



The Human Rights Advisory Panel

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OPINION

Date of adoption: 13 March 2010

Case No. 03/07

Milija VUČKOVIĆ

against

UNMIK

The Human Rights Advisory Panel sitting on 13 March 2010,
with the following members present:

Mr. Paul LEMMENS, Presiding Member
Ms. Christine CHINKIN

Mr. Rajesh TALWAR, Executive Officer

Having noted Mr. Marek NOWICKI's withdrawal from sitting in the case pursuant to Rule 12 of the Rules of Procedure,

Having considered the aforementioned complaint, introduced pursuant to Section 1.2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel,

Having deliberated, makes the following findings:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 4 June 2007 and registered on the same date.
2. The complainant, Mr. Vučković, claims that the procedure and the unfavourable decisions of the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) in his case have interfered with his right to a fair hearing under Article 6 § 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), his right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the ECHR, his right to respect for home and private life under Article 8 ECHR and his right to an effective remedy under Article 13 ECHR.

3. The Human Rights Advisory Panel (the Panel) communicated the case to the Special Representative of the Secretary-General (SRSG) on 7 February 2008 giving him the opportunity to provide comments on behalf of UNMIK on the admissibility and merits pursuant to Rule 30 of the Panel's Rules of Procedure. The SRSG did not avail himself of this opportunity.
4. On 4 June 2008 the Panel declared the complaint admissible.
5. On 9 June 2008, the Panel communicated the case to the SRSG pursuant to Section 11.3 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel (UNMIK Regulation No. 2006/12) to obtain UNMIK's response on the merits of the case.
6. On 16 September 2008 the SRSG invited the Panel to seek information directly from the HPD's successor organization, the Kosovo Property Agency (KPA).
7. On 17 November 2008, in response to a request from the Panel, the KPA provided the full case files on the two claims decided by the HPCC that were relevant to Mr. Vučković's complaint.
8. By letter dated 24 February 2009, the Panel wrote to the SRSG providing copies of the KPA case files and requesting comments upon the merits of the complaint.
9. In a response dated 14 April 2009, the SRSG provided comments upon the merits of the complaint.
10. The Panel invited the complainant to provide additional observations in light of the SRSG's comments on 21 May 2009.
11. The complainant provided his response on 15 June 2009.

II. THE FACTS

12. Mr. N.M., a resident of Kosovo was granted an occupancy right over a flat in Prishtinë/Priština in 1988 on the basis of an allocation decision to that effect and reflecting his employment. In 1990, Mr. N.M. was fired from his job and in 1995 he was evicted from the flat.
13. The complainant, Mr. Vučković, is a resident of Kosovo currently displaced and residing in Bor, Serbia. Mr. Vučković was granted an occupancy right over the same flat in 1998, in which he resided between 1995 and September 1999, when he left Kosovo.
14. A decision by the Municipal Court of Prishtinë/Priština dated 21 April 1998 cancelled the contract on lease of Mr. N.M. based on non-use of the flat pursuant to the Law on Housing Relations (Official Gazette of the Republic of Serbia Nos. 50/92 and 16/97).
15. After the arrival of UNMIK in Kosovo, the HPD and HPCC were established by UNMIK Regulation No. 1999/23 of 15 November 1999 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission.

The mandate of HPD was to regularize housing and property rights in Kosovo and to resolve disputes regarding residential property. The purpose was to provide overall direction on property rights in Kosovo for the purpose of achieving efficient and effective resolution of claims concerning residential property. UNMIK Regulation No. 1999/23 established the HPCC as an independent organ of the HPD responsible for settling non-commercial disputes concerning residential property referred to it by the HPD until the SRSG determined that the local courts were able to carry out those functions.

16. The HPD/HPCC had jurisdiction over three categories of residential property claims: claims by individuals whose ownership, possession or occupancy rights to residential property were revoked subsequent to 23 March 1989 on the basis of legislation which is discriminatory in its application or intent ("category A" claims); claims by individuals who entered into informal property transactions after 23 March 1989 ("category B" claims); and claims by individuals who involuntarily lost ownership, possession or right of occupancy to their properties after 24 March 1999 ("category C" claims).
17. On 7 March 2001, Mr. Vučković filed a "category C" claim with the HPD seeking repossession of the flat in Prishtinë/Priština. Mr. Vučković alleged that he had a right of occupancy to the flat as evidenced by a decision dated 29 December 1998 allocating the flat to him and a contract on lease dated 15 January 1999. The HPCC verified the authenticity of the contract on lease. Mr. Vučković alleged that he was forced to leave Kosovo in September 1999, due to the NATO bombing and personal threats. Mr. Vučković's claim was numbered DS002337.
18. The HPCC issued a decision on 20 June 2003 granting Mr. Vučković the right to repossess the flat.
19. However, prior to that decision, Mr. N.M. had filed a "category A" claim (DS005457) seeking recognition of his property right to the same flat on 28 January 2003.
20. According to records provided by the KPA, the HPCC failed to join the claims together for processing due to a technical error. The decision of 20 June 2003 in which the HPCC decided in favour of Mr. Vučković was taken without considering the competing "category A" claim for the same flat that was pending before the HPCC.
21. Mr. N.M. received the 20 June 2003 decision in favour of Mr. Vučković on 11 August 2004 and sought reconsideration of the decision on 31 August 2004. Mr. N.M. alleged that he had a right of occupancy to the flat as evidenced by an allocation decision dated 21 April 1988 and a contract on use dated 11 September 1989. Mr. N.M. also submitted various utility bills indicating that he used the flat until 1995. He claimed that he was evicted in 1995 without any prior notice. In addition, Mr. N.M. alleged that he was fired from his job in 1990 due to his Albanian ethnicity. In reply, Mr. Vučković alleged that Mr. N.M.'s documents were forged.
22. On 24 February 2005, the HPCC issued decision HPCC/REC/44/2005, overturning the 20 June 2003 decision in favour of Mr. Vučković, joining the claims of Mr. Vučković and Mr. N.M. and indicating that the matter would be reconsidered. The HPCC noted that Mr. N.M. had filed a competing "category A" claim that was not

considered when adjudicating the case. In its decision, the HPCC considered this second claim to be “legally relevant evidence which was not considered by the Commission” under Section 14.1(a) of UNMIK Regulation No. 2000/60 of 31 October 2000 on Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission.

23. The HPCC also sent the parties a cover letter referring to HPCC/REC/43/2005, dated 24 February 2005, which gave the impression that the request for reconsideration was rejected by the HPCC. While the cover letter referring to HPCC/REC/43/2005 specifically states that the request for reconsideration of Mr. N.M. was rejected, HPCC decision HPCC/REC/43/2005, attached to the cover letter, does not mention claim number DS002337 (Mr. Vučković’s claim) or DS005457 (Mr. N.M.’s claim). HPCC decisions, which were also published online, did not include the names of the claimants, but only referred to the relevant case numbers.
24. On 18 June 2005, the HPCC issued a decision dismissing the “category A” claim of Mr. N.M. However, this decision was inconsistent with the HPCC’s 24 February 2005 decision, HPCC/REC/44/2005, in that the HPCC did not join the cases of Mr. Vučković and Mr. N.M. for joint reconsideration, nor did it reference the competing “category C” claim of Mr. Vučković, the decision of 20 June 2003 or the request for revision.
25. On 15 July 2006, the HPCC issued a decision after reconsidering both claims together and concluded that both Mr. Vučković and Mr. N.M. had valid occupancy rights to the property in question. However, because Mr. N.M.’s “category A” claim superseded the “category C” claim of Mr. Vučković, the HPCC dismissed the “category C” claim. Due to another technical error, the HPCC failed to rescind the 18 June 2005 decision, which was inconsistent with the decision of 15 July 2006.
26. Mr. Vučković filed a request for reconsideration against the 15 July 2006 decision within the legal deadline. The HPCC rejected the request for reconsideration in its decision of 19 January 2007, reaffirmed its decision of 15 July 2006 and rejected the allegation that Mr. N.M.’s documents were forged.
27. The HPCC then, after thoroughly reviewing the complete file, all the evidence submitted, and its earlier decisions, issued “Resolution No. 69” on 24 May 2007. Resolution No. 69 explained the procedural history of the case, reaffirmed the decision of 15 July 2006 in which Mr. Vučković’s claim was denied and Mr. N.M. prevailed, and rescinded the 18 June 2005 decision.
28. Mr. Vučković filed a further request for reconsideration on 22 July 2007, to which he attached the Municipal Court of Prishtinë/Priština judgment of 21 April 1998. The KPA, as the successor to the HPD, sent a letter to Mr. Vučković on 1 October 2007 noting that he had had two prior occasions on which to submit additional evidence and that the HPCC had based its decisions on his submissions. The KPA also concluded that the judgment was not valid evidence for a number of reasons, including the fact that it purported to terminate the contract on use between Mr. N.M. and the allocation right holder three years after Mr. N.M. was evicted from the property in question and that the complainant had had multiple opportunities to submit the judgment during prior proceedings but failed to do so.

III. THE LAW

A. Right to a fair trial

i. The complaint

29. The complainant alleges that the HPCC violated his right to a fair trial by failing to take into account the judgment of the Municipal Court of Prishtinë/Priština dated 21 April 1998 in its final decision, by allowing the request for reconsideration of Mr. N.M. against the decision in favour of Mr. Vučković and for reversing an earlier determination regarding discrimination, by overturning an earlier “final” decision of the HPCC (HPCC/REC/43/2005 of 24 February 2005) and thereby violating the principle of the finality of judgments, and that the HPCC exceeded its competencies when it considered whether a practice was discriminatory as opposed to whether the law itself was discriminatory.

ii. Applicability of Article 6 § 1 of the ECHR to proceedings before the HPCC

30. Article 6 § 1 of the ECHR states, in relevant part,

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

31. Article 6 § 1 ECHR applies to determinations of one’s “civil rights and obligations”, which generally refers to rights in private law, but also to those determinations that are pecuniary in nature if the claim was founded on an alleged infringement of rights which are likewise pecuniary rights (see ECtHR, *Editions Périscope v. France*, judgment of 26 March 1992, *Publications of the Court*, Series A, No. 234-B, p. 66, § 40).

32. The HPCC made determinations on the rights of individuals in relation to particular residential properties, which in turn affected the claimants’ pecuniary interests.

33. Article 6 § 1 ECHR in principle only applies to proceedings before a “tribunal”. The ECtHR has stated that a tribunal “is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner” (ECtHR, *Cyprus v. Turkey* [Grand Chamber], no. 25781/09, judgment of 10 May 2001, *ECHR*, 2001-IV, § 233). Additionally, the tribunal in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see ECtHR, *Olujić v. Croatia*, no. 22330/05, judgment of 5 February 2009, § 38). However, in order for a body to qualify as a “tribunal”, Article 6 § 1 of the ECHR does not require it to be “a court of law of the classic kind, integrated within the standard judicial machinery of the country” (ECtHR, *Campbell and Fell v. United Kingdom*, judgment of 28 June 1984, *Publications of the Court*, Series A, No. 80, p. 39, § 76).

34. In this context, the Panel notes that the HPCC was not a classic court. It was a mass claims processing body which issued binding and enforceable decisions (See UNMIK Regulation No. 1999/23, cited above). The rules of procedure for proceedings before the HPCC were set forth in UNMIK Regulation No. 2000/60, cited above, and the HPCC determined claims in an adversarial process on the basis of rules of law. These decisions were final and were executed by an administrative body, the HPD. The HPCC was therefore judicial in function and Article 6 of the ECHR applies to proceedings before the HPCC.

iii. Application of Article 6 of the ECHR to the complainant's claim before the HPCC

a. *Judgment of the Municipal Court of Prishtinë/Priština dated 21 April 1998, the allegation that the request for reconsideration of Mr. N.M was filed out of time and that the HPCC's determination regarding discrimination was inconsistent*

35. The complainant alleges that the HPCC erred when it failed to take the judgment of the Municipal Court of Prishtinë/Priština dated 21 April 1998 into account during its second reconsideration of the matter.

36. The SRSB in his response notes that the KPA reviewed the 21 April 1998 judgment during its review of Mr. Vučković's second request for reconsideration and determined that it was not legally relevant evidence for a number of reasons including the fact that the decision was issued three years after the eviction took place and that the complainant had multiple opportunities to submit the judgment during prior proceedings but failed to do so.

37. The Panel recalls that it is not its task to act as an appellate court over the HPCC (see, *mutatis mutandis*, Human Rights Advisory Panel (HRAP), *Todorović*, no. 33/08, decision of 17 April 2009, § 21). It is the role of the latter institutions to interpret and apply the relevant rules of the applicable law in its decision making process, including whether to reopen proceedings. There will be a violation of the fair trial requirement of Article 6 § 1 only if a tribunal's decision is so striking on its face that the proceedings can be regarded as being grossly arbitrary (see ECtHR, *Khamidov v. Russia*, no. 72118/01, judgment of 15 November 2007, §§ 170-175).

38. In the present case, Mr. Vučković did not submit the judgment to the HPCC until after it had issued Resolution No. 69 of 24 May 2007. It is clear from the file that the HPCC did not consider the decision of the judgment of the Municipal Court of Prishtinë/Priština dated 21 April 1998 to be legally relevant new evidence that would warrant the reconsideration of Mr. Vučković's request. As noted above, the HPCC did not consider the judgment to be relevant as it was issued three years after the eviction took place and the complainant had multiple opportunities to submit the judgment during prior proceedings but failed to do so. Having regard to that reasoning, the Panel cannot consider the HPCC's decision as arbitrary.

39. The complainant also argues that the HPCC erred in when it determined that Mr. N.M. did not file an appeal against the 20 June 2003 decision within the legally prescribed time period of 30 days from receipt of the decision and as such committed a gross error.

40. The SRSG did not submit comments specifically dealing with this aspect of the complaint.
41. From the files provided by the KPA, it appears that Mr. N.M. received the 20 June 2003 decision in favour of Mr. Vučković on 11 August 2004 and sought reconsideration of the decision on 31 August 2004, *i.e.* within 30 days as required by the applicable law. In that submission, Mr. N.M. alleged that he had a right of occupancy to the flat as evidenced by an allocation decision dated 21 April 1988 and a contract on use dated 11 September 1989. Furthermore, the complainant never contested the timeliness of the request for reconsideration before the HPCC. The Panel therefore concludes that the complainant's assertion relating to the appeal filed by Mr. N.M. is not factually correct.
42. The complainant further contends that the HPCC originally found that there was no discrimination against Mr. N.M. in its decision of 18 June 2005, while it later found that such discrimination occurred.
43. The Panel notes that the complainant is again mistaken when it comes to the grounds for the HPCC's decisions and the alleged discrepancy between the HPCC's 18 June 2005 decision and its later decisions regarding discrimination issues. The 18 June 2005 decision of the HPCC stated that Mr. N.M. did not provide proof of the agreement on use between him and the allocation right holder. That decision therefore did not mention discrimination, as the HPCC was not required to consider whether discrimination occurred where there was no valid contract on use between the claimant and the allocation right holder.
44. By contrast, as noted above, the HPCC was clearly in possession of a copy of that contract on use when Mr. N.M. submitted his request for reconsideration to the HPCC on 31 August 2004 (and thus prior to the 18 June 2005 decision). Mr. N.M. subsequently sought a reconsideration of the 18 June 2005 decision and prevailed. It is clear in later HPCC decisions and most notably in Resolution No. 69 of 24 May 2007 that the HPCC made a number of initial administrative errors that required it to revisit its earlier decisions in relation to this matter. The HPCC simply did not address the issue of discrimination until later in the proceedings. The complainant's assertion is therefore inaccurate.
45. Furthermore, the Panel notes that even if the HPCC had made a determination regarding discrimination it was always free to reconsider that determination based on new evidence submitted in accordance with the applicable law. The purpose of a process for reconsideration is to allow a tribunal to correct potential errors in the initial findings, which the HPCC did in the instant case.
46. Based on the reasons above, the Panel finds no element to conclude that the HPCC acted in an arbitrary or unreasonable manner when determining the issues in dispute.
47. The Panel therefore finds that there has been no violation of Article 6 § 1 of the ECHR in relation to this aspect of the complaint.

b. The overturning of an earlier "final" decision of the HPCC

48. The complainant also complains that the HPCC violated the principle of legal certainty by reconsidering and eventually overturning its 24 February 2005 decision with the number HPCC/REC/43/2005. Specifically, he points to the declaration on the 24 February 2005 decision of the HPCC, which states: “Final decisions of the Commission are binding and enforceable, and are not subject to...review by any other judicial or administrative authority in Kosovo.”
49. The SRSG argues that the issue is not one of finality of the HPCC decision, but a matter of administrative mistake and therefore the complainant can not assert that there has been a breach of the principle of legal certainty in the present case. The SRSG further contends that since the complainant relies on a mistaken factual premise, there is no need to consider whether there was a violation of the principle of legal certainty or whether such a right exists independently under the ECHR.
50. The Panel notes that the declaration from the 24 February 2005 HPCC decision is taken directly from Section 2.7 of UNMIK Regulation No. 1999/23, which indeed states that decisions of the HPCC “are not subject to review by any other judicial or administrative authority in Kosovo”. However, Section 14 of UNMIK Regulation No. 2000/60 clearly defines the procedure by which a party can request the HPCC to reconsider its own decisions. Appeals or requests for reconsideration within the time frames specified by law are certainly not in conflict with the principle of legal certainty. Besides, the complainant himself filed multiple requests for reconsideration against decisions of the HPCC and the HPCC duly reconsidered those requests when legally grounded.
51. In this context, the Panel finds that the complainant’s allegations in respect to this aspect of the complaint are based on mistaken assessments of both the facts and the law. As such, there is no need to examine whether there exists a separate right to the principle of legal certainty under Article 6 § 1 of the ECHR.
52. The Panel therefore finds that there has been no violation of Article 6 § 1 of the ECHR in relation to this aspect of the complaint.
- c. Allegation that the HPCC exceeded its competencies by examining whether discrimination occurred against Mr. N.M.*
53. The complainant alleges that the HPCC exceeded its competencies when finding that discrimination occurred against Mr. N.M. According to the complainant, the HPCC was authorized only to evaluate whether a law was discriminatory and not whether a practice was discriminatory. The complainant contends that only the regular courts are competent to determine whether discriminatory practices took place. The complainant states that Mr. N.M. lost his right of occupancy on the basis of a court decision, and not on the basis of discriminatory legislation and as such the HPCC did not have jurisdiction to deal with the discrimination issue.
54. The SRSG did not submit comments specifically dealing with this aspect of the complaint.
55. Regarding the allegation that the HPCC exceeded its competencies, the Panel notes that UNMIK Regulation No. 1999/23 required the HPCC to review whether a natural person lost his or her property right “on the basis of legislation which is

discriminatory in its application or intent”. The Panel notes that the specific language of UNMIK Regulation No. 1999/23 required the HPCC to look not only into the text of the laws in question, but also into the intent of the laws and their application, by courts or any other governmental organ, when determining whether discrimination occurred. This interpretation is reinforced by the Clarification by the Special Representative of the Secretary-General on UNMIK Regulation No. 2000/60 of 31 October 2000 on Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, issued on 12 April 2001 (“the Clarification”). In the Clarification, the SRSR reaffirmed the fact that the HPCC had sole jurisdiction to deal with matters involving residential property disputes and to examine whether a person lost the property rights “on the basis of legislation which is discriminatory in its application or intent” (Section 5(a) of the Clarification).

56. Simply put, contrary to the complainant’s allegations, the HPCC was clearly authorized to look into both the text and the application of laws, to determine whether discrimination had occurred.
57. The Panel again finds no basis for concluding that the HPCC acted in an arbitrary or unreasonable manner when determining the issues in dispute.
58. The Panel therefore finds that there has been no violation of Article 6 § 1 of the ECHR in relation to this aspect of the complaint.

B. Right to respect for private and family life and protection of property

59. Regarding the complaints concerning alleged violations of Article 8 of the ECHR, right to respect for private and family life, and Article 1 of Protocol No. 1 to the ECHR, protection of property, the Panel notes that the alleged breaches rely on the complainant’s arguments in relation to the alleged violation of Article 6 of the ECHR. Having found no violation of Article 6 of the ECHR, the Panel likewise finds that there has been no violation of Article 8 of the ECHR or Article 1 of Protocol No. 1 to the ECHR for the reasons set forth above.

C. Right to an effective remedy

60. Regarding the alleged violation of Article 13 of the ECHR, the Panel recalls that the requirements of Article 6 § 1 of the ECHR are more strict than the requirements of Article 13 of the ECHR. Having found above that there has been no violation of Article 6 § 1 of the ECHR and noting that there are no separate complaints in relation to Article 13 of the ECHR, the Panel must declare that there has been no violation of Article 13 of the ECHR.

IV. CONCLUSION

FOR THESE REASONS,

The Panel, unanimously,

DECLARES:

- **THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 6 § 1 OF THE ECHR**
- **THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE ECHR**
- **THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 8 OF THE ECHR**
- **THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 13 OF THE ECHR**

Rajesh TALWAR
Executive Officer

Paul LEMMENS
Presiding Member