



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 10 December 1999)

Case no. CH/98/958

Mara BERIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 4 November 1999 with the following members present:

Ms. Michèle PICARD, President
Mr. Rona AYBAY, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Miodrag PAJIĆ
Mr. Andrew GROTRIAN

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, 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. The applicant is a citizen of Bosnia and Herzegovina. She is the holder of an occupancy right over an apartment in Prijedor, Republika Srpska. On 28 September 1992, she was granted a permanent occupancy right over the apartment by the holder of the allocation right. On 30 April 1998 the Commission for the Accommodation of Refugees and Administration of Abandoned Property in Prijedor ("the Commission"), a department of the Ministry for Refugees and Displaced Persons ("the Ministry"), declared the applicant to be an illegal occupant of the apartment and ordered her to vacate it within three days under threat of forcible eviction. On 12 September 1998 the applicant received this decision and on 14 September 1998 she appealed against it. There has been no decision on this appeal to date. The applicant still occupies the apartment.
2. The case raises issues principally under Article 8 of the European Convention on Human Rights and Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced to the Chamber on 16 September 1998. It was registered on 17 September 1998. The applicant requested that the Chamber order the respondent Party as a provisional measure to take all necessary steps to prevent her being evicted from the apartment.
4. On 18 September 1998 the President of the Chamber ordered, pursuant to Rule 36(2) of the Rules of Procedure, the respondent Party to refrain from evicting the applicant from the apartment.
5. On 29 October 1998, pursuant to Rule 49(3)(b) of the Rules of Procedure, the application was transmitted to the respondent Party for observations on its admissibility and merits. These observations were due by 29 December 1998. However, no observations were received from the respondent Party.
6. On 20 January 1999 the applicant was requested to submit a written statement and any claim for compensation or other relief which she wished to make. This statement, which did not contain a claim for compensation, was received by the Chamber on 9 February 1999. On 22 April 1999, the statement was transmitted to the respondent Party for information.
7. The Chamber deliberated upon the admissibility and merits of the application on 4 November 1999 and on the same date adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

8. The facts of the case as they appear from the applicant's submissions and the documents in the case-file have not been contested by the respondent Party and may be summarised as follows.
9. The applicant is the occupant of an apartment located at Miloša Obilića GS-2/IV, Prijedor, Republika Srpska. On 28 September 1992 she was granted the occupancy right by the holder of the allocation right over it, Prijedorska Banka A.D. ("the Bank"), where she is employed. The previous holder of the occupancy right had left Bosnia and Herzegovina. On 16 July 1993 the Bank issued a further decision, again granting the applicant the occupancy right over the apartment. On 5 August 1993 she entered into a contract for the use of the apartment with the housing company.
10. On 30 April 1998 the Commission issued a decision under Article 10 of the Law on the Use of Abandoned Property (see paragraph 14 below) declaring the applicant to be an illegal occupant of the apartment and ordering her to vacate it within three days under threat of forcible eviction. The reason for this decision was that, under the Law on the Use of Abandoned Property, the applicant was not entitled to be allocated abandoned property for use. On 12 September 1998 the applicant

received this decision and on 14 September 1998 she appealed against it. She has not received any decision on this appeal to date. On 16 July 1998 the Bank had written to the Commission in support of the applicant's occupancy of the apartment. She still occupies the apartment.

B. Relevant legislation

1. The Law on the Use of Abandoned Property

11. The Law on the Use of Abandoned Property (Official Gazette of the Republika Srpska – hereinafter “OG RS” – no. 3/96; “the old law”) establishes a legal framework for the administration of abandoned property. Accordingly, it defines what forms of property are to be considered as abandoned and sets out the categories of persons to whom abandoned property may be allocated. The provisions of the old law, insofar as they are relevant to the present case, are summarised below.

12. Articles 2 and 11 define “abandoned property” as real and personal property which has been abandoned by its owners and which is entered in the register of abandoned property. Types of property which may be declared abandoned include apartments (both privately and socially owned) and houses.

13. Article 3 states that abandoned property is to be temporarily protected and managed by the Republika Srpska. To this end, the Ministry is obliged, in Article 4, to establish commissions to carry out this task. Article 6 states that these commissions shall issue decisions on the allocation of abandoned property. The preparation of registers of abandoned property is to be carried out by the appropriate administrative bodies in each municipality.

14. Article 10 states that if a person enters into possession of abandoned property without a decision of the appropriate commission, that commission shall issue a decision ordering the person to vacate the property concerned. An appeal may be lodged to the Ministry by the recipient within three days of its receipt. Such an appeal to the Ministry does not suspend the execution of the decision.

15. Article 15 reads as follows:

“Abandoned apartments, houses and other abandoned housing facilities shall be allocated exclusively to refugees and displaced persons and persons without accommodation as a result of war activities, in accordance with the following priorities:

1. to the families of killed soldiers
2. war invalids with injuries in categories I-V
3. war invalids with injuries in categories V-X
4. qualified workers of whom there is a lack in the Republika Srpska.”

2. The Law on the Cessation of the Application of the Law on the Use of Abandoned Property

16. 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”) establishes a detailed framework for persons to regain possession of property considered to be abandoned under the law. It entered into force on 19 December 1998 and puts the old law out of force.

17. Article 2 was amended by the Law on Amendments to the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, which was contained in a decision of the High Representative of 13 April 1999. The amended text reads as follows:

“All administrative, judicial, and other decisions enacted on the basis of the regulations referred to in Article 1 of this Law in which rights of temporary occupancy have been created shall remain effective until cancelled in accordance with this Law.

Any occupancy right or contract on use made between 1 April 1992 and 19 December 1998 is cancelled. A person who occupies an apartment on the basis of an occupancy right which is cancelled under this Article shall be considered a temporary user for the purposes of this Law.

A temporary user referred to in the previous paragraph who does not have other accommodation available to him or her has a right to a new contract for use of the apartment, if the occupancy right of the former occupant terminates under Article 16 of this Law or if a claim of the former occupant to repossess the apartment is rejected by the competent authority in accordance with this Law.

An occupancy right holder to an apartment as of 1 April 1992, who agreed to the cancellation of his or her occupancy right in exchange for another occupancy right which is cancelled under this Article, is entitled to make a claim for repossession of his or her former apartment in accordance with this Law.”

18. Article 16 of the new law reads as follows:

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

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

3. The Law on General Administrative Procedures

19. The Law on General Administrative Procedures (Official Gazette of the Socialist Federal Republic of Yugoslavia no. 47/86) was taken over as a law of the Republika Srpska. It governs all administrative proceedings. The provisions of this law, insofar as they are relevant to the present case, are summarised below.

20. Article 2 states that a law may, in exceptional cases, provide for a different administrative procedure than that provided for in the Law on General Administrative Procedures. Under Article 3, all issues that are not regulated by a special law are to be dealt with under the Law on General Administrative Procedures.

21. Article 8 reads as follows:

“(1) Before making a decision a party has to be given the opportunity to express his or her opinion on all the facts and circumstances that are of importance in making an administrative decision.

(2) A decision may be made without hearing the opinion of a party only if provided by law.”

22. Article 135 paragraph 1 requires all relevant facts to be ascertained prior to the making of a decision. Under Article 247, a decision on an appeal must be made within two months of the lodging of such appeal.

4. The Law on Administrative Disputes

23. Under Articles 3 and 18 of the Law on Administrative Disputes (OG RS no. 12/94), the Supreme Court of the Republika Srpska has general jurisdiction over administrative disputes. Under Article 25 paragraph 1, if an administrative organ does not issue a decision on an appeal within 60 days of its being lodged, the applicant may lodge a reminder to the organ. If no decision is issued within 7 days of the lodging of such a reminder, the applicant may initiate an administrative dispute.

IV. COMPLAINTS

24. The applicant does not make any specific complaints of any violations of her human rights as protected by the Agreement. She complains that the decision of the Commission declaring her an illegal occupant of the apartment was made on an incorrect legal and factual basis.

V. SUBMISSIONS OF THE PARTIES

25. The respondent Party has not made any submissions regarding the application.

26. The applicant maintains her complaint.

VI. OPINION OF THE CHAMBER

A. Admissibility

27. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement.

28. 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. The Chamber notes that the respondent Party has not suggested that there is any “effective remedy” available to the applicant for the purposes of Article VIII(2)(a) of the Agreement.

29. The applicant lodged an appeal to the Ministry against the decision of the Commission of 30 April 1998. However, the lodging of such an appeal does not have any suspensive effect.

30. The Chamber notes that there has been no decision on this appeal to date. It would have been open to the applicant to commence administrative proceedings before the Supreme Court of the Republika Srpska in respect of the failure of the Ministry to issue a decision on her appeal. Before doing so, she would have had to have lodged a reminder with the Ministry, which she has not done. The Ministry would then have a seven day period in which to issue its decision. The applicant could then have initiated an administrative dispute before the Supreme Court.

31. As the Chamber noted in the *Onić* case (no. CH/97/58, decision on admissibility and merits delivered on 12 February 1999, paragraph 38, Decisions January-July 1999), the remedies available to an applicant must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. In addition, when applying the rule on exhaustion it is necessary to take realistic account not only of the existence of formal remedies in the legal system concerned but also of the general legal and political context in which they operate as well as of the personal circumstances of the applicants.

32. The Chamber considers that the non-suspensive effect of the appeal lodged by the applicant against the decision of the Ministry of 30 April 1998 raises a question of whether there is an effective remedy available to her. This fact, together with the fact that the respondent Party did not seek to argue that there was any effective remedy available to the applicant, leads the Chamber to conclude that no such remedy is in fact available to her.

33. The Chamber does not consider that any of the other grounds for declaring the case inadmissible have been established. Accordingly, the case is to be declared admissible.

B. Merits

34. Under Article XI of the Agreement the Chamber must next address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement the Parties are obliged to “secure to all persons within

their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms”, including the rights and freedoms provided for in the Convention and the other treaties listed in the Appendix to the Agreement.

1. Article 8 of the Convention

35. The applicant did not specifically allege a violation of her rights as protected by Article 8 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. Article 8 reads as follows:

“1. Everyone has the right to respect for... his home...

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.”

36. The Chamber notes that the applicant has lived in the apartment since September 1992, when she was allocated the occupancy right over it. It is therefore clear that the apartment is to be considered as her “home” for the purposes of Article 8 of the Convention.

37. The Chamber has already held that the threatened eviction of a person from his home constitutes an “interference by a public authority” with the exercise of the right to respect for his home (case no. CH/96/31, *Turčinović*, decision on the merits delivered on 11 March 1998, paragraph 20, Decisions and Reports 1998). The decision of the Commission declaring the applicant to be an illegal occupant of the apartment and ordering her to vacate it within three days under threat of forcible eviction therefore constitutes an “interference by a public authority” with that right.

38. In order to examine whether this interference has been justified under the terms of paragraph 2 of Article 8 of the Convention, the Chamber must examine whether it was “in accordance with the law”, served a legitimate aim and “was necessary in a democratic society” (see the aforementioned decision in *Onić*, paragraph 48). There will be a violation of Article 8 if any one of these conditions is not satisfied.

39. The Chamber notes that Article 2 of the old law requires a property to be entered into the register of abandoned property before it can be allocated to a person within the categories set out in Article 15. The respondent Party has not provided any evidence that any such entry was made in respect of the apartment in the present case. Nor is there any other indication available to the Chamber that such an entry was made.

40. Therefore, it has not been established that the requirements of the old law were adhered to in the present case. Accordingly, the attempts of the Commission to get the applicant to vacate the apartment cannot be considered to have been “in accordance with the law” within the meaning of paragraph 2 of Article 8 of the Convention.

41. Accordingly, the Chamber considers that there has been a violation of the applicant’s rights as guaranteed by Article 8 of the Convention.

2. Article 1 of Protocol No. 1 to the Convention

42. The applicant did not specifically allege a violation of her rights as protected by Article 1 of Protocol No. 1 to 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. Article 1 of Protocol No. 1 reads 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.”

43. The Chamber must first consider whether the applicant’s occupancy right over the apartment constitutes a “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention. The Chamber notes that the applicant was granted a permanent occupancy right over the apartment by the Bank, the holder of the allocation right, on 28 September 1992. However, Article 2 of the new law, as amended, (see paragraph 17 above) cancels all such occupancy rights and states that they shall be considered to be of a temporary nature.

44. If certain conditions as set out in the fourth paragraph of Article 2 are fulfilled, the applicant is entitled to a new contract for the use of the apartment (e.g. if the previous holder of the occupancy right does not seek to regain possession of the apartment and his or her occupancy right is accordingly terminated by Article 16 of the new law). The new law does not expressly state that the applicant is entitled to a new occupancy right although, as a person is not entitled to a contract for the use of an apartment unless he or she holds an occupancy right over it, it may be assumed that this is the intended meaning of the provision.

45. Therefore, under domestic law, the applicant possesses a temporary occupancy right over the apartment. She has, however, the possibility to be granted a new contract for the use of the apartment. However, this will only be the case if she does not have alternative accommodation available to her. The Chamber has not received any information as to whether the applicant has any alternative accommodation available to her. However, it does not consider it necessary to decide upon this issue for the purposes of the present case. It considers that at present the applicant has a right to apply for her current temporary occupancy right over the apartment to be converted into a permanent one, in accordance with Article 2 of the new law. The question of whether she has alternative accommodation available to her is a factual question for the appropriate national authorities to determine in the event that the applicant applies for her occupancy right to effectively be converted into a permanent one.

46. The Chamber considers therefore that the applicant has a conditional right to obtain a permanent occupancy right over the apartment, in accordance with the terms of Article 2 paragraph 3 and Article 16 of the new law.

47. The Chamber has previously held that an occupancy right such as that held by the present applicant constitutes a “possession” (case no. CH/98/1495, *Rosić*, decision on admissibility and merits delivered on 10 September 1999, paragraphs 60-61).

48. Accordingly, the Chamber considers that the applicant’s temporary occupancy right constitutes a possession in view of the fact that she will be eligible to receive a permanent one, if she satisfies the conditions set out in Article 2 of the new law.

49. Having established that the applicant’s right to occupy the apartment constitutes her possession, the Chamber next finds that the decision of the Commission declaring her to be an illegal occupant of the apartment and ordering her to vacate it interfered with her right to peaceful enjoyment of that possession within the meaning of the first sentence of Article 1 of Protocol No. 1.

50. The Chamber must therefore examine whether this interference can be justified. For this to be the case, it must be in the public interest and subject to conditions provided for by law.

51. The Chamber notes that the decision ordering the applicant’s eviction from the apartment was not in accordance with the old law (see paragraphs 39 and 40 above). Accordingly, the requirements of national law have not been adhered to and therefore the interference was not “subject to conditions provided for by law”.

52. Accordingly, there has been a violation of the applicant’s rights as protected by Article 1 of Protocol No. 1 to the Convention.

VII. REMEDIES

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

54. The Chamber notes that in accordance with its order for the proceedings in the case the applicant was afforded the possibility of claiming compensation or other relief. She did not do so, but requests that she be entitled to remain in the apartment.

55. The Chamber notes that the old law has been put out of force by the adoption of the new law. However, this does not of itself remove the threat to the applicant that she would be evicted, as the new law does not put out of force decisions ordering evictions under the old law.

56. The Chamber therefore considers it appropriate to order the respondent Party to revoke the decision of the Commission of 30 April 1998 ordering the eviction of the applicant from the apartment in question and to allow her to remain in possession of the apartment, subject to the terms of the new law.

VIII. CONCLUSION

57. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;
2. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 30 April 1998 declaring the applicant an illegal occupant and ordering her, under threat of eviction, to vacate the apartment she currently occupies constitutes a violation of her right to respect for her home within the meaning of Article 8 of the European Convention on Human Rights, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;
3. unanimously, that the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 30 April 1998 declaring the applicant an illegal occupant and ordering her, under threat of eviction, to vacate the apartment she currently occupies constitutes a violation of her right to peaceful enjoyment of her possessions within the meaning of Article 1 of Protocol No. 1 to the Convention, the Republika Srpska thereby being in breach of Article I of the Agreement;
4. unanimously, to order the Republika Srpska to take all necessary steps to revoke the decision of the Commission for the Accommodation of Refugees and the Administration of Abandoned Property in Prijedor of 30 April 1998 and to allow the applicant to enjoy undisturbed occupancy of the apartment in accordance with the terms of the Law on the Cessation of the Application of the Law on the Use of Abandoned Property, as amended; and
5. unanimously, to order the Republika Srpska to report to it, within three months of the date of the present decision becoming final in accordance with Rule 66 of the Chamber's Rules of Procedure, on the steps taken by it to comply with the above order.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel