DECISION ON REQUEST FOR REVIEW

Cases nos.
CH/98/659, CH/98/734, CH/98/750, CH/98/751, CH/98/753,
CH/98/824, CH/98/825, CH/98/826, CH/98/1100,
CH/98/1101, CH/98/1103, CH/98/1105,
CH/98/1106, CH/98/1107, CH/98/1108,
CH/98/1109, CH/98/1110, CH/98/1111, CH/98/1112,
and CH/98/1116

Esfak PLETILIĆ, Ibro DURAKOVIĆ, Refik KONIĆ, Husein SAMARDŽIĆ, Osman SMAJLOVIĆ, Redžo HUBIJAR, Osman ŠILJAK, Ziza GERZIĆ, Mehmed MUHAREMAGIĆ, Munib and Hatidža TABAKOVIĆ, Elmira and Naim ČEHAJIĆ, Refko BRADARIĆ, Slobodanka MILIĆ-TAIRI and Isan TAIRI, Avdo CRNOJEVIĆ, Bećo RAKOVIĆ, Muharem and Subha ŠABIĆ, Fuad MUJADŽIĆ, Ahmet MERDANOVIĆ, Sead ĆERIMOVIĆ, and Halima DIZDAREVIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 5 November 1999 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

Having considered the First Panel's recommendation;

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

I. FACTS AND COMPLAINTS

1. The applicants are citizens of Bosnia and Herzegovina, all except one of whom are of Bosniak descent. They are owners of real property in the Gradiška area in the Republika Srpska, which they were forced to leave during the war. The great majority of these properties are occupied by refugees and displaced persons of Serb origin. Most of the applicants have now returned to the area.

2. The cases concern their attempts before various authorities of the Republika Srpska to regain possession of their property. The applicants have taken various steps to regain possession of their properties. The majority of the applicants have so far been unsuccessful.

3. The cases raise issues principally under Articles 6 and 8 of the European Convention on Human Rights, Article 1 of Protocol No. 1 to the Convention and Article II(2)(b) of the Agreement.

II. SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER

4. The applications were introduced between 14 May and 19 August 1998 and registered between 9 June and 19 August 1998.

5. On 2 December 1998 the Second Panel of the Chamber decided, pursuant to Rule 49(3)(b), to transmit the applications to the respondent Party for observations on their admissibility and merits. The respondent Party submitted observations in the cases on 19 March and 13 August 1999.

6. On 14 May 1999 the Second Panel held a public hearing on the admissibility and merits of the cases.

7. On 9 July 1999, having decided to join the cases, the Second Panel adopted its decision on the admissibility and merits. It found that there had been a violation by the respondent Party of the applicants' rights under Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention. Further, the applicants had been discriminated against in the enjoyment of those rights. This discrimination was on the ground of association with a national minority in the case of the applicant Slobodanka Milić-Tairi and on the ground of national origin in respect of all of the other applicants. The respondent Party was, as a result, in breach of Article I of the Agreement. Accordingly, the respondent Party was ordered, *inter alia*, to enable the applicants who had not already done so to regain possession of their properties without further delay and to pay to the applicants certain specified amounts in compensation.

8. On 10 September 1999 the Second Panel's decision was delivered, in pursuance of Rule 60. On 6 October 1999 the respondent Party submitted a request for a review of the decision. In pursuance of Rule 64(1) the request was considered by the First Panel which, on 2 November 1999, decided to recommend to the plenary Chamber that the request be rejected. The plenary Chamber considered the request and the First Panel's recommendation on 5 November 1999.

III. REQUEST FOR REVIEW

9. In its request the respondent Party argues that the decision of the Second Panel should be reconsidered as the cases raise serious issues of general importance concerning the interpretation of the General Framework Agreement for Peace in Bosnia and Herzegovina ("the General Framework Agreement").

A. Annex 7 of the General Framework Agreement for Peace

10. The respondent Party points out that Annex 7 of the General Framework Agreement was entered into by the Parties, in order to allow the free return of refugees and displaced persons to their prewar homes, in accordance with a plan designed for this purpose drawn up in cooperation with the United Nations High Commissioner for Refugees ("UNHCR"). In addition, the Commission for Real

Property Claims of Refugees and Displaced Persons ("the Annex 7 Commission") was established to assist in this process. Article XIII of Annex 7 allows the Parties to temporarily house refugees and displaced persons in vacant property. The respondent Party passed legislation, including the Law on the Use of Abandoned Property (Official Gazette of the Republika Srpska – hereinafter "OG RS" – no. 3/96; "the old law"), to provide a legal framework for this.

11. The respondent Party states that the applicants left their properties during the war of their own free will or due to other reasons related to the war and that, therefore, those properties were abandoned. Accordingly, the respondent Party acted in accordance with Annex 7 in allowing those properties to be used by refugees and displaced persons, which is a legitimate aim.

12. Furthermore, the respondent Party has not taken any actions to prevent the applicants from regaining possession of their properties in accordance with the procedure established by Annex 7. On the contrary, by adopting the Law on the Cessation of the Application of the Law on the Use of Abandoned Property (OG RS no. 38/98; "the new law"), it established a procedure to regain possession of property where such an application has not been made to the Annex 7 Commission. In the event that a person does make an application to the Annex 7 Commission during the proceedings under the new law, the latter provides for the proceedings to be stayed pending the examination by the Annex 7 Commission.

13. The respondent Party therefore considers that there has been no violation of the rights of the applicants as guaranteed by Article 8 of the Convention and by Article 1 of Protocol No. 1 to the Convention. This is because at the time of filing their applications to the Chamber, the applicants were not in possession of their properties. The procedures established under Annex 7 and the new law are designed to deal with this issue. Decisions issued in accordance with these procedures have the effect of declaring the applicants to be the owners of their properties and entitled the applicants to regain possession of their properties. Accordingly, the Chamber is not competent to consider the applications which, instead, should be examined by the Annex 7 Commission.

14. The respondent Party further claims that it is not possible to equate "ownership" and "possession" of the properties concerned in the applications. The owner of a property does not always possess a property and the right to use abandoned property is to be considered a "temporary possession" until such time as that right is terminated by the competent organs. This matter is dealt with by Annex 7 and the relevant laws of the respondent Party. The respondent Party also refers to the fact that it was required to accommodate many refugees and displaced persons of Serb origin, and therefore it cannot be concluded that only the applicants in the present cases were discriminated against.

B. Exhaustion of domestic remedies

15. The respondent Party also claims that the cases are inadmissible for failure to exhaust domestic remedies as required by Article VIII(2)(a) of the Agreement. In relation to the applicant Mr. Pletilić, it states that the Regional Court in Banja Luka, in its judgment of 26 February 1999 on the applicant's appeal, returned the matter to the Court of First Instance for review. This, according to the respondent Party, shows that there is an efficient remedy available to the applicants at domestic level. It further states that both the old and the new laws require that matters concerning abandoned property are dealt with by an administrative procedure rather than by the courts. Accordingly, the courts of the Republika Srpska are not competent to deal with requests for the return of property. The respondent Party also claims that the applicants did not exercise their rights of appeal against the failure of the administrative organs to decide upon their appeals.

16. The respondent Party points out that the applicants Mr. Duraković, Mr. Konić and Mr. and Ms. Tabaković regained possession of their properties prior to the adoption of the Second Panel's decision of 9 July 1999. The applicant Mr. Bradarić regained possession of his property on 4 September 1999. The applicant Mr. Pletilić sold his property in September 1999 and moved to Sarajevo.

C. Compensation awards

17. Regarding the sums awarded for compensation for mental suffering and rental payments, the respondent Party considers that these awards should be reconsidered. It states that the applicants did not apply for compensation under national law and also that the Second Panel did not consider the question of when the damage concerned occurred.

18. In addition, the respondent Party claims that the applicants did not supply evidence of the costs they incurred. The respondent Party makes the same argument concerning the award of 5,000 Convertible Marks (*Konvertibilnih Maraka*, "KM") as compensation for damage caused to the property of the applicants Mr. and Ms. Tabaković while it was occupied by the Army of the Republika Srpska ("VRS"). The respondent Party considers that this claim for compensation should have been rejected for the same reasons as the rejection of the claim for compensation in case no. CH/98/777 (*Pletilić,* decision on admissibility and merits delivered on 8 October 1999).

19. The respondent Party states that the sums awarded to the applicants for mental suffering are excessive as that sum, KM 1,200, is equivalent to six months average wage in the Republika Srpska.

IV. OPINION OF THE FIRST PANEL

20. The First Panel notes that the request for review has been lodged within the time-limit prescribed by Rule 63(2). According to Rule 64(1), the request shall be referred to the Panel which did not take the challenged decision and that Panel shall make a recommendation to the plenary Chamber as to whether the decision should be reviewed. The plenary Chamber shall consider the request for review as well as the recommendation of the aforementioned Panel, and shall decide whether to accept the request. Under Rule 64(2), it shall not accept the request unless it considers (a) that the case raises a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance and (b) that the whole circumstances justify reviewing the decision (see cases nos. CH/97/59 and CH/97/69, *Rizvanović* and *Herak*, decisions on requests for review of 13 November 1998, Decisions and Reports 1998).

A. Annex 7 of the General Framework Agreement for Peace

21. As regards the respondent Party's arguments under Annex 7, the First Panel notes that the respondent Party raised substantively identical arguments in the proceedings before the Second Panel and that this Panel dealt with the issue in detail in its decision. At paragraph 160 of its decision in the cases, the Second Panel held that Article VIII(2)(d) of the Agreement enables the Chamber to declare an application inadmissible if the same matter is already pending before the Annex 7 Commission. However, as none of the applicants had applied to that Commission, the cases could not be declared inadmissible under that provision.

22. Regarding the respondent Party's claim that there has been no violation of the rights of the applicants as protected by Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention, the First Panel notes that the respondent Party did not submit any observations under Article 8 of the Convention during the proceedings before the Second Panel. In any event, the Second Panel found a violation of the rights of the applicants as protected by Article 8 of the Convention only after a detailed examination of that provision (see paragraphs 163-178 of the decision). The First Panel does not consider that the argument of the respondent Party in this regard satisfies the first condition set out in Rule 64(2), as it does not raise a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance.

23. Regarding Article 1 of Protocol No. 1 to the Convention, the respondent Party submitted arguments under this provision during the proceedings before the Second Panel. These arguments were considered by the Second Panel during its examination of the cases under this provision (at paragraphs 179-187 of its decision). Again, the First Panel does not consider that the arguments of the respondent Party in this regard satisfies the first condition set out in Rule 64(2).

24. The respondent Party further claims that the Second Panel was wrong to conclude that only the applicants were discriminated against. The First Panel notes that the Second Panel in its decision did not decide that only the applicants had been discriminated against. The First Panel also notes that the Second Panel explicitly acknowledged the difficulties the current occupants of the properties of the applicants would face in seeking to return to their homes (at paragraph 205). Thus, this argument also fails to satisfy the first condition set out in Rule 64(2).

B. Exhaustion of domestic remedies

25. The respondent Party claims that the applicants cannot be considered to have exhausted the domestic remedies available to them.

26. The First Panel notes that the Second Panel considered the question of whether the applicants had exhausted domestic remedies (at paragraphs 148-155). The First Panel also notes that the decision of the Regional Court in Mr. Pletilić's case does not alter the fact that the courts in the Republika Srpska, including in that case, have consistently declined jurisdiction over matters concerning abandoned property. In the proceedings before the Second Panel and in its request for review, the respondent Party itself seeks to justify this position by reference to the relevant laws of the Republika Srpska. This serves to further reinforce the finding of the Second Panel at paragraph 152 of its decision that "the fact that the (Municipal Court in Gradiška) has consistently declined jurisdiction and that the Supreme Court of the Republika Srpska also holds this view shows that the initiation, by the present applicants, of court proceedings seeking to regain possession of property either did not or would not have had any prospect of success either. It cannot therefore be considered to be an effective remedy which the applicants should be required to exhaust." The respondent Party's argument in this regard thus fails to satisfy the first condition set out in Rule 64(2).

27. The respondent Party also points out that certain of the applicants have regained possession of their properties. The First Panel notes that the Second Panel in its decision refers to this fact in respect of the applicants Mr. Konić and Mr. and Ms. Tabaković (see paragraphs 24 and 51 of the decision). Mr. Duraković has regained possession of part of his property only, a fact which is stated in the decision of the Second Panel (at paragraph 16). In respect of the applicants Mr.Pletilić and Mr. Bradarić, the events the respondent Party refers to occurred after the adoption of the decision of the Second Panel. In addition, the decision of the Second Panel concerning compensation awards to the applicants is designed so that compensation for rental payments for alternative accommodation is only payable until the end of the month in which an applicant regains possession of his or her property.

C. Compensation awards

28. The respondent Party also claims that the compensation awards ordered by the Second Panel should be reconsidered. The First Panel recalls that if the Chamber finds a violation of any of the rights of an applicant as protected by the Agreement, it is empowered by Article XI(1)(b) to order the respondent Party to pay monetary relief to that applicant. There is no requirement that an applicant must first seek compensation at domestic level. The First Panel notes the respondent Party's claim that the Second Panel failed to consider when the damage occurred. The Second Panel did, however, consider this issue in detail (at paragraph 238 of its decision) and ordered compensation to be paid accordingly. Concerning the award of KM 5,000 to Mr. and Ms. Tabaković, the First Panel notes that the claim for compensation in the *Pletilić* case (no. CH/98/777), referred to by the respondent Party, concerned costs for redecorating of the property of that applicant. It was rejected on the ground that it related to potential future costs and was unsubstantiated. The First Panel notes that similar claims in 19 of the present case were rejected on the same ground. The award to Mr. and Ms. Tabaković concerns damage caused to the applicants' property while it was occupied by the VRS, which is substantively different to the claim for compensation in the *Pletilić* case. Consequently, this argument of the respondent Party does not raise a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance and therefore does not satisfy the first condition set out in Rule 64(2). The First Panel makes the same consideration with regard to the other arguments made by the respondent Party concerning the compensation awards.

29. In conclusion, the First Panel notes that the grounds upon which the respondent Party's request for review is based were, in large part, raised in the proceedings before the Second Panel. In any event, the First Panel does not consider that the case raises "a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" or that "the whole circumstances justify reviewing the decision". Consequently, as the request for review does not meet the two conditions set out in Rule 64(2), the First Panel, by 6 votes to 1, recommends that it be rejected.

V. OPINION OF THE PLENARY CHAMBER

30. The Chamber first recalls that under Article X(2) of the Agreement it shall normally sit in panels of seven members. When an application is decided by a Panel, the plenary Chamber may decide, upon motion of a party to the case or the Human Rights Ombudsperson, to review the decision. Article XI(3) of the Agreement stipulates that, subject to the aforementioned review, the decisions of the Chamber shall be final and binding.

31. The plenary Chamber agrees with the First Panel, for the reasons stated above, that the request for review does not meet the two conditions required for the Chamber to accept such a request pursuant to Rule 64(2).

VI. CONCLUSION

32. For these reasons, the Chamber, by 10 votes to 1,

REJECTS THE REQUEST FOR REVIEW.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber