



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

Case no. CH/02/9130

Stana SAMARDŽIĆ

against

THE REPUBLIKA SRPSKA

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

Ms. Michèle PICARD, President
Mr. Mato TADIĆ, Vice-President
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Miodrag PAJIĆ
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 Articles VIII(2) and XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. This case concerns the attempts of the applicant, who is a citizen of Bosnia and Herzegovina of Serb origin from Visoko, now in the Federation of BiH, to prevent her eviction from a privately owned house situated in Banja Luka which she obtained by an exchange contract concluded in May 1995. By this contract the applicant had exchanged her house in Visoko with M.J., who is of Bosniak descent and originally from Banja Luka, against the one she currently uses in Banja Luka. Since the validity of the contract is disputed, there are court proceedings pending before the Court of First Instance in Banja Luka. M.J. further claimed her property with the Commission for Real Property Claims of Refugees and Displaced Persons (hereinafter "CRPC") and on 24 October 2000 received a certificate confirming that she was the "bona fide possessor" of the house in Banja Luka as of 1 April 1992. M.J. then submitted a request for enforcement of the certificate to the Republika Srpska Ministry for Refugees and Displaced Persons in Banja Luka, which issued a conclusion on enforcement of the CRPC certificate and subsequently scheduled the eviction of the applicant from the house.

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

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was received and registered on 22 March 2002. The applicant requested the Chamber to order the respondent Party, as a provisional measure, to take all necessary steps to prevent her eviction from the house she occupies in Banja Luka.

4. 27 March 2002 the President of the Second Panel issued the requested order for provisional measures. This order, which was to remain in force until 15 April 2002, was extended until the final decision of the Chamber in this case by a decision of the Panel on 8 April 2002.

5. The same day the case was transmitted to the respondent Party for its observations under Article 6, 8, 13 and Article 1 of Protocol No. 1 of the Convention.

6. The respondent Party did not submit any written observations on the admissibility and the merits of the present case. However, on 8 October 2002, it submitted a memorandum intended to clarify certain provisions of domestic law applicable in the case.

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

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

9. The Second Panel deliberated on the case on 8 April and 4 September 2002. On the latter date it decided to relinquish jurisdiction over the case in favor of the plenary Chamber in accordance with Rule 24(b). The plenary Chamber deliberated on the admissibility and merits of the case on 10 October and 7 December 2002 and on 6 January 2003. On the latter date the Chamber adopted the present decision.

III. FACTS

10. On 3 April 1995 and 12 June 1995¹, the applicant, who is of Serb origin and originally from Visoko (Federation of BiH), concluded a contract on exchange with M.J., who is of Bosniak origin and originally from Banja Luka. The applicant exchanged her privately owned house situated in Visoko for the house she currently uses at 27. jula 12 (now Srpskih ustanika 16) in Banja Luka.

11. Since 4 September 1998 there are court proceedings pending before the Court of First Instance in Banja Luka, initiated by M.J in order to obtain a declaration of nullity of the contract.

12. M.J. further claimed her property with CRPC and on 24 October 2000 received a certificate confirming that she was the owner of the house in Banja Luka as of 1 April 1992. She subsequently requested the RS Ministry for Refugees and Displaced Persons ("the Ministry") to enforce the certificate.

13. On 11 March 2002 the RS Ministry for Refugees and Displaced Persons issued a conclusion on enforcement of the CRPC decision and the eviction of the applicant was scheduled for 1 April 2002. On 22 March 2002 the applicant appealed against this conclusion to the RS Ministry for Refugees and Displaced Persons as the second instance body. As of today, she has not received a decision on her appeal.

14. On 22 March 2002 the applicant requested the First Instance Court in Banja Luka to issue an order for provisional measures to suspend the enforcement proceedings by the administrative body. The applicant drew the Court's attention to Article 12a of the Law on Implementation of CRPC Decisions. As of the date of this decision, the Court has not decided on the request for provisional measures.

15. M.J. has left the property in Visoko that is now sealed and available to the applicant for repossession.

IV. RELEVANT LEGAL PROVISIONS

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

16. Annex 7 to the General Framework Agreement, entitled Agreement on Refugees and Displaced Persons, deals with refugees and displaced persons. In accordance with Article VII of Annex 7 an Independent Commission for Displaced Persons and Refugees, later renamed Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), was established.

17. The CRPC shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since 1 April 1992, and where the claimant does not enjoy possession of that property (Article XI). The CRPC shall determine the lawful owner of the property according to Article XII(1). The decisions of CRPC are final and any title, deed, mortgage, or other legal instrument created or awarded by the CRPC shall be recognized as lawful throughout Bosnia and Herzegovina (Article XII(7)).

B. The Law on Implementation of the Decisions of the Commission For Real Property Claims of Displaced Persons and Refugees of the Republika Srpska. (Law imposed by the High Representative on 27 October 1999 (Official Gazette of RS nos. 31/99, 2/00, 39/00 and 65/01).

¹ The exchange contract of 3 April 1995 was concluded in Banja Luka, and the contract of 12 June 1995 was concluded in Visoko.

18. Article 13 reads:

“The competent court shall determine whether the transfer of rights to the appellant was conducted voluntarily and in accordance with the law.

If the transfer of rights was conducted between 1 April 1992 and 14 December 1995, and its validity is disputed by the respondent, the burden of proof shall lie on the party claiming to have acquired rights to the property under the transaction to establish that the transaction was conducted voluntarily and in accordance with the law.

If the validity of the transfer has been determined in previous proceedings that took place prior to the entry into force of this Law, the decision taken in the previous proceedings shall be null and void.

The court may make whatever orders are necessary to give effect to its decision, including orders setting aside legal transactions, orders for making or erasing entries in the appropriate public books/registers, and orders lifting any order for suspension of the administrative proceedings.

The relevant parties to the appeal shall notify the competent administrative body of the court's decision.

The responsible administrative body shall resume enforcement proceedings as required, or discontinue proceedings in accordance with the court's decisions.”

19. On 4 December 2001, the High Representative imposed the Decision on the Law on Amendments to the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, inserting *inter alia* a new Article 12a. It entered in force eight days after the publication in the Official Gazette of the Republika Srpska (“OG RS”) on 21 December 2001 (OG RS 65/01).

20. The new Article 12a, relevant in the present case, reads:

“The responsible administrative body shall direct the appellant to initiate proceedings before the competent court within 30 days to prove that the right holder named in the Commission's decision voluntarily and lawfully transferred his/her rights to the appellant since the date referred to in the dispositive of the Commission's decision.

The competent court may make a specific order to suspend the enforcement proceedings before the responsible administrative body pending the court's decision where the appellant can show evidence of a written contract on the transfer of rights in accordance with domestic law and irreparable damage to the enforcer if the enforcement proceedings continued.”

C. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property (Official Gazette of the Republika Srpska, Nos. 38/98, 41/98, 12/99, 31/99, 38/99 with incorporated amendments proclaimed by the High Representative Decision on the Law on Amendments to the Law on Cessation of the Application of the Law on the Use of Abandoned Property of 4 December 2001 and published in the Official Gazette of the Republika Srpska, No. 65/01 of the 21 December 2001).

21. Article 25 provides:

“The provisions of this Law shall also apply to the abandoned real property, the ownership of which has been acquired after 30 April 1991 under any title on sale of real property (contracts on exchange, purchase, gift, etc.)

In case of a dispute as to the lawfulness of the transferred real property right, the competent authority shall refer the matter to the competent court according to the provision of the Law on General Administrative Procedures regulating preliminary issues, in order to rule on the allegation.”

22. Article 2a, which was incorporated by the December 2001 amendments, provides:

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

In the event that each party to the contract on exchange filed a claim for repossession before the expiry of the deadline set out in Article 16, the competent authority shall process the claims according to this Law. Notwithstanding, the competent authority in each municipality shall deem the exchange valid, if both parties give a statement reconfirming the contract on exchange, and shall revalidate the contracts on use pursuant to Article 27 paragraph 2, point 4 of this Law.

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

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

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

V. SUBMISSIONS OF THE PARTIES

A. The Republika Srpska

23. According to its observations at the public hearing of 9 October 2002 the respondent Party is of the opinion that the application before the Chamber is premature, since proceedings are pending before the First Instance Court in Banja Luka since September 1998. Therefore domestic remedies available to the applicant to confront her forcible eviction from the apartment in Banja Luka have not been exhausted, as required by Article VIII paragraph 2(a) of the Agreement.

24. The respondent Party further states that in the present case Article 12a of the Law on Implementation of CRPC Decisions applies and therefore the competent court may make a specific order to suspend the enforcement proceedings pending its decision on the merits of the case, i.e. the validity of the exchange contract. However, the general practice is that courts do not apply Article 12a and do not issue orders for provisional measures in cases as the present one. The respondent Party concedes that the court has an obligation to issue a decision on the applicant's request for suspension of enforcement. However, in the present case the First Instance Court in Banja Luka remained silent.

25. The respondent Party finally states that the aim of the applicant's eviction while the court proceedings concerning the validity of the exchange contract are still pending is to allow the expeditious return of persons displaced during the armed conflict in Bosnia and Herzegovina.

B. The applicant

26. The applicant states that the contract on exchange with M.J. was concluded voluntarily and in a friendly atmosphere between the parties. She submits that the facts of her case are completely different from those considered by the Constitutional Court in case No. U 15/99, in which that Court declared null and void an exchange contract because of duress, as evidenced by the general war situation in Prijedor in 1995. She also states that M.J. does not intend to return to her house, but intends to sell it.

27. As to the question of exhaustion of domestic remedies, the applicant argues that Article 25 of the Law on Cessation is applicable to her case and that therefore enforcement should have been suspended. Moreover, she submits that she appealed both to the administrative second instance organ against the conclusion on enforcement and sought an order for provisional measures before the Banja Luka Court of First Instance. However, neither the second instance administrative organ nor the court reacted. The applicant thus concludes that she thereby exhausted all available domestic remedies.

C. Submissions of the Organisation For Security and Co-operation in Europe – Mission to BiH (OSCE) and of the Office of the High Representative (OHR) as *amici curiae*

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

29. *Amici curiae* submit that in the present case the Law on Implementation of CRPC Decisions applies as *lex specialis*, taking precedence over the provisions on exchange contract cases in the Law on Cessation of the Application of the Law on Abandoned Property. They state that the Law on Implementation of CRPC Decisions, which was originally passed in 1999, turns out to provide a parallel procedure to the one for claims for repossession of pre-war property that are filed with the administrative bodies under the Law on Cessation of the Application of the Law on Abandoned Property. As a consequence, the rights of the parties will depend on whether they filed their claim to the CRPC or they filed their claim to the administrative authority. In practice, often persons who filed a claim to CRPC and received a CRPC decision are in a better position than the persons who filed a claim for repossession to the administrative bodies, particularly so in exchange contract cases.

30. *Amici curiae* point out, however, that one of the goals of the drafting efforts leading to the 4 December 2001 amendments to the Federation Law on Cessation of the Application of the Law on Abandoned Property Owned by Citizens, Federation Law on Cessation of the Application of the Law on Abandoned Apartments, the RS Law on Cessation of the Application of the Law on Abandoned Property and the Law on Implementation of CRPC Decisions of both Entities, was to harmonize the suspension and burden of proof provisions in each law along the lines set out in Article 2a of the RS Law on Cessation of the Application of the Law on Abandoned Property. Any current ambiguity as regards this policy in the relevant legislation is likely the result of legislative oversight and the inconsistencies should be rectified and remedied, maybe through legislative amendments. Thus, with regard to suspension of enforcement proceedings, the model set out in Article 2a should be applicable and where there is a dispute as to the validity of the contract on exchange the housing

authority would have to suspend procedures and refer the case to the competent court to determine whether the contract was signed under duress.

31. *Amici curiae* further submit that the decision to require case-by-case court consideration of wartime exchanges rather than annulling them all *ex lege* indicates the legislator's assumption that some wartime exchanges were valid. In these cases, failure to suspend enforcement of the claim for repossession while the court dispute is pending would cause an effectively wrongful eviction, which could not be remedied until the court decision upholding the contract. Further, *amici curiae* argued that choosing not to suspend enforcement would allow immediate repossession by the pre-war owner, but the exercise of associated property rights, such as the right to transfer the property to third parties, would be indefinitely delayed.

32. *Amici curiae* recommend harmonizing the different laws so as to provide for cases analogous to the applicant's:

- As to the RS Law on Cessation of the Application of the Law on Abandoned Property: No changes are necessary, as Article 25 provides for the referral of cases to the competent court "according to the provisions of the Law on General Administrative Procedure regulating preliminary issues". Moreover, Article 2a could be interpreted to apply not only to exchanges of socially owned property, but also to exchanges of private property.

- RS Law on Implementation of CRPC Decisions: Amendments are necessary to ensure uniform suspension of enforcement proceedings upon referral to the competent court under Article 12a and possibly also to address the apparent drafting inconsistency. As it stands, the relevant provisions assume a conclusion on permission of enforcement (CPE) has already been issued prior to a dispute regarding the validity of the exchange being aired and referred to the competent court. In reality, such a dispute is likely to arise prior to the issuance of a CPE.

VI. COMPLAINTS

33. The applicant alleges violations of her rights as protected by Articles 6 (right to a fair trial) and 8 (right to respect for her home) of the Convention and Article 1 of Protocol No. 1 to the Convention (right to peaceful enjoyment of possessions). The applicant did not specifically allege any violation of her rights as protected by Article 13 of the Convention (right to an effective remedy). The Chamber raised the issue of a possible violation of this provision *proprio motu* when transmitting the case to the respondent Party for its observations on the admissibility and merits of the case.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Exhaustion of domestic remedies

(a) With regard to the complaint under Article 8 of the Convention:

34. According to Article VIII(2)(a), the Chamber must consider whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted.

35. The Chamber notes that at no stage of the proceedings before the administrative and judicial organs of the RS the Law on Cessation of the Law on the Use of Abandoned Property or the Law on Administrative Procedure were applied. Both the applicant and the respondent Party seem to have taken the approach of considering the Law on Implementation of CRPC Decisions as *lex specialis* with respect to exchange contracts where there is a request to enforce a CRPC decision, as in the applicant's case. This view was also expressed by the *amici curiae*. The Chamber thus, following the practice of the public authorities and the opinion of the *amici curiae*, considers that Article 12a of the

Law on Implementation of CRPC Decisions applies in the present case. Article 12a of the Law on Implementation of CRPC Decisions obliges the responsible administrative body to direct the individual to initiate proceedings before the competent court when a dispute arises as to the validity of a transfer of the property after 1 April 1992. In this case, the court proceedings concerning the validity of the exchange contract were already pending before the CRPC decision was issued and its enforcement initiated.

36. Proceedings were commenced before the First Instance Court in Banja Luka in September 1998 and on 22 March 2002 the applicant requested that the Court issue an order for provisional measures to prevent her eviction pending court proceedings on the validity of the exchange contract. The Banja Luka Court of First Instance has the power under Article 12a to order suspension, but it has failed to reply to the applicant's request for an interim measure. As of today, the Court has neither issued the requested provisional measure, nor rejected the applicant's request. The representative of the respondent Party at the public hearing (see paragraph 24) confirmed that this failure to act reflects the general practice of the Republika Srpska courts.

37. The Chamber recalls that the exhaustion requirement refers solely to remedies which are effective (see, e.g., CH/96/17, *Blenić*, Decision on Admissibility and Merits of 3 December 1997, par. 19; Decisions on Admissibility and Merits 1996-1997). In the present case, due to the silence of the first instance court, the remedy provided for in Article 12a of the Law on Implementation of CRPC Decisions is not effective, and the applicant is left without any other remedy to seek suspension of her eviction. The Chamber finds that under such circumstances, the remedy at the applicant's disposal to prevent her eviction, and thus the interference with her right to respect for her home, was not effective.

(b) With regard to the complaint under Article 1 of Protocol No. 1 to the Convention:

38. As to the applicant's complaint that her rights as protected by Article 1 of Protocol No. 1, the Chamber notes that the question of the ownership over the property claimed by both the applicant and M.J. is the subject matter of a case pending before the First Instance Court in Banja Luka. In this dispute the court will clarify whether the exchange contract between the applicant and M.J. is valid. If the Banja Luka court determines that the contract is valid, the applicant will be the owner of the property, as she will have obtained it by virtue of a valid transfer subsequent to 1 April 1992, the date to which the CRPC decision establishing M.J.'s rights refers. The Chamber is of the opinion that the domestic courts are well equipped and able to solve the civil law problems at issue. Thus, the application is premature with regard to the alleged violation of the right to peaceful enjoyment of possessions, because a domestic proceeding concerning the matter is pending. Accordingly, the domestic remedies have not been exhausted as required by Article VIII(2)(a) of the Agreement. The Chamber therefore decides to declare the application inadmissible in this part.

2. Conclusion as to admissibility

39. The Chamber finds that no other ground for declaring the case inadmissible has been established. Accordingly, the Chamber declares the application admissible in relation to Articles 6, 8 and 13 of the Convention. The Chamber declares the remainder of the application inadmissible.

B. Merits

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

41. The applicant complains that her rights as contained in Article 8 of the Convention have been violated.

1. Article 8 of the Convention

42. Article 8 of the Convention provides as follows:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

43. It is undisputed that the applicant has been living in the house at 27. jula 12 (now Srpskih ustanika 16) in Banja Luka since the end of 1995. It has thus become the applicant’s home for the purposes of Article 8 of the Convention.

44. It is also undisputed that the applicant is under the threat of being evicted from the house she lives in, and that her eviction was halted only by the Chamber’s order for provisional measures. There is thus little doubt that there is an interference with her rights under Article 8 insofar as her family life and home would be disrupted by the eviction.

45. 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. It must accordingly be determined whether the interference in question satisfied the conditions in paragraph 2, that is to say was "in accordance with the law", in the interests of one or more of the legitimate aims listed, and "necessary in a democratic society" for achieving them. Further, a proper balance needs to be achieved between the legitimate aim pursued and the means employed.

(a) Is the threatened eviction “in accordance with the law”?

46. 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.

47. Under Article 12a, paragraph 2, of the Law on Implementation of CRPC Decisions the relevant domestic court has the power to make a specific order to suspend the enforcement proceedings before the responsible administrative body pending the court’s decision. The applicant must fulfil two conditions to be eligible for such a suspension: firstly, he/she must show evidence of a written contract on transfer of rights in accordance with domestic law. Secondly, there has to be irreparable damage to the enforcer. The Chamber notes that under Article 12a the Court is given discretion as to whether to order suspension. There is no provision requiring or allowing the administrative body in charge of the enforcement proceedings to suspend the enforcement in the absence of an order by the competent court.

48. Thus the Chamber concludes that the continuation of the enforcement proceedings against the applicant was in accordance with the law.

(b) Whether the interference with the applicants rights pursues a legitimate aim under paragraph 2 of Article 8, i.e. the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

49. The Chamber notes that the right of displaced persons and refugees to repossess and return to their pre-war property is one of the central objectives of the Dayton Peace Agreement. It further

notes that the Republika Srpska Law on Implementation of CRPC Decisions is based on the recognition that the failure to return property to rightful owners or occupancy right holders represents a violation of the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the Convention. The Law acknowledges that return of property is essential to the creation of durable solutions for refugees and displaced persons. This can take the form of either actual return to the property or sale of the property in order to finance one's own local integration elsewhere, through purchase or rental of a home that does not belong to someone else.

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

(c) 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?

51. Thus, the question before the Chamber is whether the interference with the applicant's right is "necessary in a democratic society", in other words, whether the respondent Party strikes the right balance between the "protection of the rights and freedoms of others", in this case M.J., and the applicant's right to respect for her home by ordering the applicant to vacate the house, and evicting her in case of non-compliance, before the dispute about the validity of the contract pending before the competent court is solved.

52. The Chamber notes that Article 13, paragraph 2, of the Republika Srpska Law on Implementation of CRPC Decisions, in allocating the burden of proof as to the voluntariness of the exchange contract on the applicant, contains a presumption that war-time exchanges were concluded under duress.

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

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

(i) *The failure to decide on the applicant's request for provisional measures*

55. This Law on Implementation of CRPC Decisions in Article 12a contains a mechanism that allows the court seized with the dispute about the validity of the exchange contract to decide whether, in the specific case before it, the general aim of expeditious repossession of pre-war homes should prevail over the rights asserted on the basis of the exchange contract or not. Article 12a, paragraph 2 reads: "The competent court may make a specific order to suspend the enforcement proceedings before the responsible administrative body pending the court's decision where the appellant can show evidence of a written contract on the transfer of rights in accordance with domestic law and irreparable damage to the enforcee if the enforcement proceedings continued."

56. The law appears to envision that the competent court, once it has been requested to issue an order provisionally halting the enforcement of the administrative repossession proceedings, will make a decision on the basis of the case file before it. The court will examine the *prima facie* strength of the arguments made and evidence presented by the two parties, the one asserting the validity of the exchange contract and the one claiming that it was concluded under duress. In this respect the court will require the side asserting the validity of the exchange to, as a minimum, "show evidence of a written contract" on the exchange. The court will then take into account whether the party seeking suspension of the eviction can make credible that the deprivation of the possession of the home until the dispute about the contract is solved will cause irreparable harm to it. The Chamber is of the opinion that the mechanism envisaged by the law may be seen to strike a fair balance between the two parties to the dispute.

57. However, in the case before the Chamber the First Instance Court in Banja Luka has failed until today to decide on the, manifestly urgent, request for provisional measures by the applicant. As a result, the balance crafted by the legislator is overturned and the applicant *de facto* deprived of all procedural safeguards. Under these circumstances, the interference with the applicant's right to respect for her home does not comply with the requirement that it be "necessary in a democratic society for the protection of the rights of others", in this case of the pre-war owner M.J..

(ii) *The differences between the rules governing suspension of enforcement under the Law on Implementation of CRPC Decisions and the Law on Cessation of the Law on Use of Abandoned Property*

58. The Chamber further notes that while the suspension of enforcement is mandatory under Article 2a of the Law on Cessation of the Law on the Use of Abandoned Property, and - through the relevant provisions on preliminary issues in the Law on Administrative Procedure - the same is true for Article 25, suspension is subject to the fulfillment of certain conditions and to the court's discretion under Article 12a of the Law on Implementation of CRPC Decisions. The only criterion whereby an individual's claim will fall into one or the other procedure is the issuance of a CRPC decision. As a result, M.J. having obtained a CRPC decision and requested the Ministry to enforce it instead of seeking reinstatement in regular administrative proceedings, the applicant can only obtain suspension of her eviction at the discretion of the First Instance Court (if that Court was to decide on her request). Under the Law on Cessation of the Law on the Use of Abandoned Property suspension would have been automatic.

59. The *amici curiae* submit that there is no reasonable justification to have different provisions in the two laws and that the Law on Implementation of CRPC Decisions needs to be harmonized with Article 2a of the Law on Cessation of the Law on the Use of Abandoned Property. The *amici curiae* further note that the Law on Implementation of CRPC Decisions remains silent as to the action to be taken by the administrative authorities in terms of suspension of proceedings and that this departs from the general legal framework in BiH (the Laws on Cessation of the Laws on Abandoned Property and the Laws on Administrative Procedure), which provides for suspension of proceedings by the administrative bodies when a court has been asked to decide a "preliminary matter".

60. The Chamber notes that CRPC decisions only determine in a final and binding manner who was the owner, occupancy right holder or otherwise bona fide possessor of a piece of property as of 1 April 1992. Thus, they do not reflect any change of title, valid or invalid, voluntary or under duress, that may have taken place after that date. CRPC decisions are limited to confirming the status as of

April 1992. The Chamber further notes that in exchange contract cases (and other cases of transfer of title to a property after 1 April 1992) both parties agree as to who is the pre-war possessor. Indeed, these contracts are characterized by the fact that there is no dispute as to who is the pre-war owner or occupancy right holder. Necessarily, the party opposing repossession recognizes the pre-war rights of the party seeking repossession, otherwise it could not claim to have validly received title to the property by exchange contract (*resoluto iure dantis, resolvitur et ius accipientis*).

61. For the reasons explained, the Chamber is of the opinion that the differences between exchange contract cases in which the person challenging the validity of the exchange contract holds a CRPC decision and those in which he/she doesn't, have no real justification, but, as the *amici curiae* suggested, appears to be due to a "legislative oversight". This distinction, however, has considerable impact on the procedural safeguards afforded to the party seeking not to be evicted from the exchanged property. In the case before the Chamber, the fact that M.J. has requested and obtained recognition of her undisputed pre-war ownership before CRPC and not before the Banja Luka housing authorities, has a strongly adverse impact on the rights of the applicant. Also in this respect, the interference with the applicant's right to respect for her home does not comply with the requirement that it be "necessary in a democratic society for the protection of the rights of others", in this case of the pre-war owner M.J..

(c) Conclusion as to Article 8

62. The Chamber finds that the continuation of the enforcement proceedings against the applicant, aiming at evicting her from the house in Banja Luka, without any consideration of the court dispute concerning the validity of the contract in her case; the failure of the First Instance Court to decide on the applicant's request for suspension of proceedings; the unjustified difference in treatment between exchange contract cases in which the person challenging the validity of the exchange contract holds a CRPC decision, as in the applicant's case, and those in which no CRPC decision is involved, fail to strike a fair balance between the protection of the rights of the pre-war occupant and those of the applicant.

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

2. Article 13 of the Convention

64. 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."

65. The applicant did not specifically allege a violation of her rights as protected by Article 13 of the Convention. The Chamber raised it *proprio motu* when transmitting the case to the respondent Party for its observations on the admissibility and merits of the case.

66. The Chamber recalls that the European Court of Human Rights has held in the case of *Aydin v. Turkey* Eur. Ct. HR, judgment of 25 September 1997 *Reports of Judgments and Decisions* 1997, paragraph 103):

"The Court recalls at the outset that Article 13 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. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, 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. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State".

67. In the present case, the applicant clearly has an arguable claim that her rights as guaranteed by Article 8 of the Convention were being violated and accordingly she was entitled to an effective remedy in respect of that claim.

68. One of the essential elements for the application of Article 13 is the so-called *material effectiveness* which requires that an effective remedy is not only available in the national legal system, but also that the applicant be able to take effective advantage of it. The principle that applies here, is that rights in the Convention must be effective and not theoretical. Further, remedies available and that could qualify as effective ones, will not impress the Chamber if they are not being applied properly or not at all complied with by the authorities.

69. In the present case, although the applicant has requested that the First Instance Court in Banja Luka issue an order for provisional measures to prevent her eviction pending court proceedings on the validity of the exchange contract as provided for in Article 12a, due to the silence of the first instance court, the applicant is left without any other remedy to seek suspension of her eviction. The Banja Luka Court of First Instance has the power under Article 12a to order suspension, but it has failed to reply to the applicant's request for an interim measure. As of today the Court has not given any decision on the request for provisional measures. The respondent Party has confirmed the applicant's allegation that her case is just an instance of a general practice not to decide requests for provisional measures in cases like hers. The Chamber is of the opinion that under such circumstances, the applicant was deprived of her right under Article 13 to an effective remedy against the violation of her right to respect for her home.

70. The Chamber thus finds a breach of Article 13 in conjunction with Article 8 of the Convention by the respondent Party.

3. Article 6 of the Convention:

71. The applicant complains that there has been a violation of her right to a fair trial under Article 6 of the Convention. However, in the light of the finding of a violation of Article 13 of the Convention, the Chamber considers it unnecessary to separately examine the complaint under Article 6 of the Convention.

VIII. REMEDIES

72. Under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the respondent Party to remedy established breaches of the Agreement. In this regard the Chamber shall consider issuing orders to cease and desist, monetary relief, as well as provisional measures.

73. The Chamber notes that it has found a violation of the applicant's right to respect for her home as guaranteed by Article 8 of the Convention and the right to an effective remedy as provided for in Article 13 of the Convention. These violations result from the failure of the respondent Party to render effective in practice the remedy afforded to the applicant by Article 12a of the Law on Implementation of CRPC Decisions and the consequential failure to strike a fair balance between the protection of the rights of the pre-war owner and those of the applicant. The Chamber therefore finds it appropriate to order the respondent Party to take necessary action to ensure that this fair balance between the applicant's rights and those of the pre-war owner of the apartment is re-established through the establishment of a materially effective mechanism.

74. In these circumstances, the Chamber finds it appropriate to order the respondent Party to take necessary legislative or administrative action to ensure that in the applicant's case all administrative proceedings, including enforcement proceedings, are suspended ex officio by the administrative bodies pending the final (pravosnažno) decision of the judiciary as to the validity of the exchange contract.

75. The Chamber also sees it fit to order that its order for provisional measures issued on 27 March 2002 remains in force until the suspension ordered in paragraph 74 becomes effective.

IX. CONCLUSIONS

76. For the above reasons, the Chamber decides:

1. unanimously, that the application is admissible against the Republika Srpska with respect to the complaint under Article 8 of the European Convention on Human Rights;

2. unanimously, that the application is admissible against the Republika Srpska with respect to the complaint under Article 13 of the Convention;

3. unanimously, that the application is admissible against the Republika Srpska with respect to the complaint under Article 6 of the Convention;

4. by 9 votes to 1, that the application is inadmissible with respect to the complaint under Article 1 of Protocol No. 1 to the Convention;

5. unanimously, that the Republika Srpska has violated the right of the applicant to respect for her home as guaranteed by Article 8 of the Convention, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

6. unanimously, that the Republika Srpska has violated the right of the applicant to an effective remedy as guaranteed by Article 13 in conjunction with Article 8 of the Convention, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

7. unanimously, that it is not necessary to examine whether there has been a violation of the applicant's rights protected by Article 6 of the European Convention on Human Rights;

8. unanimously, to order the Republika Srpska to take all necessary legislative or administrative action to ensure that in the applicant's case all administrative proceedings, including enforcement proceedings, are suspended ex officio by the administrative bodies pending the final (pravosnažno) decision of the judiciary as to the validity of the exchange contract;

9. unanimously, that its order for provisional measures issued on 27 March 2002 remains in force until the suspension ordered in conclusion 8 becomes effective;

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

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex

Partly dissenting opinion of Mr. Jakob Möller

ANNEX

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Jakob Möller.

PARTLY DISSENTING OPINION OF MR. JAKOB MÖLLER

I disagree with conclusion no. 4 declaring the applicant's claim concerning her right to peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention inadmissible for non-exhaustion of domestic remedies under Article VIII(2)(a) of the Agreement. The majority motivates its conclusion in paragraph 38 of the decision on admissibility and merits by observing that the question of the ownership of the property concerned is the subject matter of a case pending before the First Instance Court in Banja Luka and expressing the opinion "that the domestic courts are well equipped and able to solve the civil law problems at issue".

I agree that the courts should, in principle, be well equipped and able to solve civil law cases. Considering, however, that the court proceedings at issue have been pending before the First Instance Court for more than four years (see paragraph 11 of the decision on admissibility and merits), I am of the view that the Chamber should have declared the claim under Article 1 of Protocol No. 1 admissible, with a view to assessing whether the remedy pursued has been effective in this particular case and determining on the merits whether or not there has been a breach of Article 1 of Protocol No. 1 to the Convention. In this context, I respectfully refer to the Chamber's motivation for declaring the applicant's claim under Article 13 of the Convention (the right to an effective remedy) admissible (see paragraph 68 of the decision on admissibility and merits). The Chamber there observes, *inter alia*, that "remedies available and that could qualify as effective ones, will not impress the Chamber if they are not being applied properly or not at all complied with by the authorities" (*id.*). I consider this observation to be relevant also in relation to the applicant's claim under Article 1 of Protocol No. 1 to the Convention.

(signed)
Jakob Möller