



The Human Rights Advisory Panel

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OPINION

Date of adoption: 17 December 2010

Case No. 11/07

Vesna ANDJELKOVIĆ

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

Assisted by

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 organization based in Belgrade, Serbia. Praxis later withdrew from participation in this 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 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. The SRSG responded on 16 September 2008, attaching a letter from the HPD's successor organisation, the Kosovo Property Agency (KPA), dated 12 September 2008, and inviting the Panel to seek information directly from the KPA.
6. On 25 September 2008 and 6 October of 2008, the Panel wrote to the complainant, inviting her to submit comments on the letters from the SRSG and the KPA.
7. On 15 October 2008, Praxis informed the Panel that it no longer represented the complainant.
8. On 17 November 2008, in response to a request from the Panel, the KPA provided the full case file on the complainant's case.
9. In a letter received on 17 November 2008, the complainant responded to the comments of the SRSG.
10. In a letter dated 13 January 2009, the Panel wrote to the complainant and posed a series of additional questions. The complainant replied on 9 February 2009, although the response was only received on 23 May 2009.
11. On 1 September 2010, the Panel requested further information from the KPA. On 16 September 2010, the KPA provided its response.

II. THE FACTS

12. The complainant is a resident of Kosovo currently living as a displaced person in Serbia. The complainant claims that she was allocated a flat in the Municipality of Shtime/Štimlje on 30 December 1996, which she purchased on 19 March 1999. She 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 18 July 2002, the complainant filed a “category C” claim with the HPD seeking repossession of her flat in Shtime/Štimlje. She argued that she 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 her 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.
16. The complainant’s claim was opposed by Mr R.J., who at the time occupied the disputed flat. He argued that on 6 August 1999 the Municipality of Shtime/Štimlje allocated the flat to him and that on 14 November 2002 the HPD issued him a permit to reside in the flat on humanitarian grounds for a temporary period.
17. 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 other documents submitted by him. It 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 authorised officer of the court stated that the document was not valid, and even forged, as it did not contain a certification number and was signed and stamped by an unauthorised person.
18. The HPD made further inquiries to determine whether the complainant occupied the premises in question by checking public utility records with the public electricity utility and the regional water supply company. Again, however, neither utility could find a record of the complainant at the address in question.
19. 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”.

20. The complainant was notified of that decision on 13 November 2006.
21. 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.
22. 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.
23. The complainant filed a request for reconsideration of the initial decision of the HPCC on 15 December 2006. She asserted that the HPCC wrongly and incompletely verified the status of fact and wrongly applied the material law. She again referred to the allocation decision of 30 December 1996 and the contract on purchase certified on 19 March 1999. The records show that the complainant provided another copy of the contract on purchase, this time with a certification number. She claims she moved into the flat with her family in the beginning of 1997 and that she regularly paid for utility and telephone bills but did not take the receipts with her when she left Kosovo. She further submitted that, since the apartment was new when she moved in, no one else could have lost possession of the apartment due to discriminatory laws and that therefore her right to possession should be recognised by the HPCC.
24. On 29 January 2007, the KPA – as the successor to the HPD – contacted the complainant. It informed the complainant of the procedure and the type of evidence that was required for the recognition of a property right. During the conversation, the complainant informed the KPA that she had not concluded a contract on use with the municipality and that she had not registered with any public utility at the address in question. In addition, the KPA ascertained that the complainant could not identify any witness who could confirm that she had been allocated the property.
25. The HPCC issued its decision on 26 March 2007, 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”. Regarding the claims of the complainant and some other claimants in the same situation, the HPCC stated:

“In [these] claims [...], the [HPCC] finds that the Requesting Parties have not presented any new legally relevant evidence, which was not considered by the Commission in deciding the claims. Nor has the Commission found any material error in the application of [UNMIK Regulation No. 2000/60]. The Commission therefore determines that the reconsideration requests fail [...]. The reasons for the decisions remain as set out in the first instance decisions.”

26. The decision on the reconsideration request was certified on 27 April 2007. The complainant received the decision on 17 May 2007.

III. THE COMPLAINT

27. 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):

- she argues that the HPCC did not take into due consideration all of the presented evidence, thus failing to deliver a reasoned decision;
- she submits that the length of the proceedings before the HPCC violated her right to a decision within a reasonable time;
- she 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.

28. The complainant further complains about the fact that the HPCC delivered a decision that disregarded her 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.

29. The complainant also argues that she was prevented from accessing and repossessing her home and from freely enjoying her private space. According to her, UNMIK failed to protect her right to respect for the home and private life, and the HPCC interfered with these rights without a proper justification. In this respect she invokes a violation of Article 8 of the ECHR.

30. 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 she 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

31. 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 [...].

32. 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).
33. 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).
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, 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 (later the KPA). 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

35. 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. She does not elaborate on those arguments.

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

b. The Panel’s assessment

37. 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 she would have to doubt the independence and impartiality of the HPCC on such grounds, or to elaborate on those theories.

38. 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

39. 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.

40. She 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.

41. 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”. She 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”.

42. The SRSG relies on the explanation provided by the KPA in its letter of 12 September 2008 to argue 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

43. 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).
44. 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.
45. 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).
46. 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).
47. 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.
48. 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).

49. 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”.

50. 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).

51. In the present case the complainant argued in her request for reconsideration, in substance, that the HPCC had wrongly assessed the elements of the case. According to the complainant, she had sufficiently proven that she had certain rights over the apartment and that there were means to verify that she had lived in the apartment prior to her departure from Kosovo. As another proof of the gross mistake made by the HPCC she referred to the cases of other persons allegedly in the same situation, in which the HPCC had upheld their property rights.

52. The HPCC came to its decision on reconsideration after a fresh examination of the already available evidence and after new attempts to verify the allegations made by the complainant. It concluded that no error had been made, that the complainant admitted that she never concluded a contract on use of the apartment, and that she could not furnish any new evidence which would warrant a change in its decision.

53. 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.

54. 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).

55. 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.
56. 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.
57. 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).
58. 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

59. 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”. She 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. She 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.
60. The first shortcoming concerns the reasons given in the first-instance decision. According to the complainant they were not stated in sufficient detail so as to provide her with the opportunity to defend her case on appeal. In particular, it could not be determined whether she fell into the group of claimants who “failed to produce any verified documentary evidence”, or whether she belonged to those who had submitted at least a “verified allocation decision”.
61. The second shortcoming applies to the hypothesis that the HPCC in its first-instance decision had considered that both the allocation decision and the purchase contract could not be verified. The complainant argues that the decision did not give a detailed explanation of why it had not been possible to verify the purchase contract submitted by her. She argues that she 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. The same omission allegedly occurred in respect of the allocation decision.

62. The third shortcoming still applies to the hypothesis that the HPCC in its first-instance decision had considered that both the allocation decision and the purchase contract could not be verified. The complainant refers to Section 22.2 of UNMIK Regulation No. 2000/60, according to which the HPCC is bound by the principles established in its own decisions when applying the law to claims raising similar legal and evidentiary issues. According to the complainant, the HPCC should have been aware of at least two similar cases of colleagues of her, which were decided in their favour. Her documents were of the same type as those of her colleagues, but the HPCC failed to compare the documents in the three cases, thus violating the principle of consistency in the application of the law.
63. The fourth shortcoming applies to the hypothesis that the HPCC in its first-instance decision had considered that the allocation decision had been verified. In that case, according to the complainant, there was no reason that prevented a positive determination of her property rights. The HPCC did not necessarily have to settle the claim on the basis of a claimed ownership, but could settle it also on the basis of an “occupancy right” or possession of the property. Therefore, even if the HPCC found that the validity of the purchase contract was doubtful, it should have continued to examine the case from the point of view of the lesser property right, namely that based on the decision on permanent use of the apartment. However, it failed to do so.
64. The fifth shortcoming concerns the decision of the HPCC on the reconsideration request. By considering it unimportant to deal with the evidence that already had been considered by it in the first instance, the HPCC on reconsideration did not examine the manner in which the evidence had been evaluated, thereby again failing to deliver a reasoned decision.
65. 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, contained in the latter’s letter of 12 September 2008, he notes that during the first instance proceedings the allocation decision could not be verified as authentic by comparison with the records held by the Municipality of Shtime/Štimlje (the allocation right holder) and that the purchase contract could not be verified as authentic by comparison with the records held at the Municipal Court of Ferizaj/Uroševac. Furthermore, an official of the Municipal Court indicated that the contract was likely a forgery as it was signed and stamped by an unauthorised person. The SRSG also notes that the identification card submitted by the complainant indicated a different address than the disputed property. Further inquiries with the electricity provider and the regional water supplier by the HPD showed no record of the complainant’s name in relation to the disputed property. In the absence of any other documents that would prove the possession of the property prior to 24 March 1999, the allocation decision and the contract on purchase being of doubtful veracity, the HPCC found that the complainant did not have a property right. In the reconsideration proceedings the KPA, as successor to the HPD, conducted a telephone interview with the complainant on 29 January 2007 to ascertain the facts of the case. During that conversation, the complainant stated that she had never entered into a contract on use or lease with the Public Housing Enterprise and that she had never registered with the public utilities. Without such a contract she could not have lawfully purchased the property. In

addition, the complainant could not name any witness to confirm that she had been allocated the property. It is in the absence of any supporting documentation or available witnesses that the HPCC rejected the request for reconsideration.

b. The Panel's assessment

66. 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).
67. 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).
68. At the outset the Panel notes that the HPCC in its decision on reconsideration explicitly confirmed the reasons contained in its first-instance decision. The complaints directed against the reasoning in the first-instance decision are therefore to be examined in the context of both the proceedings at first instance and on reconsideration.
69. Insofar as the complainant argues that it could not be concluded with certainty whether she fell into the group of claimants who "failed to produce any verified documentary evidence", or whether she belonged to those who had submitted at least a "verified allocation decision", the Panel notes that the decision adopted by the HPCC at first instance states that the group of claimants to which the complainant belonged "failed to produce any verified documentary evidence to prove that they ever had possession of the property concerned" (§ 13). The decision continues by noting that some of these claimants "presented verified allocation decisions or contracts on lease [...], but no other evidence of possession prior to 24 March 1999 was furnished" (same §). This reasoning leaves no ambiguity: what the HPCC means is that, as far as documentary evidence of possession is concerned, the documents submitted should be capable either of showing that the claimant was the owner of the claimed property, or that he or she had a possession right, which could be proven by an allocation decision or a contract on lease, but then the actual possession (or use of the property) had to be proven by other evidence. Whether or not the complainant presented a verified allocation decision is not decisive in the reasoning of the HPCC. The

complainant's argument that the HPCC failed to provide a reasoned decision in this respect cannot therefore be accepted.

70. Insofar as the complainant argues that the HPCC does not give credence to the purchase contract she submitted, without explaining the method of verification used by it to come to that conclusion, the Panel notes that the initial decision 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.
71. 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.
72. 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, she added a new copy of the same contract to her 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 KPA, shows that this number went unnoticed: the report simply states that no new evidence was presented.
73. However, as noted above, during the telephone interview with the complainant on 29 January 2007, she stated that she had never entered into a contract on use with the Public Housing Enterprise. In the claim processing report in the initial proceedings it is noted that without such a contract the complainant could not lawfully have purchased the property.
74. 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 fact that the new copy of the purchase contract apparently went unnoticed (see above, § 72) 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.

75. Furthermore, the claim processing report in the initial proceedings mentions that the allocation decision could not be found in the offices of the Municipality of Shtime/Štimlje and did not appear to be genuine. It was also noted that without a valid allocation decision (or a contract on lease, which the complainant did not invoke), she could not have purchased the apartment from the allocation right holder.
76. Finally, the same claim processing report mentions that searches conducted by the HPD in the records of the various utility companies did not turn up any evidence of possession.
77. It follows from these elements that the decision of the HPCC was founded on reasons that could support the conclusion that the complainant had failed to produce evidence that she had ever had possession or ever had the right to take possession.
78. Insofar as the complainant suggests that the HPCC could have verified the authenticity of the available documents by comparing them to the documents submitted by other persons in similar situations who were successful in their claims, the Panel notes that 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.
79. Insofar as the complainant argues that the HPCC should have determined the lesser property right based on the allocation decision, if it could not confirm the validity of the purchase contract, the Panel recalls that the HPCC found that the allocation decision itself could not be confirmed as authentic. As such, the complainant's argument is not supported by the facts.
80. Insofar as the complainant argues that the HPCC on reconsideration confirmed its first-instance reasoning without examining the way it had arrived at its consideration of the evidence, the reconsideration request processing report, drafted by another legal officer of the KPA, notes in the first place that the complainant did not produce any new evidence. It also notes that during a telephone interview with the complainant on 29 January 2007, she stated that she had never entered into a contract on use with the Public Housing Enterprise and that she never had registered herself as a customer of the electricity company or any other public company. She also was unable to name any witness who could confirm that she had been allocated the claimed property.
81. In her submission to the Panel, the complainant contests this latter finding and claims that she informed the KPA that she could identify ethnic Serbs who could confirm that she had been allocated the property, but that she was not sure that ethnic Albanians who could also confirm the allocation "would be willing to testify because of the situation known to all of us". However, as indicated above, it is not for the Panel to act as a court of appeal over the HPCC and to re-assess the evidence that was available to it (see above, § 67). It may suffice to note that the question of the witnesses was in any event not the only element relied on by the HPCC in its decision on the request for reconsideration.

82. It thus results from the file that during the reconsideration proceedings steps were taken to ascertain whether the HPCC had in its first-instance decision properly come to the conclusion that the complainant did not meet the required standard of proof. The complainant's suggestion that the first-instance decision was confirmed without any further analysis of the evidence, does therefore not find any support in the file.
83. Finally, the Panel notes that the complainant provided it with a copy of a "request for a new power connection" to the electricity provider at the time in Ferizaj/Uroševac for a flat in Shtime/Štimlje that was to commence on 22 June 1998. It appears, however, that this document was never submitted to the HPCC. Thus, whatever the probative value of the "request for a new power connection", it would be for the HPCC to examine the document and make conclusions as to its evidentiary value. The Panel, for its part, can only review the assessment made by the HPCC, and cannot substitute its own assessment of the facts for that of the HPCC. It is therefore not appropriate for the Panel to come to conclusions based on the submission of evidence which was never submitted to the body whose decision making is the subject of the complaint before it. The complainant's initial failure to provide such information to the HPCC cannot be corrected in the proceedings before the Panel.
84. 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

85. The complainant argues that the almost five year period between the submission of the claim in July 2002 and the rendering of the final determination in March 2007 amounts to a violation of the reasonable time requirement imposed by Article 6 § 1 of the ECHR. She 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 her material plight as an impetus for resolving her case within a reasonable time.
86. The complainant is aware of the extraordinary character of the mass claims resolution process conducted by the authorities in Kosovo. However, she 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.
87. The SRSG, referring to the evaluation of the length of the proceedings by the KPA in its letter of 12 September 2008, 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.

b. The Panel's assessment

88. The proceedings began on 18 July 2002, when the complainant lodged her 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).
89. The Panel further notes that the proceedings that the proceedings ended on 17 May 2007, when the complainant received the decision on reconsideration of 26 March 2007.
90. The total duration of the proceedings was thus four years, nine month and twenty-nine days, of which two years and twenty-four days fall to be examined by the Panel.
91. 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).
92. The Panel accepts that the case presented a certain complexity, especially during the first instance stage, since information had to be obtained from the public utility companies and various institutions. However, the issues in the case were by no means exceptional.
93. The Panel further notes that the complainant did not contribute to any delay in the proceedings.
94. With respect to the conduct of the authorities, the Panel notes that there was a considerable delay in the initial proceedings between the date when the complainant filed the claim (18 July 2002) and the date on which the initial decision of the HPCC was certified (25 July 2005). The complainant was only notified of the decision on 26 November 2006. Upon receipt of the request for reconsideration (22 December 2006), the HPD contacted the complainant by telephone for further information on 29 January 2007, and delivered the claim processing report on 8 February 2007. The HPCC adopted its decision on 26 March 2007, which was certified on 27 April 2007 and the complainant received the decision on 17 May 2007.
95. 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

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).

post-conflict Kosovo, the Panel finds, in the light of all the circumstances of the case, that a reasonable time was not exceeded.

96. 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

97. The complainant argues that, even if her alleged ownership right could be disputed, she certainly had other relevant property rights, determinable on the basis of all available evidence. She argues that the HPCC delivered a decision whereby it disregarded the legitimate basis of the complainant's claim and effectively extinguished her rights over the apartment, amounting to a *de facto* expropriation. Since such an act could allegedly not be justified by any reason of public interest, there has been a violation of her right to property, guaranteed by Article 1 of Protocol No. 1 to the ECHR.

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

2. The Panel's assessment

99. 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).

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

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

102. 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, §§ 66-84). The Panel therefore concludes that the complainant had no “legitimate expectation”, based on the applicable law, of realising her claim for possession of the apartment.

103. 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

104. The complainant argues that she was prevented from accessing and repossessing her home and from freely enjoying her private space. In this respect she 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. She left her home due to external circumstances, but that does not imply her 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.
105. According to the complainant, UNMIK had the duty to protect her right to respect for her home and private life, but did not act accordingly. She 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 her rights under Article 8 of the ECHR, was fair and afforded due respect to the interests safeguarded to her by that provision.
106. The complainant further reiterates that the fair trial guarantees were not duly observed in the HPCC proceedings relating to her claim. The permanent deprivation from accessing her home, by means of an unreasonable decision, constitutes an interference with her right to home and private life, which cannot be justified under § 2 of Article 8 of the ECHR.
107. The SRSG does not specifically comment on this part of the complaint.

2. The Panel’s assessment

108. 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, §§ 66-84), 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

109. Under Article 13 of the ECHR the complainant refers to the fact that the same panel of the HPCC examined her claim and her 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.
110. The SRSB does not specifically comment on this part of the complaint.

2. The Panel’s assessment

111. 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, §§ 43-58), the Panel considers it unnecessary to examine the same issue separately under Article 13 of the ECHR.

V. RECOMMENDATIONS

112. 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.
113. 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.
114. 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.
115. 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, § 57). 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