



The Human Rights Advisory Panel

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OPINION

Date of adoption: 17 December 2010

Case No. 06/07

Simo MITROVIĆ

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,

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. Praxis later withdrew from participation in the case.

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 13 May 2008, the Panel communicated the complaint 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. In a letter dated 20 January 2009, the SRSG provided UNMIK's comments on the merits, attaching a letter from the KPA dated 19 September 2008.
8. On 23 January 2009, the Panel wrote to Praxis, the legal representatives of the complainant, inviting them to submit comments on the letters from the SRSG and the KPA.
9. On 6 February 2009, Praxis responded to the Panel noting that it no longer acted as the legal representative for the complainant. It noted that the Panel's requests would be forwarded to the complainant for his comments once they were translated into the Serbian language.
10. On 20 February 2009, the Panel provided a Serbian language version of the letter for the complainant.
11. Having received no response by the requested date, the Secretariat of the Panel contacted the complainant by telephone on 9 July 2009 and 13 July 2009 and left messages with his son. The Panel did not receive any responses to its inquiries.

II. THE FACTS

12. The complainant is a resident of Kosovo currently living as a displaced person in Serbia. He claims that he was allocated a flat in the Municipality of Shtime/Štimlje on 30 December 1996, which he purchased on 19 March 1999. He left Kosovo in June 1999.
13. 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.

14. 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).
15. On 23 March 2002, the complainant filed a “category C” claim with the HPD seeking repossession of his flat in Shtime/Štimlje. He argued that he had a right of occupancy to the flat as evidenced by a decision of the Municipality of Shtime/Štimlje dated 30 December 1996 allocating the flat to him and a contract on purchase signed on 30 November 1998 and certified by the Municipal Court of Ferizaj/Uroševac on 19 March 1999. The copy of the latter contract did not mention a reference number for the certification by the Court. During the consideration of his claim the complainant indicated that he moved into the claimed property while the building was still under construction and that therefore he was not registered in the records of public enterprises.
16. The complainant’s claim was opposed by Mr N.I., who at that time occupied the flat in dispute. He argued that he had acquired the property over the flat by entering on 15 November 2002 into a purchase contract with a construction company G., which had built the building in which the flat was situated.
17. The HPD attempted to verify the documents submitted by the complainant. The HPD inquired with the Municipality of Shtime/Štimlje, as the allocation right holder, in order to verify the initial allocation decision. However, the decision could not be found in their archives. Furthermore, the HPD attempted to verify the purchase contract with the Municipal Court of Ferizaj/Uroševac, as the institution which certified the contract. However, the contract could not be confirmed as authentic by comparison with the records of the court.
18. The HPCC issued its decision on 21 October 2005 dismissing the claim on the ground that the complainant, as well as some other claimants in the same situation,

“at best, presented valid allocation decisions for the claimed property and failed to produce any other verified documentation. Moreover, as [on] 24 March 1999, the claimed properties were still under construction, these claimants never obtained possession of the properties claimed”.

The HPCC concluded that the said claimants “accordingly had no property right in respect of the properties and were not dispossessed of them”.

19. The complainant filed a request for reconsideration of that decision on 24 March 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 allocation decision of 30 December 1996 and the purchase contract certified on 30 March 1999. The records show that the complainant provided another copy of the contract on purchase, this time with a certification number. The complainant stated that he lived in the flat with his family from April 1998. He furthermore explained that he was unable to produce utility bills, but invited the HPCC to check the archives of the former electricity company and to assure itself that he effectively had used electricity. He finally argued that the outcome of his case was in contradiction with the outcome of the cases of some other users of flats in the same building, who were in the same position as the complainant and who had produced similar documents, and who had obtained a favourable decision from the HPCC.
20. The HPD attempted to verify the evidence produced by the complainant. It inquired with neighbours as to whether the complainant ever lived in the flat in question. It could not find anyone who could verify the claim. In addition, multiple witnesses indicated that the building in question was under construction as of 24 March 1999. The HPD also contacted public utility companies to see if they could provide any evidence that the complainant ever resided at the property in question. These companies could not find any records of him in relation to the property.
21. On 10 October 2006, the HPD contacted the complainant. Asked whether he had signed a lease contract with the Public Housing Enterprise, the complainant answered that he had not, given the fact that the Municipality had not technically accepted the building, even though the construction was finished. He further stated that he and other persons occupied the apartments without delivery of keys or permission to reside, and repeated that he had valid documents for his apartment.
22. The HPCC issued its decision on 11 December 2006, dismissing the complainant’s request for reconsideration. It recalled that according to Section 14.1 of UNMIK Regulation No. 2000/60 a reconsideration request may be submitted: “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 [that] regulation”. The HPCC found that “no error has been shown to have been made by the [HPCC] in the application of [UNMIK Regulation No. 2000/60], nor has any new evidence been adduced which warrants any change in the [HPCC’s] first instance decision”. Noting that the request raised a specific issue, the HPCC went on to consider as follows:

“(The) requesting party, who is the unsuccessful category C claimant in the initial decision, avers that the (HPCC) granted two claims submitted by two colleagues who also worked for the Municipal Assembly in Stimlje and considers this to be contradictory. The requesting party states that these colleagues acquired the apartments on the same basis as the requesting party. The (HPCC) has investigated the two claims referred to by the requesting party and notes that both claims were granted based on verified evidence showing lawful possession, whereas the requesting party in the case at hand submitted no documents which could be verified.”

23. The decision on the reconsideration request was certified on 23 March 2007. The complainant received the decision on 9 May 2007.
24. 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.
25. 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.

III. THE COMPLAINT

26. 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 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.

27. 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.
28. 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.
29. 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

30. 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 [...].

31. 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).
32. 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, *Olujic 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).

33. 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

34. 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.

35. The SRSG does not specifically comment on this part of the complaint.

b. The Panel’s assessment

36. 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.

37. 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

38. 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.
39. 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.
40. 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”.
41. The SRSG replies that, pursuant to Section 2.2 of UNMIK Regulation No. 1999/23, the establishment of a second panel to adjudicate claims, at first or second instance, was not mandatory but at the discretion of the SRSG. The workload and available funding were such that a second panel was not warranted. Hence, the reconsideration requests were indeed considered by the one existing panel. The impartiality of the HPCC was, however, not in jeopardy as the preparation of the cases was done by different lawyers. This was sufficient to guarantee a fresh review in all cases.

b. The Panel’s assessment

42. 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 of 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).
43. In the present case, the complainant only complains about an alleged structural impartiality of the HPCC. It is therefore the second test that is to be applied.
44. 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).

45. 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).
46. 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” (*sic*). 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.
47. 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).
48. 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”.

49. 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).
50. 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 and that there were means to verify that he had lived in the apartment prior to his departure from Kosovo. As another proof of the gross mistake made by the HPCC he referred to the cases of other persons allegedly in the same situation, in which the HPCC had upheld their property rights.
51. 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, that no new evidence had been adduced which would warrant a change in its decision, and that the case of the complainant was distinguishable from the cases of the persons he had mentioned.
52. 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.
53. 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).
54. 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.
55. 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.
56. 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).

57. 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

58. 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 a number of 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.

59. The first shortcoming concerns the alleged lack of examination of all the available evidence. Specifically, the complainant alleges that the HPCC failed to obtain evidence in terms of witness statements from other persons who had lived in the same building. Such evidence could have confirmed the factual element of the lawful possession of the apartment by the complainant. As the complainant was not in a position to provide the witness statements himself, it was for the HPCC to use the investigative powers provided in Sections 10.2 and 21.2 of UNMIK Regulation No. 2000/60 and to obtain such statements, most notably from other claimants who were successful in relation to their claims regarding flats located in the same building under practically identical material and temporal circumstances.

60. The second shortcoming concerns the decision on the authenticity of the allocation decision submitted by the complainant. The complainant argues that the second decision of the HPCC rescinded the part of its first instance decision that had previously confirmed the legal validity of the allocation decision. In the decision on reconsideration the HPCC held that not only the purchase contract, but also the allocation decision could not be verified as to its authenticity. According to the complainant, by placing him in a situation that was worse than in the first instance proceedings, the HPCC violated the legal principle of preclusion of *ex officio reformatio in peius*, which was a constituent element of a fair trial. Moreover, the HPCC allegedly did not offer any explanation for the different outcome during the second proceedings, thus failing to deliver a reasoned decision.

61. The third shortcoming concerns the decision on the authenticity of the purchase contract submitted by the complainant. The complainant argues that he had

submitted a contract, which was certified on 19 March 1999 by the Municipal Court of Ferizaj/Uroševac, the archives of which were maintained in Serbia proper since the withdrawal of the Serbian authorities from Kosovo. The HPCC did not give credence to this evidence and reaffirmed that it was impossible to verify the authenticity of the contract. It failed, however, to give a detailed explanation as to the exact method of verification used by it.

62. Finally, the fourth shortcoming concerns the lack of use of an available alternative verification method. The complainant argues that the HPCC had been able to verify the authenticity of the allocation decisions and the purchase contracts in the cases of two of his colleagues. Since his documents were of the same type as those of his colleagues, a simple comparison of the documents in the three cases would have been sufficient to verify his documents as well. This is all the more so since pursuant to Section 22.2 of UNMIK Regulation No. 2000/60 the HPCC is bound by the principles established in its own decisions when applying the law to claims raising similar legal and evidentiary issues. In any event, where one verification method had been used in two previous and closely similar cases, resulting in positive decisions for the claimants, the same method should have been applied and elaborated upon in the complainant's case. The complainant argues that the failure to duly take into account all the available material facts proves that the HPCC in the exercise of its discretionary power applied the legal and evidentiary principles inconsistently, amounting to arbitrariness in the decision making process.
63. The SRSG replies in a general way to the allegation that the evidence was not duly assessed by the HPCC. On the basis of an examination of the HPD file by the KPA, he notes that during the first instance proceedings the purchase contract could not be verified as authentic by comparison with the records held at the Municipal Court of Ferizaj/Uroševac. In the absence of any other documents that would prove the possession of the property prior to 24 March 1999, the allocation decision alone being insufficient, and in the light of the fact that the building was completed only after that date, the HPCC found that the complainant did not have a property right. In the reconsideration proceedings the HPD made additional attempts to determine the existence of the complainant's alleged property rights. It contacted residents of the neighbouring apartments and various utility companies, but no information could be obtained supporting the complainant's claim. To the contrary, witnesses confirmed that the building was still under construction at the relevant time. Moreover, in a telephone interview with the HPD on 10 October 2006 the complainant stated that he never had entered into a contract on use or lease with the Public Housing Enterprise. Without such a contract he could not have lawfully purchased the property. In the absence of any supporting documentation adduced by the complainant and despite attempts by the HPD to adduce further evidence (pursuant to Section 10.2 of UNMIK Regulation No. 2000/60), the HPCC rejected the request for reconsideration.

b. The Panel's assessment

64. 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).

65. 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).
66. Insofar as the complainant argues that the HPCC failed to obtain relevant witness statements, it is clear from the HPD file that the HPCC sought to obtain relevant evidence from witnesses (see § 20 above). The complainant's assertion therefore is factually not correct.
67. Insofar as the complainant argues that the HPCC on reconsideration rescinded the part of its first instance decision that had confirmed the legal validity of the allocation decision, the Panel finds that a careful reading of the reasons of both the initial decision and the decision on reconsideration is required.
68. In its initial decision of 21 October 2005 the HPCC considered, in a general way, that "[i]n order to satisfy the requirements for a valid category C claim, the claimant must show that he or she has lost possession of the property concerned. As a result, a claimant who is unable to show that he or she ever had possession of the property concerned or a right of ownership which conferred the right to take possession cannot succeed in his or her claim" (§ 13). Turning specifically to the group of claims to which the complainant's claim belonged, the HPCC considered that the claimants, "at best", presented valid allocation decisions for the claimed property, but "failed to produce any other verified documentation". Moreover, as on 24 March 1999 the claimed properties were still under construction, these claimants "never obtained possession of the properties claimed". The HPCC concluded that the said claimants "accordingly had no property right in respect of the properties and were not dispossessed of them" (§ 15).
69. In its decision of 11 December 2006 on reconsideration the HPCC notes that the complainant argued that there was a contradiction between the HPCC's decisions in the cases of two colleagues who also worked for the Municipal Assembly in Shtime/Štimlje and its decision in the case of the complainant. It dismisses this argument on the ground that the two claims referred to by the complainant were

granted on the basis of verified evidence “showing lawful possession”, whereas the complainant submitted no documents which could be verified (§ 10).

70. It follows that in both instances the decisive issue for the HPCC was whether the complainant could prove that he had lawful possession of the apartment on 24 March 1999. Contrary to the argument of the complainant, the HPCC did not confirm the validity of the allocation decision in its initial decision. It rather left this question open, as even a valid allocation decision would not be sufficient to prove possession of the property in question. In its decision on reconsideration the HPCC again made no statement as to the validity of the allocation decision, but instead simply confirmed that the complainant had not submitted any verifiable document which would show lawful possession. Both decisions thus consistently state that the complainant did not prove possession of the apartment, without expressing an opinion on the validity of the allocation decision. The argument based on an alleged worsening of the complainant’s situation at the reconsideration stage thus lacks any factual basis.
71. Insofar as the complainant argues that the HPCC does not give credence to the purchase contract he submitted, without explaining the method of verification used by it to come to that conclusion, the Panel notes that, like the initial decision, the decision on reconsideration indeed does not explain why the contract could not be verified. This circumstance raises the question whether that decision can be held to be sufficiently reasoned.
72. In this respect the Panel refers to the case law of the European Court of Human Rights, according to which, in conformity with “a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based”. However, “the extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case” (ECtHR (Grand Chamber), *García Ruiz v. Spain*, no. 30544/96, judgment of 21 January 1999, *ECHR*, 1999-I, § 26). The Panel considers that in proceedings specifically designed to deal with mass claims, like in those with the HPCC, the duty to give reasons cannot be understood in the same way as it should be understood in regular proceedings before ordinary courts. It is not for the Panel to elaborate a general theory on this issue. It confines itself to noting that in mass claim proceedings such as those with the HPCC it may be sufficient, from the point of view of the fairness of the proceedings, that the tribunal’s decision indicates in general terms why a given claim is accepted or rejected, without explicit reference to the concrete elements of the particular case, provided that its reasoning finds support in the elements of the file. It is for the Panel to verify whether such support can indeed be found.
73. It results from the claim processing report in the initial proceedings, drafted by a legal officer of the HPD, that the purchase contract submitted by the complainant could not be verified as authentic by comparison with the records of the Municipal Court of Ferizaj/Uroševac, which allegedly had certified the contract on 19 March 1999. There was no certification number on that copy of the contract. When the complainant filed a request for reconsideration, he added a new copy of the same contract to his request, this time with a number filled in the space provided for it

in the certification formula. The claim processing report in the reconsideration proceedings, drafted by another legal officer of the HPD, shows that this number went unnoticed: the report states that the complainant submitted an “identical” copy “with no verification number”.

74. However, as the SRSB indicates in his comments, searches in the records of the various utility companies and interviews with neighbours did not turn up any evidence of possession, in the sense of effective occupation of the apartment. Moreover, the legal officer of the HPD had a telephone interview with the complainant on 10 October 2006, during which the complainant stated that he never had entered into a contract on use or lease with the Public Housing Enterprise. In the claim processing report it is noted that without such a contract the complainant could not lawfully have purchased the property. The report concludes that the complainant was not the owner, an occupancy right holder or a lawful possessor of the apartment in question.
75. These latter elements suffice to formally support the finding of the HPCC that the complainant submitted no documents capable of showing lawful possession which could be verified. The error with respect to the verifiability of the purchase contract (see above, § 73) therefore relates to an element that was, in the light of the absence of a contract on use or lease, not essential for the conclusion of the HPCC. The Panel therefore concludes that this error does not affect the regularity of the reasoning.
76. Insofar as the complainant argues that the HPCC could have verified the authenticity of the available documents by comparing them to the documents submitted by his colleagues who were successful in their claims, the Panel notes in the first place that this grievance is again directed against an element which, in the light of the findings by the HPCC with respect to the lack of proof of effective occupation of the apartment and the inexistence of a contract on use or lease, is not essential for the conclusion of the HPCC. Moreover, 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). On the basis of the elements of the file, the Panel cannot find an indication of arbitrariness with respect to the verification method used by the HPCC.
77. In conclusion, the Panel considers that, taken as a whole, the reconsideration proceedings were fair. There has therefore been no violation of Article 6 § 1 of the ECHR in this respect.

iii. Reasonable time

a. Arguments of the parties

78. The complainant argues that the more than five year period between the submission of his claim in April 2002 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.

79. 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.
80. The SRSG, referring to the evaluation of the length of the proceedings by the KPA, notes that during its early years the HPD suffered significant institutional problems, in particular financial hardships and managerial reshuffles that unfortunately led to some delay in all cases. He further states that the claim was subject to a complex system of processing before it could be brought to the HPCC for adjudication, including notifying the current occupant and any other party with a legal interest and providing them with time to respond. In addition, the process of verification of the documents submitted in support of the claim could be time consuming.
81. Turning to the chronology of the history of the complainant's claim, the SRSG notes that the only substantial delay occurred from April 2002 to October 2005, and that this delay could be explained by the reasons explained above.

b. The Panel's assessment

82. The proceedings began on 21 March 2002, 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).
83. The Panel further notes that the proceedings ended on 9 May 2007, when the complainant received the decision on reconsideration of 11 December 2006.
84. The total duration of the proceedings was thus five years, one month and eighteen days, of which two years and sixteen days fall to be examined by the Panel.
85. 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).

86. The Panel accepts that the case presented a certain complexity, especially at the reconsideration stage, since information had to be obtained from the public utility companies and statements had to be obtained from witnesses. However, the issues in the case were by no means exceptional.
87. The Panel further notes that the complainant did not contribute to any delay in the proceedings.
88. 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 respondent, Mr N.I., made a statement relating to the claim (27 November 2002) and the day when the complainant was contacted by telephone for further information (15 May 2005). Much of this period lies outside the Panel's jurisdiction. After that last date, the initial proceedings moved on without significant delays: the claim processing report was signed on 4 August 2005; the initial decision was adopted on 21 October 2005 and certified on 5 December 2005; the complainant was informed about the decision on 12 January 2006 and the decision was sent to him on 16 March 2006. Upon receipt of the request for reconsideration by the HPD Office in Belgrade (24 March 2006), the HPD contacted the neighbours for witness statements on 8 June 2006, notified the respondent of the request on 15 September 2006, contacted the complainant by telephone for further information on 10 October 2006, and delivered the claim processing report on 27 October 2006. The HPCC adopted its decision on 11 December 2006, which was certified on 23 March 2007 and sent to the complainant on 7 May 2007.
89. Taking into account the high number of cases received by the HPD for adjudication by the HPCC¹, 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.
90. 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

91. 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

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

disregarded the legitimate basis of the complainant's claim and effectively extinguished his rights over 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.

92. The SRSG does not specifically comment on this part of the complaint.

2. The Panel's assessment

93. 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).

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

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

96. 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 gave sufficient reasons for its decision and that its assessment of the elements of the case cannot be regarded as arbitrary (see above, §§ 64-77). 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.

97. 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

98. 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.
99. 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 by that provision.
100. 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.
101. The SRSG does not specifically comment on this part of the complaint.

2. The Panel’s assessment

102. 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, §§ 64-77), 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

103. 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.

104. The SRSG does not specifically comment on this part of the complaint.

2. The Panel's assessment

105. 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, §§ 42-57), the Panel considers it unnecessary to examine the same issue separately under Article 13 of the ECHR.

V. RECOMMENDATIONS

106. 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.

107. 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.

108. 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.

109. 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, § 56). 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