



# *The Human Rights Advisory Panel*

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## OPINION

**Date of adoption: 17 December 2010**

**Case No. 09/07**

**Slobodan DRAGOJEVIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel sitting on 17 December 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, as amended,

Having deliberated, makes the following findings and recommendations:

### **I. PROCEEDINGS BEFORE THE PANEL**

1. The complaint was introduced on 15 September 2007 and registered on 18 October 2007. At the commencement of proceedings before the Human Rights Advisory Panel (the Panel), the complainant was represented by Praxis, a non-governmental organisation based in Belgrade, Serbia. The complainant later decided to represent himself before the Panel.

2. 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 of the complaint pursuant to Rule 30 of the Panel's Rules of Procedure. The SRSG did not avail himself of this opportunity.
3. On 7 May 2008 the Panel declared the complaint admissible.
4. On 9 May 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 to obtain UNMIK's response on the merits of the case.
5. On 16 September 2008 the SRSG invited the Panel to seek information directly from the Kosovo Property Agency (KPA).
6. On 17 November 2008, in response to a request from the Panel, the KPA provided the full case file on the complainant's case.
7. By letter dated 24 February 2009, the Panel wrote to the SRSG providing copies of the case file and requesting comments upon the merits of the complaint. In a response dated 19 March 2009, the SRSG provided comments upon the merits of the complaint.
8. The Panel invited the complainant to provide additional observations in light of the SRSG's comments on 23 April 2009. The complainant provided his response on 18 May 2009.
9. On 6 July 2009, the complainant submitted additional documents to the Panel.

## **II. THE FACTS**

10. The complainant is a resident of Kosovo currently living as a displaced person in Serbia. He claims that he entered into a contract on lease for a flat in Ferizaj/Uroševac on 10 February 1999 and purchased the flat on 22 February 1999. He left Kosovo in June 1999.
11. After the arrival of UNMIK in Kosovo, the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (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 the HPD was to regularise housing and property rights in Kosovo and to resolve disputes regarding residential property, until the SRSG determined the local courts were able to carry out those functions. 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. The rules of procedure and evidence were the object 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.

12. The 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).
13. On 16 October 2001, the complainant filed a “category C” claim with the HPD seeking repossession of his flat in Ferizaj/Uroševac. He argued that he had a right of occupancy to the flat as evidenced by a contract on use concluded on 10 February 1999 between him and the public electricity company and a purchase contract between the same parties signed on 22 February 1999 and certified by the Municipal Court of Ferizaj/Uroševac on 16 March 1999.
14. Apart from noting that the identity card submitted by the complainant mentioned another address than that of the claimed property, the HPD attempted to verify the documents submitted by him. The HPD submitted both contracts to the public electricity company as the allocation right holder, and the purchase contract to the Municipal Court of Ferizaj/Uroševac as the institution which certified the contract. None of those bodies could confirm the validity of the contracts.
15. The HPD made further inquiries with the water supply company, the sanitation service and the telecommunication company, but there was no record of the complainant or any of his family members at the address of the claimed property. The HPD also interviewed municipal officials and witnesses who lived near the claimed property, but none could confirm that the complainant was the property right holder of that apartment.
16. The HPD also contacted the occupant of the flat, but that person asserted no legal right over the apartment and did not take part in the proceedings.
17. The HPCC issued its decision on 18 June 2005 dismissing the claim on the ground that the complainant, as well as some other claimants in the same situation,  

“failed to produce any verified documentary evidence to prove that they ever had possession of the property concerned, or any proof of a property right, which conferred the right to take possession. In some instances, Claimants presented verified allocation decisions or contracts on lease in support of their alleged property right, but no other evidence of possession prior to 24 March 1999 was furnished. Therefore, these claims stand to be dismissed”.
18. The complainant filed a request for reconsideration of that decision on 30 January 2006. He asserted that the HPCC was wrong in stating that he had not submitted

evidence of his property rights. He again referred to the contract on lease for the flat of 10 February 1999 and the purchase contract certified on 16 March 1999 and requested that the HPCC reconsider the decision in his case and issue a new decision recognising his property right. In that submission, the complainant argued that he had moved into the flat in February 1999. He attached a certificate from the offices in Serbia of the public electricity company confirming the purchase price was paid in full, as well as an additional contract on use concluded between the complainant and the Public Housing Entity in Ferizaj/Uroševac dated 15 March 1999.

19. The HPD again attempted to verify the evidence produced by the complainant. It checked the contract on lease with the Public Housing Entity in Ferizaj/Uroševac. However, the latter could not locate the contract in its archives and one of its agents concluded that it was a forgery. The HPD also checked the purchase contract at the dislocated archives of the Municipal Court of Ferizaj/Uroševac in Leskovac, Serbia. The verification report from the displaced court concluded that the contract was genuine, based on the register of documents for the archive, but no copy of the contract was attached to it. The HPD then contacted the court again, and the president of the court confirmed that the original contract was not in their archives, since the original was located in the court archives in Ferizaj/Uroševac.
20. The HPCC issued its decision on 11 December 2006, dismissing the complainant's request for reconsideration. Regarding the verification, the HPCC stated:

“In Claim No. DS302140 the Requesting Party, who is the unsuccessful category C Claimant in the initial decision, avers that he has a valid purchase contract and a contract on lease for the claimed property. In support of his allegations the Requesting Party submitted the abovementioned documents, but the Directorate was not able to verify them. Accordingly, the Commission concludes that the Requesting Party has failed to adduce any legally relevant evidence, which was not considered by the Commission in deciding the claim in the first instance.”

21. The decision on the reconsideration request was certified on 26 March 2007. The complainant received the decision on 2 May 2007.
22. In the meantime, UNMIK Regulation No. 2006/10 of 4 March 2006 on the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property, had set up the KPA as the successor body to the HPD. Section 23 provided, however, that the HPCC had continued authority to adjudicate claims which had already been submitted to the HPD and to act on requests for reconsideration of decisions in accordance with UNMIK Regulation No. 2000/60.
23. UNMIK Regulation No. 2006/10 was shortly thereafter “provisionally suspended” by UNMIK Regulation No. 2006/50 of 16 October 2006 on the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property. According to UNMIK Regulation No. 2006/50, the KPA was maintained as an independent body. Section 22 continued to provide that the HPCC kept authority to adjudicate claims which had already been submitted to the HPD and to act on requests for reconsideration of decisions in accordance with UNMIK Regulation No. 2000/60.

Pursuant to another provision of the same section, UNMIK Regulation No. 2006/50 remained in force until 31 December 2008.

24. On 6 July 2009, the complainant submitted a copy of the purchase contract to this Panel, allegedly obtained from the displaced court in Leskovac, Serbia. The stamp affixed to the document indicates that the document is a certified copy from their archives and that it was verified with the original. The stamp indicates that the court in Leskovac certified that copy on 10 June 2009. The complainant added that the court's archive contained a copy of the contract and that with the evidence submitted by him to the HPD, the latter was in fact able to verify the contract despite what was stated in its decision on reconsideration.

### **III. THE COMPLAINT**

25. The complainant complains of a number of alleged violations of the right to due process or to a fair trial, guaranteed by Article 6 § 1 of the European Convention on Human Rights (ECHR):
- he argues that the HPCC did not take into due consideration all of the presented evidence, thus failing to deliver a reasoned decision;
  - he submits that the length of the proceedings before the HPCC violated his right to a decision within a reasonable time;
  - he avers that the HPCC generally lacked independence and impartiality, because of the virtually inexistent separation of powers in Kosovo and because of the lack of rules on ethnic composition of the local commissioners, and that it specifically was not an impartial tribunal, as the decision on reconsideration was taken by the same panel, composed of the same members, which had taken the first-instance decision.
26. The complainant further complains about the fact that the HPCC delivered a decision that disregarded his ownership right or at least other relevant property rights (right to lease) relating to the apartment in question. That decision amounted to a *de facto* expropriation. In this respect the complainant invokes a violation of Article 1 of Protocol No. 1 to the ECHR.
27. The complainant also argues that he was prevented from accessing and repossessing his home and from freely enjoying his private space. According to him, UNMIK failed to protect his right to respect for the home and private life, and the HPCC interfered with these rights without a proper justification. In this respect he invokes a violation of Article 8 of the ECHR.
28. The complainant finally argues that the above mentioned lack of impartiality of the HPCC in the proceedings on reconsideration affects the "effectiveness" of the HPD/HPCC mechanism as a remedy in housing and property disputes. No other effective remedies are available. In this respect he invokes a violation of Article 13 of the ECHR.

### **IV. THE LAW**

## **A. Alleged violations of Article 6 § 1 of the ECHR**

### ***1. Applicability of Article 6 § 1 of the ECHR***

29. As a threshold question, the Panel must determine whether Article 6 § 1 of the ECHR applies in the present case. Article 6 § 1 of the ECHR states, in relevant part:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...].

30. Article 6 § 1 of the ECHR applies to determinations of one's "civil rights and obligations". The Panel notes that the dispute between the parties before the HPCC related to their rights with respect to a particular residential property. The dispute therefore related to the determination of the complainant's property right, a right which is clearly of a "civil" nature (see European Court of Human Rights (ECtHR), *Zander v. Sweden*, judgment of 25 November 1993, *Publications of the Court*, Series A, no. 279-B, p. 40, § 27).

31. Article 6 § 1 of the 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 (Grand Chamber), *Cyprus v. Turkey*, 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).

32. In this context, the Panel notes that the HPCC was not a court of the classic kind. 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, 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 (see Human Rights Advisory Panel (HRAP), *Vučković*, no. 03/07, opinion of 13 March 2010, § 34).

### ***2. Compliance with Article 6 § 1 of the ECHR***

#### **i. Independence and impartiality of the tribunal**

##### **1. General complaint**

### **a. Arguments of the parties**

33. The complainant generally argues that the “virtually inexistent separation of powers in Kosovo and the lack of rules on ethnic composition of the local commissioners” show that the HPCC lacked independence and impartiality. He does not elaborate on those arguments.
34. The SRSG argues in substance that the HPCC was established as an independent organ, and that the commissioners were appointed by the SRSG for fixed terms, and could only be removed in exceptional circumstances. The SRSG does not comment on the argument regarding the lack of rules on the ethnic composition of the HPCC.

### **b. The Panel’s assessment**

35. The Panel notes that the complainant’s objections regarding virtually inexistent separation of powers in Kosovo and the lack of rules on the ethnic composition of the HPCC, are very general in nature. The complainant fails to point out any specific reason he would have to doubt the independence and impartiality of the HPCC on such grounds, or to elaborate on those theories.
36. The Panel concludes that this part of the complaint is not substantiated. It therefore cannot be accepted as well-founded.

## **2. Specific complaint**

### **a. Arguments of the parties**

37. The complainant specifically argues that the HPCC was not an impartial tribunal because the first instance and second instance decisions were rendered by the same panel in the same composition.
38. He refers to Section 2.2 of UNMIK Regulation No. 1999/23, which states that the HPCC “shall initially be composed of one Panel of two international and one local members” (*sic*). According to the complainant, it was clearly not the intention of the legislator that this situation would persist for many years.
39. The complainant finds an expression of the intention to establish more than one panel in Section 25.1 of UNMIK Regulation No. 2000/60, which provides that, “[f]ollowing the establishment of two or more Panels of the Commission, any reconsideration of a matter shall be conducted by a different Panel than the one that decided the claim, unless the Chairperson of the Panel appointed to conduct the reconsideration, in consultation with the Chairperson of the Commission, determines that it should be conducted in plenary session”. He further refers to the Clarification given by the SRSG on 12 April 2001 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 on 12 April 2001, point 21 of which states that “[t]he only appeal from decisions of the HPCC is to another panel or a plenary session of the HPCC, not to the courts”.

40. The SRSG does not comment on the complainant's arguments under the fair trial aspect of Article 6 of the ECHR regarding the rendering of the first instance and second instance decisions by the same panel in the same composition.

#### **b. The Panel's assessment**

41. Impartiality, within the meaning of Article 6 § 1 of the ECHR, normally denotes the absence of prejudice or bias. There are two tests for assessing whether a tribunal is impartial: the first consists in seeking to determine a particular decision maker's personal conviction or interest in a given case and the second in ascertaining whether the decision maker offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among many other judgments of the ECtHR: ECtHR (Grand Chamber), *Kyprianou v. Cyprus*, no. 73797/01, judgment of 15 December 2005, *ECHR*, 2005-XIII, § 118; ECtHR (Grand Chamber), *Lindon, Otchakovsky-Laurens and July v. France*, nos. 21279/02 and 36448/02, judgment of 22 October 2007, § 75).

42. In the present case, the complainant primarily complains about an alleged structural impartiality of the HPCC. It is therefore the second test that is to be applied.

43. As to such a test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance. It follows that when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important, but not decisive. What is decisive is whether the fear can be held to be objectively justified (ECtHR (Grand Chamber) *Kyprianou v. Cyprus*, cited above, § 118; ECtHR (Grand Chamber), *Lindon, Otchakovsky-Laurens and July v. France*, cited above, § 77).

44. The Panel notes that according to the case law of the European Court of Human Rights, the participation in appellate proceedings of judges who have dealt with the case in the first instance proceedings may constitute a breach of Article 6 § 1 of the ECHR (ECtHR, *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, *Publications of the Court*, Series A, no. 204, p. 23, § 50). The same is true with the participation of judges in "opposition" proceedings, directed against the merits of a decision in which they themselves participated (ECtHR, *De Haan v. Netherlands*, judgment of 26 August 1997, *Reports of Judgments and Decisions*, 1997-IV, pp. 1392-1393, § 51).

45. According to Section 2.2 of UNMIK Regulation No. 1999/23, the HPCC "shall initially be composed of one Panel of two international and one local members, all of whom shall be experts in the field of housing and property law and competent to hold judicial office". Section 2.2 also provided that the SRSG "may establish additional Panels of the [HPCC] in consultation with the [HPCC]". In practice, no additional panels have been established. It follows that reconsideration requests could only be examined by the same panel that had issued the decision under reconsideration, in the same composition. This is what happened in the case of the complainant.

46. The Panel accepts that such a situation could raise doubts in the complainant's mind as to the impartiality of the HPCC panel when examining his request for reconsideration.



However, the Panel must further assess whether those doubts were objectively justified (consult ECtHR, *Morel v. France*, no. 34130/96, judgment of 6 June 2000, *ECHR*, 2000-VI, § 44).

47. In this respect, the nature of the reconsideration proceedings is to be taken into account. The Panel recalls that Section 14.1 of UNMIK Regulation No. 2000/60 allowed any party to a claim to submit a request for reconsideration based “(a) upon the presentation of legally relevant evidence, which was not considered by the [HPCC] in deciding the claim”, or “(b) on the ground that there was a material error in the application of the present regulation”. While the first ground seemed to restrict the possibility to obtain reconsideration to specified exceptional circumstances, the second ground had the effect of making a request for reconsideration analogous to an appeal on points of law or fact. The broad grounds for obtaining a reconsideration are echoed in Section 25.2 of UNMIK Regulation No. 2000/60, according to which,

“[i]n the reconsideration of a decision, the [HPCC] or a Panel established by it shall consider all evidence and representations submitted with respect to the original claim and any new evidence and representations with respect to the reconsideration request. The [HPCC] or Panel concerned shall either reject the reconsideration request, or issue a new decision on the claim”.

48. The obligation for the HPCC to consider not only new evidence, but also the evidence already submitted to it during the initial proceedings, confirms that a request for reconsideration cannot be seen as an extraordinary remedy. In this respect, the Panel departs from the view it expressed in its decision on admissibility in case no. 43/08, *Simić* (decision of 12 December 2008, § 14).

49. In the present case the complainant argued in his request for reconsideration, in substance, that the HPCC had wrongly assessed the elements of the case. According to the complainant, he had sufficiently proven that he had certain rights over the apartment. He also attached an additional certificate indicating that he had paid the purchase price in full for the apartment.

50. The HPCC came to its decision on reconsideration after a fresh examination of the already available evidence and after new attempts to verify the documents submitted and the allegations made by the complainant. It concluded that no error had been made and that, although new evidence was introduced, it was not sufficient to warrant a change in its decision.

51. It thus appears that the HPCC was in fact invited to have a new look at the elements of the case, and that it actually gave them a fresh look. It did not limit its re-examination to newly adduced evidence.

52. The Panel notes that, according to the European Court of Human Rights, where the same judges are called upon to determine whether or not they themselves made an “error of legal interpretation or application” in their earlier decision, they are in fact being asked “to judge themselves and their own ability to apply the law”. Such a situation is sufficient to hold any fears as to the lack of impartiality of the court to be

objectively justified (ECtHR, *San Leonard Band Club v. Malta*, no. 77562/01, judgment of 29 July 2004, *ECHR*, 2004-IX, § 63; in the same sense ECtHR, *Driza v. Albania*, no. 33771/02, judgment of 13 November 2007, § 81).

53. It follows that the HPCC was not impartial within the meaning of Article 6 § 1 of the ECHR when it had to examine the request for reconsideration.
54. The circumstance that in the initial proceedings and the reconsideration proceedings the case was prepared for the HPCC by different lawyers of the HPD does not alter this conclusion. What counts are the doubts that the composition of the panel of the HPCC, as the deciding body, could raise as to its impartiality.
55. The Panel notes that the situation has in the mean time been addressed. UNMIK Regulation No. 2006/10 replaced the request for reconsideration by an appeal to the Supreme Court on the grounds that “(a) the decision contains a serious violation of the applicable law” or “(b) the decision rests upon incomplete facts or an erroneous evaluation of the facts” (Section 13.1). This possibility was retained in UNMIK Regulation No. 2006/40, in slightly different wording: under the latter regulation an appeal could be filed on the grounds that “(a) the decision involves a fundamental error or serious misapplication of the applicable material or procedural law” or “(b) the decision rests upon an erroneous or incomplete determination of the facts” (Section 12.3).
56. For the foregoing reasons, the Panel concludes that there was a violation of Article 6 § 1 of the ECHR with respect to the impartiality of the HPCC in the reconsideration proceedings.

## **ii. Fairness of the proceedings**

### **a. Arguments of the parties**

57. The complainant generally argues that the HPCC, when delivering the second instance decision, did not take into account all of the “presented and necessary evidence”. He argues that a tribunal is under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision. He refers to two alleged shortcomings in the manner in which the HPCC scrutinised and elaborated the issues of ownership and lawful possession, and argues that these shortcomings affected the fairness of the whole procedure.
58. The first shortcoming concerns the alleged failure to examine the complainant’s claim not only from the point of view of his claimed ownership right, but also from the point of view of an “occupancy right” or possession of the property, based on the “valid/uncontested contract on use of the apartment”. By not fully examining the complainant’s claim, the HPCC failed to deliver a reasoned decision. In a submission of 18 May 2009 to this Panel, the complainant argues that by failing to mention any examination of the archive of the Public Housing Entity of the Municipality of Ferizaj/Uroševac concerning the contract on lease of 15 March 1999, the HPCC makes clear that that contract was not taken into consideration at all.

59. The second shortcoming concerns the decision on the authenticity of the purchase contract of 22 February 1999, submitted by the complainant. The complainant argues that the lack of duplicate documents in the displaced archives in Serbia should not have led to an unfavourable decision, since the state of affairs at the archives was not under his control. By dismissing the complainant's claim "without attempting to obtain or availing the complainant of the possibility to adduce further evidence", the HPCC failed to duly determine the material facts. The decision in his case was therefore arbitrary. Attached to a submission of 6 July 2009 to this Panel, the complainant sends a copy of the purchase contract purportedly verified by the Municipal Court of Ferizaj/Uroševac, dislocated in Leskovac. This copy contains a verification stamp from 10 June 2009. The complainant argues that this copy proves that it was possible for the HPD to have the contract verified at the dislocated archive of the Municipal Court of Ferizaj/Uroševac.
60. The SRSG replies in a general way that the HPD conducted a proper and diligent verification of the supporting evidence in the complainant's case. The HPD undertook a number of verification procedures to confirm the validity of the contract on use and the purchase contract submitted during the proceedings. The SRSG also argues that the HPD conducted verification procedures with the water, electricity and telecommunication companies, as well as the sanitation department, to search for any records of the complainant or his family members ever having been registered as consumers of those services at that address. The answer was negative. Finally, the SRSG states that the identification card submitted by the complainant indicated a different address. As such, the HPD properly examined the evidence, but ultimately, the complainant failed to submit any evidence that could support his claim.

#### **b. The Panel's assessment**

61. As the complainant rightly indicates, Article 6 § 1 of the ECHR places the tribunal under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (see, e.g., ECtHR, *van de Hurk v. Netherlands*, judgment of 19 April 1994, *Publications of the Court*, Series A, no. 288, p. 19, § 59).
62. However, it is not the Panel's task to act as a court of appeal over the HPCC (see, *mutatis mutandis*, Human Rights Advisory Panel (HRAP), *Todorović*, no. 33/08, decision of 17 April 2009, § 21; see also HRAP, *Parlić*, no. 01/07, opinion of 18 June 2010, § 35). It is the role of the HPCC to interpret and apply the relevant rules of substantive or procedural law in its decision making process. Furthermore, it is the HPCC that is best placed for assessing the credibility of the evidence and its relevance to the issues in the case (compare, for example, ECtHR, *Vidal v. Belgium*, judgment of 22 April 1992, *Publications of the Court*, Series A, no. 235-B, p. 32, § 33; ECtHR, *Shalimov v. Ukraine*, no. 20808/02, judgment of 4 March 2010, § 67). The mere fact that a party to proceedings is dissatisfied with the outcome of them cannot of itself raise an issue under Article 6 § 1 of the ECHR (ECtHR, *Tengerakis v. Cyprus*, no. 35698/03, judgment of 9 November 2006, § 74). A tribunal's decision, as such, will be indicative of a violation of the fair trial requirement if, for instance, the unreasonableness of it is so striking on its face that the decision can be regarded as being grossly arbitrary (see ECtHR, *Khamidov v. Russia*, no. 72118/01, judgment of 15 November 2007, § 175).

63. Insofar as the complainant argues that the HPCC should have determined the lesser property right in favour of the complainant based on the “valid/uncontested contract on use for the apartment”, it is clear from the HPD file that the HPD did attempt to verify the validity of the contract on use (see §§ 14 and 19 above). The complainant’s argument cannot therefore be accepted.
64. Insofar as the complainant relies on the lack of specific mention of the 15 March 1999 contract on lease to show that the HPCC failed to duly determine the material facts, the Panel notes that it results from the HPD file that the HPD did in fact attempt to verify that contract with the Public Housing Entity in Ferizaj/Uroševac (see § 19 above). The complainant’s argument cannot therefore be accepted.
65. Insofar as the complainant argues that the HPCC should not have held the absence of documents in the dislocated archives in Serbia against him, the Panel considers that this part of the complaint relates to an assessment of the authenticity of the available evidence. The HPCC refused to rely on a mere statement by the dislocated archive in Serbia that the purchase contract was verified in court. The evaluation of the evidence is a matter that comes within the appreciation of the HPCC, and it is not for the Panel to review such evaluation unless there is an indication that the HPCC has drawn grossly unfair or arbitrary conclusions from the facts before it (ECtHR, *Herbst v. Germany*, no. 20027/02, judgment of 11 January 2007, § 83). In the given circumstances the Panel cannot find that the evaluation by the HPCC was arbitrary.
66. Insofar as the complainant argues that the HPCC failed to provide him an opportunity to submit further evidence, the Panel notes that the complainant did in fact submit new evidence during the processing of his request for reconsideration.
67. Regarding the submission to this Panel of the copy of the purchase contract purportedly verified on 10 June 2009 by the Municipal Court of Ferizaj/Uroševac, dislocated in Leskovac, the Panel notes that the complainant raises this issue for the first time in his 6 July 2009 submission to the Panel. Considering that such evidence was never submitted to the HPD, the Panel cannot conclude that the HPD failed to conduct a diligent verification process nor that the HPCC reviewed the evidence before it in an arbitrary manner (compare HRAP, *Vučković*, opinion of 13 March 2010, § 41). The Panel cannot speculate as to the outcome of the proceedings had such evidence been duly presented to the HPCC during the course of its consideration of the complainant’s case.
68. For the forgoing reasons, the Panel concludes that there was no violation of Article 6 § 1 of the ECHR with respect to the fairness of the proceedings.

### **iii. Reasonable time**

#### **a. Arguments of the parties**

69. The complainant argues that the more than five year period between the submission of his claim in October 2001 and the rendering of the final determination in December 2006 amounts to a violation of the reasonable time requirement imposed by Article 6 § 1 of the ECHR. He argues that the case was not excessively complex and that the

conduct of the parties did not contribute to the delay. Moreover, although the complainant as a displaced person was living in difficult circumstances, the authorities did not find it important to take into consideration his material plight as an impetus for resolving his case within a reasonable time.

70. The complainant is aware of the extraordinary character of the mass claims resolution process conducted by the authorities in Kosovo. However, he argues that a fair balance should be struck between the requirements of efficient management of a high number of cases and the imperative of respecting the essence of human rights of the individual claimants for whom such mechanism was ultimately established, the right to adjudication within a reasonable time being one of these rights. Backlogs of cases or the wish of a tribunal to hear together cases raising similar issues cannot excuse unreasonable delays.
71. The SRSB notes that “there may be some basis to the argument made by the complainant regarding failure by the HPCC to meet the ‘reasonable time’ requirement”. While conceding that the complainant’s case did not present any complex legal issues, he is of the opinion that the proceedings should be considered in light of the overall context in which the HPCC was operating. He points to the fact that the HPCC rendered decisions regarding 29,000 property disputes during its existence. He further argues that, notwithstanding the mass claims approach adopted by the HPCC, each case was reviewed on a case by case basis. Once the cases were categorised, verification procedures were conducted with both primary and secondary sources such as the official authorities (courts, allocation rights holders) as well as informally with public service providers. The SRSB argues that this required a significant amount of time given the volume of cases. He concludes by noting that, since the HPCC ultimately concluded that the complainant did not have a legal right regarding the apartment, the complainant was not adversely affected by any delay in the present case.

#### **b. The Panel’s assessment**

72. The proceedings began on 16 October 2001, when the complainant lodged his claim with the HPCC. However, the period to be considered starts from the date of the Panel’s temporal jurisdiction, which is 23 April 2005. In assessing the reasonableness of the time that elapsed after 23 April 2005, the Panel will nevertheless take into account the state of the proceedings at that moment (ECtHR, *Foti and Others v. Italy*, judgment of 10 December 1982, *Publications of the Court*, Series A, no. 56, p. 15, § 53; ECtHR, *Styranowski v. Poland*, judgment of 30 October 1998, *Reports of judgments and decisions*, 1998-VIII, p. 3376, § 46).
73. The Panel further notes that the proceedings ended on 2 May 2007, when the complainant received the decision on reconsideration of 11 December 2006.
74. The total duration of the proceedings was thus five years, six months and sixteen days, of which two years and nine days fall to be examined by the Panel.
75. The Panel recalls that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the complainant and the relevant authorities

and what was at stake for the complainant in the dispute (see, among many other authorities, ECtHR (Grand Chamber), *Frydlender v. France* no. 30979/96, judgment of 27 June 2000, *ECHR*, 2000-VII, § 43; see also HRAP, no. 17/08, *Emini*, opinion of 18 June 2010, § 21).

76. The Panel accepts that the case presented a certain complexity, during both the first and second instances, since information had to be obtained from the public housing enterprise, the public utility companies and the relevant courts. However, the issues in the case were by no means exceptional.
77. The Panel further notes that the complainant did not contribute to any delay in the proceedings.
78. With respect to the conduct of the authorities, the Panel notes that there was a considerable delay in the initial proceedings between the day when the complainant filed the claim (16 October 2001) and the day when the first decision was adopted (18 June 2005). The Panel notes from the HPD files that during 2002 the HPD attempted to verify the documents submitted by the complainant and notified the occupant of the flat at the time that a claim was pending regarding the property. By February 2005, the HPD had completed its check for whether there were additional claims relating to the same property and by May 2005 it had completed the claim processing report. On 18 June 2005, it adopted its first decision in the case. The decision was sent to the complainant on 27 January 2006. Much of this period lies outside the Panel's jurisdiction. Upon receipt of the request for reconsideration by the HPD Office in Belgrade (1 March 2006), the HPD contacted the displaced archives and received their verification reports in April 2006. In May 2006, the HPD received the verification report from the Municipal Court of Ferizaj/Uroševac. In August 2006, the HPD obtained the verification report from the Public Housing Enterprise in Ferizaj/Uroševac. The HPCC adopted its decision on 11 December 2006, which was certified on 26 March 2007 and sent to the complainant on 10 April 2007.
79. Taking into account the high number of cases received by the HPD for adjudication by the HPCC<sup>1</sup>, and the logistical difficulties faced in the context of post-conflict Kosovo, the Panel finds, in the light of all the circumstances of the case, that a reasonable time was not exceeded.
80. Consequently, there has been no violation of Article 6 § 1 of the ECHR in this respect.

## **B. Alleged violation of Article 1 of Protocol No. 1 to the ECHR**

### **1. Arguments of the parties**

81. The complainant argues that, even if his alleged ownership right could be disputed, he certainly had other relevant property rights, determinable on the basis of all available evidence. He argues that the HPCC delivered a decision whereby it disregarded the legitimate basis of the complainant's claim and effectively extinguished his rights over

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<sup>1</sup> According to the Final Report of the HPCC (Pristina, 2007, available at [http://www.hpdkosovo.org/pdf/HPCC-Final\\_Report.pdf](http://www.hpdkosovo.org/pdf/HPCC-Final_Report.pdf)), 29,160 claims were filed with the HPD (p. 40).

the apartment, amounting to a *de facto* expropriation. Since such an act could not be justified by any reason of public interest, there has been a violation of his right to property, guaranteed by Article 1 of Protocol No. 1 to the ECHR.

82. The SRSG responds that the complainant has wrongfully invoked Article 1 of Protocol 1 to the ECHR as that article applies only to existing possessions and does not confer a right to obtain property.

## **2. The Panel's assessment**

83. The Panel notes that the question arises as to whether Article 1 of Protocol No. 1 to the ECHR is applicable. The concept of “possessions” referred to in the first sentence of the first paragraph of that provision has an autonomous meaning. As the European Court of Human Rights has held on many occasions, Article 1 of Protocol No. 1 applies only to a person's existing possessions. It is true that, in certain circumstances, a “legitimate expectation” of obtaining an “asset” may also enjoy the protection of Article 1 of Protocol No. 1, provided that there is a sufficient basis for the proprietary interest in the applicable law, for example where there is settled case-law of the domestic courts confirming its existence (ECtHR (Grand Chamber), *Kopecký v. Slovakia*, no. 44912/98, judgment of 28 September 2004, *ECHR*, 2004-IX, § 52). However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the complainant's submissions are subsequently rejected by the courts (ECtHR (Grand Chamber), *Kopecký v. Slovakia*, judgment cited above, § 50; ECtHR (Grand Chamber), *Anheuser-Busch Inc. v. Portugal*, no. 73049/01, judgment of 11 January 2007, § 65).

84. In the present case the HPCC held that the complainant failed to show that he had ever obtained possession of the property claimed.

85. The complainant's complaint essentially amounts to an objection to the regularity and the outcome of the proceedings before the HPCC.

86. It is not excluded that UNMIK could be held responsible for the adverse effects on the complainant's proprietary interests caused by the determination made by the HPCC, if the latter's decision were to be regarded as arbitrary or manifestly unreasonable (compare ECtHR, *Beshiri and Others v. Albania*, no. 7352/03, judgment of 22 August 2006, § 89; see also HRAP, *Parlić*, no. 01/07, opinion of 18 June 2010, § 49). However, the Panel has found, under Article 6 § 1 of the ECHR (in relation to a fair hearing), that the HPCC's assessment of the elements of the case cannot be regarded as arbitrary (see above, §§ 61-68). The Panel therefore concludes that the complainant had no “legitimate expectation”, based on the applicable law, of realising his claim for possession of the apartment.

87. It follows that there has been no violation of Article 1 of Protocol No. 1 to the ECHR.

## **C. Alleged violation of Article 8 of the ECHR**

### **1. Arguments of the parties**

88. The complainant argues that he was prevented from accessing and repossessing his home and from freely enjoying his private space. In this respect he states that the notion of “home”, in the sense of Article 8 of the ECHR, refers not only to the place where a person actually lives, but also to a place where the person intends to live. He left his home due to external circumstances, but that does not imply his unwillingness to return. Furthermore, the right to respect for “private life”, in the sense of Article 8 of the ECHR, implies the right to a personal or private space which can be viewed as the right of the person to be left alone and to freely enjoy the private space, without external interferences.
89. According to the complainant, UNMIK had the duty to protect his right to respect for his home and private life, but did not act accordingly. He argues, in particular, that UNMIK failed to set up a regulatory framework which would assure that the decision-making process by the HPCC, leading to measures of interference with his rights under Article 8 of the ECHR, was fair and afforded due respect to the interests safeguarded to him by that provision.
90. The complainant further reiterates that the fair trial guarantees were not duly observed in the HPCC proceedings relating to his claim. The permanent deprivation from accessing his home, by means of an unreasonable decision, constitutes an interference with his right to home and private life, which cannot be justified under § 2 of Article 8 of the ECHR.
91. The SRSG responds that there has not been any interference by local authorities or by any other natural or legal person with the complainant’s personal life, or physical or moral integrity.

## **2. The Panel’s assessment**

92. The Panel notes that the alleged breaches rely on the complainant’s arguments in relation to the alleged violation of Article 6 § 1 of the ECHR concerning the reasoning of the HPCC decision. Having found no violation of the right to a fair trial (see above, §§ 61-68), the Panel likewise finds that there has been no violation of Article 8 of the ECHR (see HRAP, *Vučković*, no. 03/07, opinion of 13 March 2010, § 59).

## **D. Alleged violation of Article 13 of the ECHR**

### **1. Arguments of the parties**

93. Under Article 13 of the ECHR the complainant refers to the fact that the same panel of the HPCC examined his claim and his request for reconsideration. Since this situation affected the impartiality of the HPCC in the reconsideration proceedings, as argued by the complainant under Article 6 § 1 of the ECHR, and since no superior judicial review of the decisions of the HPCC was possible, the reconsideration proceedings cannot be seen as complying with the standard of an “effective remedy” in the sense of Article 13 of the ECHR.



94. The SRSG argues that, where the more specific guarantees of Article 6 of the ECHR apply, the more general provisions of Article 13 of the ECHR are absorbed by Article 6 of the ECHR, which constitute a *lex specialis*. He thus concludes that, since he has already submitted arguments under Article 6 of the ECHR, it is not necessary to comment upon the complaint regarding Article 13 of the ECHR.

## **2. The Panel's assessment**

95. The complaint under Article 13 of the ECHR appears to be based on the same elements as the complaint under Article 6 § 1 of the ECHR with respect to the impartiality of the HPCC. Having found that there has been a violation of Article 6 § 1 of the ECHR in this respect (see above, §§ 41-56), the Panel considers it unnecessary to examine the same issue separately under Article 13 of the ECHR.

## **V. RECOMMENDATIONS**

96. The Panel recalls that it has found that the complainant did not have the benefit of the guarantee of an impartial tribunal in the proceedings on reconsideration before the HPCC. It cannot speculate as to whether the outcome of the proceedings would have been different if no violation of the ECHR had taken place. Therefore, it does not recommend any reparation for pecuniary damage.

97. Nevertheless, the fact remains that the proceedings relating to the complainant's request for reconsideration were, in the Panel's opinion, not conducted entirely in conformity with the ECHR.

98. The Panel considers that the recognition by UNMIK that a violation has occurred would constitute an adequate form of redress for any non-pecuniary damage that may have been sustained by the complainant.

99. As for more general measures to be taken, the Panel recalls that the situation found to be not in conformity with Article 6 § 1 of the ECHR has in the meantime been redressed by UNMIK (see above, § 55). In the Panel's opinion no further measures of a general nature are needed.

## **FOR THESE REASONS,**

The Panel, unanimously,

**1. FINDS THAT THE GENERAL COMPLAINT CONCERNING THE VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS REGARDS THE INDEPENDENCE AND IMPARTIALITY OF THE HOUSING AND PROPERTY CLAIMS COMMISSION IS NOT SUBSTANTIATED;**

**2. FINDS THAT THERE HAS BEEN A VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS REGARDS THE**

**IMPARTIALITY OF THE HOUSING AND PROPERTY CLAIMS COMMISSION ON ACCOUNT OF ITS COMPOSITION IN THE PROCEEDINGS ON RECONSIDERATION;**

- 3. FINDS THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS REGARDS THE FAIRNESS OF THE PROCEEDINGS;**
- 4. FINDS THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS REGARDS THE LENGTH OF THE PROCEEDINGS;**
- 5. FINDS THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 6. FINDS THAT THERE HAS BEEN NO VIOLATION OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 7. FINDS THAT THERE IS NO NEED TO EXAMINE THE COMPLAINT UNDER ARTICLE 13 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 8. RECOMMENDS THAT THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON BEHALF OF UNMIK RECOGNISE THAT THERE HAS BEEN A VIOLATION OF ARTICLE 6 § 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, AS INDICATED IN POINT 2 ABOVE.**

Rajesh TALWAR  
Executive Officer

Paul LEMMENS  
Presiding Member