's inability to repossess their pre-war apartment. Consequently, he and his family have been unable to return to Bosnia and Herzegovina. .

VII. OPINION OF THE COMMISSION

A. Admissibility

45. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided on the application by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the application. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant's case, from those of the Chamber, except for the composition of the Commission.

1. Admissibility as against Bosnia and Herzegovina

46. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept.… In so doing, the [Commission] shall take into account the following criteria: …(c) The [Commission] shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

47. The Commission notes that the applicant directs his application against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina.

48. In the previous cases decided by the Chamber on the subject of JNA apartments, the Chamber held Bosnia and Herzegovina responsible for passing the legislation that retroactively annulled the contracts on purchase of JNA apartments (*see, e.g.*, case nos. CH/96/3, CH/96/8 and

CH/96/9, *Medan, Bastijanović, and Marković,* decision on merits of 3 November 1997, Decisions on Admissibility and Merits March 1996-December 1997; case no. CH/96/22, *Bulatović,* decision on merits of 3 November 1997, Decisions on Admissibility and Merits March 1996–December 1997; case nos. CH/96/2 *et al., Podvorac and others,* decision on admissibility and merits of 14 May 1998, Decisions and Reports 1998; case nos. CH/97/82 *et al., Ostojić and others,* decision on admissibility and merits of 13 January 1999, Decisions January–July 1999; and case nos. CH/97/60 *et al., Miholić and others,* decision on admissibility and merits of 9 November 2001, Decisions July–December 2001).

49. The Commission notes that, in the present case, the conduct of the bodies responsible for the proceedings complained of by the applicant, including the acts of the Service and the Ministry, engages the responsibility of the Federation of Bosnia and Herzegovina, not of Bosnia and Herzegovina, for the purposes of Article II(2) of the Agreement. Accordingly, as directed against Bosnia and Herzegovina, the application is incompatible *ratione personae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c).

50. The Commission therefore decides to declare the application inadmissible against Bosnia and Herzegovina.

2. Admissibility as against the Federation of Bosnia and Herzegovina

51. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept…In so doing, the [Commission] shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted …."

52. In its submission of 20 August 2004 the Federation of Bosnia and Herzegovina asserts that the application should be declared inadmissible for non-exhaustion of domestic remedies because the applicant failed to initiate an administrative dispute against the second instance procedural decision.

53. The Commission notes that the applicant received a negative decision from the first and second instance administrative organs and did not initiate an administrative dispute before the competent court regarding his repossession request. The Commission also considers, however, that according to the legislation in force at the time, the applicant had no prospect of success, because he was a member of the JNA on 30 April 1991 and he was not a citizen of the Socialist Republic of Bosnia and Herzegovina on that date. Given that the former Article 3a of the Law on Cessation provided no legal possibility for the domestic organs to reinstate the applicant into the apartment, the Commission finds that initiating an administrative dispute could not have been considered an effective remedy in this case. The Commission also notes that the applicant cannot simply file another repossession request, in light of the amendments to Article 3a of the Law on Cessation, because the Law on Cessation includes specific filing deadlines for repossession requests (see paragraph 33 above). The applicant has requested the renewal of the administrative proceedings, but the first and second instance organs have rejected his claim, finding that he has no legal grounds to request a renewal of the proceedings. The Commission therefore finds that the applicant exhausted all effective domestic remedies with regard to his repossession request. For these reasons, the Commission decides to declare the application admissible against the Federation of Bosnia and Herzegovina in connection with Article 8 of the Convention.

3. Conclusion as to admissibility

54. The Commission notes that the applicant raised other complaints in his application, such as his right to freedom of movement and his right to citizenship in 1991. However, the Commission finds that these complaints, in essence, all stem from his inability to repossess his apartment. In conclusion, the Commission finds the application inadmissible in its entirety against Bosnia and Herzegovina and admissible as directed against the Federation of Bosnia and Herzegovina.

B. Merits

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

1. Article 8 of the Convention

56. The applicant alleges a violation of his right to respect for his home, as protected by Article 8 of the Convention. Article 8 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."

57. The Commission must first determine whether the applicant's pre-war apartment constitutes his "home" in the sense of Article 8 of the Convention. If so, the Commission must determine whether the respondent Party has interfered with the applicant's right to respect for his home under Article 8 of the Convention. Finally, the Commission must determine whether the respondent Party's interference is justified. The Commission recalls that the conditions upon which a respondent Party may interfere with the right to respect for one's home are set out in paragraph 2 of Article 8. The interference is only justified if it is: (a) "in accordance with the law"; (b) in the interest of one or more of the legitimate aims listed; and (c) "necessary in a democratic society". Therefore, a proper balance must be struck between the legitimate aim pursued and the means employed, taking into account the respondent Party's margin of appreciation.

a. Whether the apartment is the applicant's "home"

58. The Commission notes that the applicant was allocated the apartment in 1991, as a newly built apartment, and prior to obtaining this apartment, the applicant had an occupancy right over another apartment in the same neighborhood in Bihać. The applicant states that he lived in the apartment from 1991 until 1993, and that his mother-in-law lived in the apartment from 1993 until some time in 1995. The respondent Party states that the apartment was already allocated to another member of the RBiH Army in December 1992, but the applicant has submitted ample evidence that he was a member of the RBiH Army in Bihać until July 1993. In 1998, the applicant requested the competent body to reinstate him into his apartment. The respondent Party asserts that the apartment is not the applicant's home, because the domestic organs have denied him the right to repossess it. The Commission finds this reasoning circular and illogical. The domestic organs have denied him the right to repossess the apartment by simply applying Article 3a of the Law on Cessation, not because they have made any determination about the connections the applicant may have with his pre-war apartment. The Commission notes that the Chamber previously held that links that persons in the applicant's situation retained to their apartments were sufficient for the apartment to be considered to be their "homes" within the meaning of Article 8 of the Convention (*see e.g.,* case nos. CH/97/46, *Kevešević,* decision on the merits of 15 July 1998, paragraphs 39-42, Decisions and Reports 1998; CH/97/58, *Onić,* decision on admissibility and merits of 12 January 1999, paragraph 48, Decisions January-July 1999). The Commission concludes that in this case the applicant's pre-war apartment is the applicant's home for the purposes of Article 8 of the Convention.

b. Interference with the applicant's rights

59. The respondent Party states that in December 1992 the applicant's apartment was declared temporarily abandoned and allocated to another member of the RBiH Army. The applicant disputes this and asserts that he used the apartment until July 1993. In any case, the apartment was declared permanently abandoned in 1996 by a procedural decision issued by the RBiH Army. The applicant states that he never received this decision, nor did the respondent Party submit any evidence of having delivered it to the applicant.

60. On 4 April 1998 the Law on Cessation entered into force. This Law expressly repealed the Law on Abandoned Apartments and declared all administrative, judicial and other decisions terminating occupancy rights on the basis of the Law on Abandoned Apartments null and void. It provided the pre-war occupancy right holders with the right to repossess their apartments and regulated the procedures for doing so. Specifically, pre-war occupancy right holders were to submit a repossession request to the competent body, which was obliged to decide on the request within 30 days from the date of submission of the request. The applicant submitted his repossession request on 11 September 1998. The competent body failed to decide on the applicant's request in 30 days, as required by law.

61. On 4 July 1999 Article 3a of the Law on Cessation entered into force. This Article deprived the applicant of the right to repossess the apartment, and the authorities of the respondent Party accordingly refused the applicant's repossession request in accordance with paragraph 1 of Article 3a of the Law on Cessation. On 1 July 2003 Article 3a of the Law on Cessation was amended, such that the former paragraph 1 is no longer a part of Article 3a. Despite the provision which denied him the right to repossess the apartment no longer being in force, the applicant is still not able to repossess his pre-war home.

c. Legality of the interference

62. The interference of a respondent Party is only lawful if the law that is the basis for the interference is: (a) accessible to the citizens of the respondent Party; (b) precise so as to enable the citizens to regulate their conduct; and (c) compatible with the rule of law, meaning that the legal discretion granted to the executive must not be unrestrained (i.e., the law must provide citizens with adequate protection against arbitrary interference) (*see e.g.,* Eur. Court HR, *Sunday Times,* judgment of 26 April 1979, Series A no. 30, p. 31, paragraph 49; Eur. Court HR, *Malone,* judgment of 2 August 1984, Series A no. 82, pp. 32-33, paragraphs 67-68).

63. The Commission notes that, prior to 4 April 1998, the interference of the Federation of Bosnia and Herzegovina was based on the Law on Abandoned Apartments. The Chamber consistently held that the Law on Abandoned Apartments failed to meet the standards of "law" as this expression is to be understood for the purposes of Article 8 of the Convention, with particular regard to the requirements of accessibility and compatibility with the rule of law (*see* the above-mentioned *Kevešević* decision, paragraphs 55-58). In the present case, the Commission sees no reason to differ from this conclusion. The interference based on the Law on Abandoned Apartments is therefore not in accordance with the law.

64. On 4 April 1998 the Federation of Bosnia and Herzegovina passed the Law on Cessation, expressly repealing the Law on Abandoned Apartments. The Law on Cessation provided the applicant with the right to be reinstated into his pre-war apartment. The applicant submitted his request to the Service in Bihać on 11 September 1998. According to Article 6, paragraph 1 of the Law on Cessation, the authorities had 30 days to issue decisions reinstating the applicant into his pre-war home. The interference of the Federation of Bosnia and Herzegovina was "in accordance with the law" from 4 April 1998, the date of the entry into force of the Law on Cessation, until 11 October 1998, that is to say the date on which the 30-day time limit for issuance of the decision in his case elapsed.

65. From 11 October 1998 until 4 July 1999, the date of the entry into force of Article 3a of the Law on Cessation, the interference of the Federation of Bosnia and Herzegovina was again not "in accordance with the law".

66. Finally, as of the entry into force of Article 3a on 4 July 1999, the interference of the Federation of Bosnia and Herzegovina was again "in accordance with the law". The crux of the applicant's complaint revolves around this interference, that is, the domestic organs' denial of his right to repossess based on the former paragraph 1 of Article 3a of the Law on Cessation. The Commission will thus proceed to establish whether the interference that has been based on Article 3a, and which interference the Commission has found to be "in accordance with the law", is justified under paragraph 2 of Article 8 of the Convention.

d. Whether the interference with the applicant's 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, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others

67. The respondent Party has submitted no explanation in this case for the application of the former paragraph 1 of Article 3a of the Law on Cessation to the applicant's repossession request. As mentioned above, the respondent Party has merely asserted that the apartment is not the applicant's home, because the domestic organs have determined that he does not have the right to repossess it. The Commission does not agree, and as stated above, has found the apartment to be the applicant's home for the purposes of Article 8 of the Convention.

68. In previous similar cases concerning JNA apartments, the Federation of Bosnia and Herzegovina has asserted that this particular provision of Article 3a of the Law on Cessation was intended to free scarce housing space for former soldiers of the RBiH Army and their families. In that context, the Federation of Bosnia and Herzegovina pointed out that the 1992-1995 armed conflict caused massive destruction of its housing fund and huge migrations of its population (*see* case nos. CH/02/8202, CH/02/9980 and CH/02/11011, *M.P, Brdar and Štrbac v. the Federation of Bosnia and Herzegovina*, decision on admissibility and merits delivered on 4 April 2003, Decisions January-June 2003). The Commission notes that according to Article 18d of the Law on Cessation and Points 23 and 24 of the Instruction on Application of the Law on Cessation, apartments that are not repossessed by their pre-war occupants due to Article 3a of the Law on Cessation should be allocated to individuals whose housing needs were not otherwise met (see paragraph 36 above). The Commission is aware that many apartments, for which the repossession request of the pre-war occupant was refused on the basis of Article 3a of the Law on Cessation, are not necessarily being used for the purpose asserted by the respondent Party. Nonetheless, the Commission can accept, in principle, that the national authorities' decision to provide housing for former soldiers of the RBiH Army and their families pursues the legitimate aim of "protection of the rights and freedoms of others" in the sense of Article 8, paragraph 2 of the Convention

e. 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?

69. As to the principles relevant to the assessment of the "necessity" of a given measure "in a democratic society", reference should be made to the case law of the European Court (Eur. Court HR, *Lingens,* judgement of 8 July 1986, Series A no. 103, pp. 25-26, paras. 39-40; Eur. Court HR, *Gillow,* judgement of 24 November 1986, Series A no. 109, p. 22, para. 55). The notion of necessity implies a pressing social need. In particular, the measure employed must be proportionate to the legitimate aim pursued. If the measure employed is proportionate to the legitimate aim pursued, then the respondent Party has acted within its margin of appreciation.

70. As to the scope of the margin of appreciation enjoyed by the respondent Party, it will depend not only on the nature of the aim pursued, but also on the nature of the right involved. In this case, the general interest of the protection of the housing needs of former soldiers and their families must be balanced against the rights of the applicant, also a former soldier, to respect for his home, a right that is germane to his personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Federation of Bosnia and Herzegovina. The Commission must therefore look closely at the legal grounds for rejecting the applicant's repossession request.

71. The applicant was born outside the territory of Bosnia and Herzegovina, in Vojvodina, Serbia. He was registered as a citizen of the republic of his birth. He requested, and was granted, the right to be registered into the birth and citizenship records of Bosnia and Herzegovina in 1999, although he had lived in Bosnia and Herzegovina since 1973. During the 1992-1995 armed conflict, the applicant served in the RBiH Army from 1992 until June 1993.

72. The Service in Bihać refused the applicant's repossession request on the basis of the former paragraph 1 of Article 3a of the Law on Cessation (see paragraph 17 above). This provision denied the right to repossess a pre-war apartment to a person who was in active service in the JNA on 30 April 1991 and was not a citizen of the Republic of Bosnia and Herzegovina on the same date.

73. As to the 30 April 1991 active service requirement, the Chamber held in *Miholić and others* (*see* the above-mentioned *Miholić and others* decision, paragraphs 161-162) that, at that time, Bosnia and Herzegovina was still a part of the former Socialist Federal Republic of Yugoslavia. Persons who served in the JNA were accordingly serving in the armed forces of a then unified country. Even if one was a member of the JNA as of 30 April 1991, it does not necessarily mean that that person took part in the 1992-1995 conflict in any armed forces opposed to the RBiH Army. In fact, in the present case, the applicant served in the Fifth Corps of the RBiH Army until June 1993.

74. As to the 30 April 1991 citizenship requirement, the Chamber held in *Miholić and others* that prior to the dissolution of the former Socialist Federal Republic of Yugoslavia, there was no real need to ensure that one was actually a registered citizen of the republic of one's residence. Accordingly, many citizens who had citizenship of the Socialist Federal Republic of Yugoslavia and who were residents of the Socialist Republic of Bosnia and Herzegovina were not registered in the citizenship records, although they participated fully as citizens in all other respects. The Chamber further established that this requirement is discriminatory in its intent or at least in its impact. Since citizenship in 1991 was predominantly based upon where a person was born, the citizenship requirement appears to be targeted at persons of Serb or Croat descent, who are most likely to have been born outside of Bosnia and Herzegovina (*see* the above-mentioned *Miholić and others* decision, paragraphs 157-160).

75. In the present case, the applicant has been living in Croatia since 1993 after his departure from Bihać. The applicant states that he voluntarily agreed to house another member of the RBiH Army in his house upon his departure. He states that Mr. A.H. lived in his apartment until his pre-war house was repaired after the war. The respondent Party asserts that the apartment was already allocated to Mr. A.H. in December 1992. In any case, Mr. M.M., presently a member of the Army of the Federation of Bosnia and Herzegovina, lives in the apartment without any legal basis, and uses the apartment as alternative accommodation. The Commission acknowledges that the respondent Party has had a difficult task in reconciling the rights of the pre-war occupant to repossess the apartment with the rights of the current occupants to have their housing needs met. The Commission is of the opinion, however, that the respondent Party, when weighing the opposing interests of those individuals, should give preference to the right of the applicant to return. The Chamber and Commission have consistently held that the right to return of refugees and displaced persons is a primary objective of the Dayton Peace Agreement. The Commission also recalls the Chamber's conclusion in *Miholić and others*, related to the citizenship and active

service requirements, where both were found to be unreasonable and therefore not proportionate. The Commission considers that these conclusions also apply when occupancy rights are in question. The deprivation of the applicant's pre-war home was thus not proportionate to the legitimate aim pursued because the applicant was made to bear an excessive burden.

76. The Commission therefore concludes that, in the present case, the Federation of Bosnia and Herzegovina overstepped its margin of appreciation and accordingly violated the applicant's right to his home as protected by Article 8 of the Convention.

2. Article 1 of Protocol No. 1 to the Convention, Article 6 of the Convention, and alleged discrimination

77. The application was transmitted in connection with Article 1 of Protocol No. 1 to the Convention, which provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

78. The application was also transmitted in connection with Article 6, paragraph 1 of the Convention, which, in relevant part, provides as follows:

> "1. In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

79. The application was also transmitted in connection with Article II(2)(b) of the Agreement, which provides that the Chamber, (and Commission) shall consider:

> "…alleged or apparent discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex…"

80. In view of its findings concerning Article 8 of the Convention, the Commission decides that it is unnecessary to examine the application in connection with Article 1 of Protocol No. 1 to the Convention, Article 6 of the Convention, and alleged discrimination.

3. Conclusion on the merits

81. Having regard to the above, the Commission concludes that the respondent Party has violated the applicant's right to his home as protected by Article 8 of the Convention, and decides that it is not necessary to examine the application in connection with Article 6, Article 1 of Protocol No. 1 to the Convention and discrimination.

VIII. REMEDIES

82. The Commission has established that the Federation of Bosnia and Herzegovina violated the right of the applicant to respect for his home in connection with Article 8 of the Convention. Under Article XI(1)(b) of the Agreement, the Commission must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Commission shall consider issuing orders to cease and desist,

monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

83. In his application, the applicant listed various pecuniary damages he has suffered as a result of his inability to repossess his apartment.

84. In view of the violation found, the Commission considers it appropriate to order the Federation of Bosnia and Herzegovina to ensure that the applicant is allowed to repossess the apartment located at Harmani H-5/II, apartment no. 7 in Bihać with no further delay, and at the latest, within three months from the date of receipt of this decision, and to take all steps to legally recognise his occupancy right to the apartment. The Commission considers that this remedy is sufficient satisfaction for the violation found.

85. The Commission will order the Federation of Bosnia and Herzegovina to submit to the Commission, or its successor institution, a report on the steps taken by it to comply with these orders within four months of receipt of the present decision.

IX. CONCLUSIONS

86. For the above reasons, the Commission decides:

1. unanimously, to declare the application inadmissible as directed against Bosnia and Herzegovina;

2. unanimously, to declare the application admissible as directed against the Federation of Bosnia and Herzegovina;

3. unanimously, that the applicant's right to respect for his home, within the meaning of Article 8 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

4. unanimously, that it is not necessary to examine the application in connection with Article 1 of Protocol No. 1 to the European Convention on Human Rights, Article 6 of the European Convention on Human Rights, and alleged discrimination;

5. unanimously, to order the Federation of Bosnia and Herzegovina to ensure that the applicant is permitted to repossess the apartment located at Harmani H-5/II, apartment no. 7 in Bihać and to take all steps to legally recognise the applicant as the occupancy right holder of the apartment within three months of the date of receipt of this decision; and,

6. unanimously, to order the Federation of Bosnia and Herzegovina to submit to the Commission, or its successor institution, a report on the steps taken by it to comply with these orders within four months of receipt of the present decision.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission