



The Human Rights Advisory Panel

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DECISION

Date of adoption: 21 August 2012

Cases Nos 36/09 and 37/09

Radislav DEKIĆ and Xhevahire MORINA

against

UNMIK

The Human Rights Advisory Panel, sitting on 21 August 2012,
with the following members present:

Mr Paul LEMMENS

Ms Christine CHINKIN

Assisted by

Mr Andrey ANTONOV, Executive Officer

Having considered the aforementioned complaints, 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 noted Mr Marek Nowicki's withdrawal from sitting in the case pursuant to Rule 12 of the Rules of Procedure,

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaints were introduced on 18 March 2009 and registered on the same day.
2. On 27 July 2009, the Panel requested information from the Kosovo Property Agency (KPA). On 29 July 2009, the KPA provided its response.
3. On 12 September 2009, the Panel joined the complaints, pursuant to Rule 20 of the Panel's Rules of Procedure.

4. On 25 November 2009, the Panel communicated the complaints to the Special Representative of the Secretary-General (SRSG) for UNMIK's comments on the admissibility of the complaints. On 15 January 2010, the SRSG provided UNMIK's response.
5. On 24 August 2011, the Panel forwarded the SRSG's comments to the complainants and invited them to submit comments if they so wished. On 20 September 2011, the Panel received their comments.
6. On 30 November 2011, the Panel forwarded the complainants' response to the SRSG for information.

II. THE FACTS

7. Mr H.S., a resident of Kosovo, was granted in 1988 the right to use an apartment in Prishtinë/Priština, Ramiz Sadiku street, by the Commission for the allocation of apartments and loans of the Executive Council of the Assembly of the Socialist Autonomous Province of Kosovo. The apartment was allocated to him on account of his official duties and functions within the Assembly.
8. In 1991, the municipal board of the Yugoslav Union of Veterans' Associations granted Mrs Ljubica Dekić, the mother of Mr Radislav Dekić, the right to use an apartment in Prishtinë/Priština. In 1992, pursuant to that decision, the above mentioned apartment on Ramiz Sadiku street was allocated to her by the Commission for Housing Issues of the Provincial Bodies of the Autonomous Province of Kosovo. In the same year, she entered into a contract on the use of the apartment with the Public Housing Enterprise of Prishtinë/Priština, and moved into the apartment with her son, Mr Radislav Dekić. On 1 March 1993, she entered into a contract for the purchase of the apartment with the Autonomous Province of Kosovo.
9. Mrs Ljubica Dekić died on 6 August 1993. Mr Radislav Dekić was declared the only heir to her property, including the apartment on Ramiz Sadiku street, in which he continued to reside.
10. After the conflict in 1999, Mr Dekić left Kosovo for security reasons and went to live in Serbia proper. According to him, Mr H.S. later occupied the apartment.
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 HPD was to regularise housing and property rights in Kosovo and to resolve disputes regarding residential property. The purpose was to provide overall direction on property rights in Kosovo for the purpose of achieving efficient and effective resolution of claims concerning residential property. UNMIK Regulation No. 1999/23 established the HPCC as an independent organ of the HPD responsible for settling non-commercial disputes concerning residential property referred to it by the HPD, until the SRSG determined that the local courts were able to carry out those functions.
12. The HPD/HPCC had jurisdiction over three categories of residential property claims: claims by individuals whose ownership, possession or occupancy rights to residential property were revoked subsequent to 23 March 1989 on the basis of legislation which is

discriminatory in its application or intent (“category A” claims); claims by individuals who entered into informal property transactions after 23 March 1989 (“category B” claims); and claims by individuals who involuntarily lost ownership, possession or right of occupancy to their properties after 24 March 1999 (“category C” claims).

13. Having heard of the occupation of the apartment by Mr H.S., Mr Dekić on 24 May 2001 filed a “category C” claim with the HPD, seeking repossession of the apartment (claim DS 001970). On 20 June 2001, Mr H.S. filed a “category A” claim, seeking recognition of his property right to the same apartment (claim DS002241).
14. On 9 September 2002, Mr Dekić sold the apartment to Ms Xhevahire Morina. The sale contract was certified by the Municipal Court of Prishtinë/Priština on 18 September 2002. Immediately after having paid the purchase price, Ms Morina took possession of the apartment and moved into it with her daughter.
15. In 2004, Mr H.S. filed a claim with the Municipal Court of Prishtinë/Priština against Ms Morina and her daughter, for breaking into the premises he claimed belonged to him. He requested the Court to order the respondents to vacate the apartment.
16. On 26 April 2004, the Municipal Court rejected the claim. It found that, when Ms Morina and her daughter entered the apartment, Mr H.S. did not have factual possession of the apartment but on the contrary had rented it out to three other persons.
17. Mr H.S. appealed against this judgment. On 8 June 2006, the District Court of Prishtinë/Priština held that the first-instance court had correctly assessed the factual situation and correctly applied the law. The appeal was therefore rejected.
18. In the meantime, on 22 October 2005, the HPCC issued a decision on the two above mentioned competing claims (see § 13 above). It decided that Mr H.S.’s “category A” claim be granted and his property right restored. However, in order for this order to become effective, Mr H.S. had to pay to the HPD a sum for the apartment, to be determined by the HPD. The purchase contract between Mr Dekić and Ms Morina was declared null and void. As a “category C” claimant, Mr Dekić was entitled to compensation for the loss of ownership of the apartment, from the amount to be paid by Mr H.S. However, since Mr Dekić had received payment from Ms Morina, he could only benefit from the provision for compensation once he had repaid to Ms Morina the purchase price he had received pursuant to the invalid sale. If Mr H.S. did not pay the compensation, he would himself be entitled to compensation out of the Kosovo Consolidated Budget in lieu of restitution, and the apartment would remain the property of Ms Morina.
19. Ms Morina, as an interested party, filed a request for reconsideration on 16 July 2007. Mr Dekić filed such request on 3 September 2007. Both complainants argued that under the applicable law at the time (the Law on Housing Relations, *Official Gazette of the Socialist Autonomous Province of Kosovo*, Nos 11/93, 29/86 and 42/86), the allocation of an apartment for official use did not result in an occupancy right for the office holder. Since the apartment had been allocated to Mr H.S. for official use only, he never acquired an occupancy right, and therefore did not have a valid “category A” claim.
20. The HPCC rejected both requests on 19 June 2008. It considered that the apartment allocated to Mr H.S. “appears to have been converted into a regular apartment already when (Mr H.S.) was in possession of the property, as evidenced by the fact that (he) was able to conclude a contract on use – a legal device not available for service apartments

under the applicable law”. Ms Morina received the decision of the HPCC on 5 March 2009, Mr Dekić on 25 March 2009.

III. THE COMPLAINTS

21. The complainants invoke in the first place a violation of Article 6 § 1 of the European Convention on Human Rights (ECHR). They argue that the HPCC was not a “tribunal”, but an administrative body, and that their case has not been heard in public.
22. The complainants further invoke a violation of Article 13 of the ECHR, as they were not allowed to exercise the right to an effective remedy before a “national” body.
23. The complainants finally invoke a violation of Article 1 of Protocol No. 1 to the ECHR, as they were deprived of their property rights in favour of a person who under the applicable law could not claim a valid occupancy right.

IV. THE LAW

24. Before considering the cases on their merits, the Panel must first decide whether to accept the cases, considering the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.
25. In his comments, the SRSG accepts that the complaints appear to be *prima facie* admissible. He argues, however, that they are unfounded.
26. At this stage of the proceedings, the Panel will consider whether, on the basis of the arguments invoked by the SRSG, the complaints should be considered “manifestly ill-founded”, within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel, and therefore declared inadmissible.

Alleged violations of Article 6 § 1 of the ECHR

a) Submissions of the parties

27. The complainants argue that their claims have not been determined by a “tribunal”, within the meaning of Article 6 § 1 of the ECHR. According to the complainants, the HPCC does not have the characteristics of a court and is not qualified by any act as a court. Rather, it should be considered a classical administrative body. In any event, for an organ to be considered a “tribunal”, it should, among other things, be a permanent body. This is not the case with the HPCC, which was external to the Kosovo judicial system and established on an *ad hoc* basis.
28. The complainants further argue that their case has not been heard in public by the HPCC.
29. The SRSG argues in the first place that a “tribunal”, within the meaning of Article 6 § 1 of the ECHR, does not have to be a court of the “classic” kind. It is sufficient that it is a body independent of the parties and impartial, upon which national legislation confers the power to issue binding decisions in a particular area. This involves substantive aspects, namely the body’s judicial function, and procedural aspects, namely the requirement to conduct proceedings in a prescribed manner and to act independently and impartially, as

well as certain guarantees with respect to the duration of the members' office. According to the SRSG, the HPCC fulfilled these criteria. From a substantive point of view, it had exclusive jurisdiction to settle certain private, non-commercial claims, by decisions that were binding and not subject to any review. From a structural and procedural point of view, the SRSG refers to the fact that the HPCC was composed of two international members and one local member, all of whom were to be experts in their field. The members' legal qualifications provided a strong guarantee of their independence. They were appointed for a fixed term and they could be removed only in exceptional circumstances. They were not UN or UNMIK staff members. The SRSG concludes that the HPCC was a tribunal, albeit of a "quasi-judicial" nature, as its judicial activity was limited to certain issues.

30. The SRSG further argues that, while it is true that the HPCC generally decided claims on the basis of written submissions and without a public and oral hearing, this does not mean that the procedure violated Article 6 § 1 of the ECHR. It was undoubtedly in the public interest that adjudication of the claims before the HPCC was generally conducted without an oral hearing in a public setting, so as to allow the HPCC to cope with and solve a great number of property cases that were pending since 1999. The SRSG emphasises that the HPD and HPCC process was a mass claims process. In drafting the rules of procedure for the HPCC, it was widely recognised that the adoption of traditional adversarial court proceedings, with oral hearings and elaborate procedural rights, could not ensure rapid decision making, and had to be balanced against the claimants' right to have their claims heard within a reasonable period of time. Thus, the rules of procedure had to strike a balance between ensuring due process and achieving speed and efficiency. According to the SRSG, the legal framework still provided the claimant with significant procedural rights. Finally, with respect to the context in which the HPCC was operating, the SRSG points to the high number of disputes decided by the HPCC during its existence (29,000 disputes, adjudicated between 2001 and 2007) and to the high percentage of HPCC decisions that have been implemented (98.5 %).

b) The Panel's assessment

31. 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 [...].”

32. The Panel notes that the SRSG does not dispute the applicability of Article 6 § 1 of the ECHR. The guarantees of that provision apply whenever a person's "civil rights and obligations" are to be determined. The Panel notes that the proceedings before the HPCC related to the complainants' rights with respect to a particular residential property. The proceedings therefore related to the determination of their 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). The Panel concludes that the proceedings fall within the scope of Article 6 § 1 of the ECHR (see Human Rights Advisory Panel (HRAP), *Vučković*, no. 03/07, opinion of 13 March 2010, §§ 31-32).

Whether the HPCC was a “tribunal”

33. Insofar as the complainants argue that the HPCC was not a “tribunal” within the meaning of Article 6 § 1 of the ECHR, the Panel recalls that the European Court of Human Rights 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, § 233, *ECHR*, 2001-IV). Additionally, the tribunal in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see ECtHR, *Olujić v. Croatia*, no. 22330/05, judgment of 5 February 2009, § 38). However, in order for a body to qualify as a “tribunal”, Article 6 § 1 of the ECHR does not require it to be “a court of law of the classic kind, integrated within the standard judicial machinery of the country” (ECtHR, *Campbell and Fell v. United Kingdom*, judgment of 28 June 1984, *Publications of the Court*, Series A, no. 80, p. 39, § 76).
34. In this context, the Panel notes that the HPCC was not a court of the classic kind. It was a mass claims processing body which issued binding and enforceable decisions (see 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 rules of procedure for proceedings before the HPCC were set forth in 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, 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, later the KPA. The HPCC was therefore judicial in function (see HRAP, *Vučković*, cited in § 32 above, at § 34).
35. Moreover, the HPCC was set up as a permanent body, to adjudicate well-determined categories of claims. It cannot be characterised as an exceptional or *ad hoc* body, set up for the specific purpose of adjudicating the complainants’ claims.
36. It follows that the HPCC was a tribunal, within the meaning of Article 6 § 1 of the ECHR. This part of the complaints is manifestly ill-founded, within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12, and must therefore be declared inadmissible.

On the absence of a public hearing

37. Insofar as the complainants complain about the lack of a public hearing in the proceedings before the HPCC, the Panel recalls that the European Court of Human Rights generally holds that the right to a public hearing entails an entitlement to an oral hearing. However, this right is not absolute, and there may be exceptional circumstances that justify dispensing with such a hearing (see, *e.g.*, ECtHR (Grand Chamber), *Göç v. Turkey*, no. 36590/97, judgment of 11 July 2002, § 47, *ECHR*, 2002-V). The Court has further specified that “the exceptional character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases” (ECtHR, *Miller v. Sweden*, no. 55853/00, judgment of 8 February 2005, § 29; ECtHR (Grand Chamber), *Jussila v. Finland*, no. 73053/01, judgment of 23 November 2006, § 42, *ECHR*, 2006-XIV). While the Court often refers to the technical nature of the dispute as a circumstance that can justify dealing with a case in writing rather than through oral argument, it also accepts that in certain areas it is understandable that the national authorities have regard to

the “demands of efficiency and economy”, especially where “systematically holding hearings could be an obstacle to the particular diligence” required in certain types of cases, such as social-security cases (see, e.g., ECtHR, *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, *Publications of the Court*, Series A, no. 263, pp. 19-20, § 58; ECtHR, *Döry v. Sweden*, no. 28394/95, judgment of 12 November 2002, § 41).

38. Turning to the circumstances of the present case, the Panel notes that in its final report, the HPCC expressed itself in the following way on the general absence of public hearings in the proceedings before it:

“Parties were not entitled to give oral evidence unless invited to do so (...), as organising for the participation of some thousands of claimants would have entailed a significant drain on resources and time, thereby conflicting with the claimants’ rights to a remedy within a reasonable period of time.(...) Further, the fact that claimants were dislocated throughout (the Federal Republic of Yugoslavia) and further afield would have resulted in only a few claimants being able to exercise the right to participate in hearings” (*Final report of the Housing and Property Claims Commission*, Prishtinë/Priština, 2007, pp. 55-56, available at http://www.kpaonline.org/hpd/pdf/HPCC-Final_Report.pdf).

39. The Panel attaches due weight to this explanation. It also takes into account the mass claims character of the HPCC process (see § 34 above). In proceedings specifically designed to deal with such claims, the right to a public hearing cannot be understood in the same way as it should be understood in regular proceedings before ordinary courts (compare, with respect to the duty for the HPCC to give the reasons on which its decisions are based, HRAP, *Anđelković*, no. 11/07, opinion of 17 December 2010, § 71).
40. Having regard to the specific situation existing in Kosovo when the complainants’ claims were adjudicated by the HPCC, the Panel can agree with the SRSG that it was in the public interest that the adjudication of claims by the HPCC was generally conducted without an oral hearing. That public interest aspect was also present in the complainants’ case.
41. On the basis of the foregoing, the Panel finds that there were circumstances that justified dispensing with a public hearing. It therefore concludes that there is no appearance of a violation of Article 6 § 1 of the ECHR. This part of the complaints is also manifestly ill-founded and must be declared inadmissible.

Alleged violation of Article 13 of the ECHR

a) Submissions of the parties

42. The complainants argue that, having regard to the establishment of the HPCC (by UNMIK) and to its composition (two international members and one local member), the HPCC cannot be considered a national authority. Rather, it was a multinational authority. They conclude that they were not allowed to exercise the right to “an effective remedy before a national authority”, as guaranteed by Article 13 of the ECHR.
43. The SRSG argues that the proceedings before the HPD/HPCC constituted an effective remedy, for the purpose of Article 13 of the ECHR. He states that, after the HPCC had taken a decision in first instance, the complainants were also able to obtain a reconsideration of the case. The SRSG also refers to the post-conflict society that

characterised Kosovo when the HPD and the HPCC were set up. He argues that this unique situation should be taken into account when the efforts undertaken by UNMIK in all aspects of civilian governance are to be assessed.

b) The Panel's assessment

44. According to Article 13 of the ECHR, “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.
45. Assuming that Article 13 of the ECHR is applicable to the proceedings before the HPCC, the Panel notes that the complainants do not question the effectiveness of these proceedings as a remedy to redress an alleged violation of their human rights. They only complain about the fact that the HPCC allegedly does not constitute a “national” authority.
46. Article 13 of the ECHR guarantees the availability at national level of a remedy to enforce the substance of the ECHR rights and freedoms in whatever form they may happen to be secured (see, *e.g.*, ECtHR (Grand Chamber), no. 27765/09, *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012, § 197; ECtHR (Grand Chamber), no. 26828/06, *Kurić and Others v. Slovenia*, judgment of 26 June 2012, § 369).
47. In a situation like the one in Kosovo, where under United Nations Security Council Resolution 1244 of 10 June 1999 an international civil presence was established in order to provide an interim administration, the “national authority” within the meaning of Article 13 of the ECHR would inevitably have to be an authority set up by that international administration, or at least under its control.
48. The Panel concludes that the HPCC can be considered a “national authority”, within the meaning of Article 13 of the ECHR. This part of the complaints is therefore also manifestly ill-founded, and must be declared inadmissible.

Alleged violation of Article 1 of Protocol No. 1 to the ECHR

a) Submissions of the parties

49. The complainants generally argue that they were deprived of their possessions without there being any “public interest”, and in violation of the “general principles of international law”, within the meaning of Article 1, first paragraph, second sentence, of Protocol No. 1 to the ECHR.
50. They argue, more specifically, that under the applicable law at the time (the Law on Housing Relations, *Official Gazette of the Socialist Autonomous Province of Kosovo*, Nos 11/93, 29/86 and 42/86), Mr H.S. had only a right to use the apartment on a temporary basis, as long as he exercised his public functions within the Assembly of the Socialist Autonomous Province of Kosovo. According to the complainants, he never acquired an occupancy right. When his official functions came to an end, his right with respect to the apartment also ceased to exist. The complainants further argue that under the applicable law at the time, there was no possibility for the entity that furnished the apartment to Mr H.S. “for official use”, to convert it into one for “residential” use. The apartment was only later converted into a residential one, and it was then given for use to the late Mrs Dekić.

The complainants conclude that the HPCC could not decide that Mr H.S. had a valid “category A” claim.

51. The SRSG argues that the complainants have not been deprived of the possession of the apartment in question. Rather, it has been adjudicated, in accordance with the law, that Mr H.S. was the rightful possessor of the flat. If the complainants should be considered deprived of the possession of the apartment, this is only the natural consequence of the determination by the HPCC that they were not the ones who had a priority right over the apartment.

b) The Panel’s assessment

52. Article 1, first paragraph, of Protocol No. 1 to the ECHR reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

53. The HPCC acknowledged that both complainants had certain proprietary interests related to the apartment in question (see § 18 above). The Panel therefore accepts that the complainants can invoke the protection of Article 1 of Protocol No. 1.
54. Insofar as the complainants argue that the HPCC was wrong in finding that Mr H.S. had a valid “category A” claim, the Panel recalls that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be provided by law (see, *e.g.*, ECtHR (Grand Chamber), no. 38433/09, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, judgment of 7 June 2012, § 187).
55. In the present case, the interference with the complainants’ proprietary interests results from the application 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. That regulation provides, among other things, for the restitution of socially-owned apartments to which a claimant had an occupancy right, which was cancelled as a result of discrimination (Section 4). The HPCC found that Mr H.S. had such an occupancy right, which prevailed over the rights of the complainants. There was therefore a legal basis for the interference.
56. The complainants contest the decision of the HPCC, on the ground that, according to Article 7 of the Law on Housing Relations, applicable in 1988, the provisions of that Law did not apply to apartments used for official purposes, *i.e.* apartments which were allocated for a given official duty and function and defined as such. Users of such apartments did not acquire occupancy rights. They also invoke Section 1 of UNMIK Regulation No. 2000/60, which contains a definition of “occupancy right”. That notion covers a right of use granted under, among others, the Law on Housing Relations, while “the right to use apartments for official purposes (service apartments)” is explicitly excluded from it.
57. The complainants are in essence requesting the Panel to review the findings of the HPCC, both in fact and in law, concerning the existence of an occupancy right in respect of Mr H.S. However, it is not the Panel’s function to deal with errors of fact or law allegedly made by the HPCC, unless and in so far as they may have infringed fundamental rights

and freedoms. Otherwise, the Panel would be acting as a court of appeal over the HPCC and would disregard the limits of the scope of its review (compare ECtHR (Grand Chamber), no. 30544/96, *García Ruiz v. Spain*, judgment of 21 January 1999, § 28, *ECHR*, 1999-I; ECtHR (Grand Chamber), no. 38433/09, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, cited above, § 197; HRAP, *Mitrović*, no. 06/07, opinion of 17 December 2010, § 65). The Panel is satisfied that the HPCC carefully examined the arguments invoked by the complainants and gave reasons for its decision. There is no indication of arbitrariness or unfairness.

58. Insofar as the complainants argue that the interference with their rights was not in the “public interest” and violated the “general principles of international law”, the complaints are not substantiated.

59. The Panel concludes that this part of the complaints is also manifestly ill-founded, and must be declared inadmissible.

FOR THESE REASONS,

The Panel, unanimously,

DECLARES THE COMPLAINTS INADMISSIBLE.

Andrey ANTONOV
Executive Officer

Paul LEMMENS
Presiding Member