BASIC COURT OF GJILAN/GNJILANE

C. no. 336/06

THE BASIC COURT OF GJILAN/GNJILANE, through EULEX Judge Franciska Fiser, acting upon decision of EULEX Judge delegated by the President of the Assembly of EULEX Judges, dated 21 November 2012, in the civil case of the claimant ASh from Gjilan/Gnjilane, Str. "K" 4/11 represented by lawyer HM from Gjilan/Gnjilane against the respondent KEC JSC – Prishtinë/Priština, 36 "NT" Street, for release of apartment, acting ex officio, following main trial session held on 19 April 2013, renders the following

J U D G M E N T

I.

The following main claim request:

"The claim of the claimant is approved as grounded, therefore the respondent KEC – Gjilan District is obliged to solve the claimant the residential right by returning the flat at the place called K 3, first entrance, first floor, flat number 11 in the total surface of 64,84 square/meters."

is dismissed.

II.

The following alternative claim request:

“The claim of the claimant is approved as grounded, therefore the respondent KEC – Gjilan District is obliged to provide the claimant another adequate flat from the flats under its possession at K 4, wing B, one of the apartment no. 11, no. 13, no. 14 or no. 15.”

is rejected.

III.

The claimant shall bear his own costs and expenses.

R e a s o n i n g :

The claimant filed a claim with the Municipal Court in Gjilan/Gnjilane on 19 April 2006 requesting to approve his claim and oblige the respondent to solve to the claimant the residential right by returning his flat or providing him another adequate flat since the same one as a result of discriminatory measures from working relation, without legal basis was taken the flat which was in his use.

The claimant has amended his claim request on the preliminary hearing held on 25 March 2013 and specified the main claim request upon which the respondent KEC – Gjilan District shall be obliged to solve the claimant the residential right by returning the flat at the place called K 3, first entrance, first floor, flat number 11 in the total surface of 64,84 square/meters. He also specified the alternative claim request requesting from the court to oblige the respondent to provide the claimant with another adequate flat from the flats under its possession at K 4, wing B, one of the apartment no. 11, no. 13, no. 14 or no. 15.

The claimant alleged in his claim that he was given for permanent use the three-room apartment at the place called K 3, 1st entrance, flat no. 11 in the total surface of 64,84

square/meters upon the decision of Workers Council of the respondent no. 77 dated 12 March 1990. On the date 10 July 1990 he received the keys of the flat from the Self-Governing Community of Interest for Utilities and Urbanism. The written minutes no. 360/1018/90 was compiled and signed on the date 19 July 1990. At the time of key delivery he was placed in the said flat.

The claimant alleges he was interested to enter into the contract on use of the flat but he does not reach that because of the fact that competent officials of Self-Governing Community of Interest for Utilities and Urbanism have dragged out the procedure without giving any reasons.

Serbian Assembly by its decision installed in the enterprise – the respondent so called Interim Body which issued the decision no. 521 dated 15 August 1990 upon which the claimant as an electrical engineer was dismissed from the post of the director of Gjilan KEC Distribution.

Furthermore by the ruling no. 646 dated 5 September 1990 based on discriminatory provisions, as alleged the claimant, his working relations were terminated and as consequence of this his right to reside in the flat he was using was withdrawn.

After the end of the war in the Kosovo the claimant returned to his working place and sought the realization of his right to return the flat which was given to him by the respondent. The claimant alleges in his claim that the respondent on the date 13 July 1999 made a request to the possessor, respectively to RS and ask him to release the flat.

And finally the claimant alleges that the respondent after this request did not undertake any adequate actions in order to return the flat or to provide another adequate flat for the claimant even that the UNMIK Regulation no. 2000/60 dated 31 October 2000 pursuant Article 2 point 2 obliges the respondent to do so.

The respondent filed a reply to the claim in which he denies the claim in its entirety as ungrounded.

The respondent confirmed in his reply to the claim that the Workers Council rendered the Decision no. 77 dated 12 March 1990 upon which the claimant was allocated the two-room apartment in surface of 64,84 square/meters. With the Ruling of the Interim Managing Body no. 646 dated 5 June 1990 the labor relation was terminated, because of

the 5 days absence in the row and upon the Conclusion of the Secretariat for Utilities and Property Matters of Municipal Assembly of Gjilan no. 06-03-360-53 dated 18 March 1190 the claimant was evicted from the flat.
In addition the respondent alleged that the Interim Body has rendered the Decision no. 99 dated 5 February 1991 upon which the same apartment was allocated to the employee RS and according to the Contract on Purchase of the Apartment, verified in the Municipal Court in Gjilan on 12 March 1993, the flat was bought by RS.

At the proposal of the litigants and in order to establish the factual situation, the court produced and read the following evidence:

- Decision issued by KEC Gjilan District dated 12 March 1990;
- Minutes on hand over of the flat dated 10 July 1990;
- Decision issued by Interim Managing Board dated 15 August 1990 on dismission from duty of director;
- Request for release of the flat dated 13 July 1999;
- Decision issued by Interim Managing Board dated 5 September 1990 on termination of working relation;
- Decision issued by Housing and Property Claims Commission dated 8 February 2006;
- Contract on purchase of apartment dated 12 March 1993;
- Decision number 1923/90 on allocation the apartment dated 25 January 1991;
- Conclusion on execution dated 18 March 1991;
- a newspaper's Article dated 8 April 1991;
- a motion filed with Associated Labour Court Branch Gjilan for the annulment of a decision number 521 dated 15 August 1990 and decision number 646 dated 5 September 1990 both issued by the Interim Management Board;
- the Claim filed by KEC, to Municipal Court of Gjilan on 22 July 2009 regarding the apartments on the address K 4 Wing B; and
- testimony of the claimant and respondent's representative.

Having assessed each and every piece of evidence separately and as a whole conscientiously and carefully pursuant to article 8 of the Law on Contested Procedure (hereinafter: LCP), the court comes to its conclusion that the main claim request and also the alternative claim request cannot be approved.

During the evidence procedure the following factual situation was established.

By the decision of Workers Council no. 77 dated 12 March 1990 the claimant, who was at that time appointed in duties of the Director of Distribution in Gjilan, was allocated two-room apartment no. 11 at the address K 3 in surface of 64,5 square/meters. By the said decision it has been also decided that the employee – the claimant would fulfill the obligations from article 20 of the Law on Housing Relations as well as other obligations foreseen by law. The claimant was specifically obliged in case of receiving the apartment in use to sign the contract on use for the flat with Self-Governing Community of Interest. As it is gathered from the reasoning of the said decision of Workers Council the decision has been issued after reviewing the objections of the unsatisfied employees with the priority list. The Workers Council confirmed the priority list respectively the Decision of the Commission for allocation of flats and rejected the objections of the workers as ungrounded.
The fact that the two-room apartment (not three-room as claimant most probably by mistake stated in claim's narration) no. 11, 1st floor on the address K 3 was allocated to the claimant upon the Decision of Workers Council no. 77 dated 12 March 1990 is not disputable between parties. There is a discrepancy in surface; in the said decision it is stated that the apartment is in surface of 64,5 square/meters unlike other documents where the surface is of 64,84 square/meters. The court deems the surface of 64,84 square/meters as correct.

It is also not disputable between the parties that the minutes on handover the flat no. 360/1018/90 was compiled on 10 June 1990. As it is noted in the minutes the claimant received the keys of the flat and he was obliged to pay the rent for the flat and the amount which was determined based on the Contract on use of the flat.

The claimant in his statement confirmed that he moved into the flat on 10 July 1990 when the minute on handover the flat was compiled. From that date until 26 March 1991 he resided together with his family and his parents in the apartment. But he never concluded o contract on use and also he did not pay any rent.

Upon the Decision on Applying the Temporary Measures for Social Protection in Public Enterprise "KEC" in Prishtina the Interim Body on its 5th regular session held on date 8 August 1990 rendered the decision and dismissed the claimant from his duty as director of the part of the enterprise – Distribution of Gjilan valid from 15 August 1990. It has been also decided that he would be appointed in another working place with no authorizations and special responsibilities.

The claimant in his statement stated that this happened after the violent measures were imposed in June 1990. Since all of them collectively were using an annual leave he received said decision by post.

On 5 September 1990 the ruling was issued by which the claimant was terminated the working relation at the respondent on the date 14 August 1990 because of the unreasonable absence at work for more than five days in a row. As is it stated in the reasoning of the said ruling the claimant started using the annual leave of the year 1990 without the notice and permission of anyone. On 15 August 1990 he informed by phone the new director that his was on annual leave. On 23 August 1990 he informed the enterprise that he was on leave until 9 September 1990. As it is stated in the ruling the decision on using the annual leave was not signed and its using was not allowed by the competent official on use of annual leave.

In his statement the claimant stated that he received the afore-mentioned decision together with the decision on dismission from his duty as director of the part of the enterprise – Distribution of Gjilan by post.

He also stated that he filed a motion for annulment of the Decision no. 521 dated 15 August 1990 and Decision no. 646 dated 5 September 1990 with the Basic Court of Associated Labor in Prishtina but his motion was refused. He received a decision on this in 1996.

As a consequence of termination the working relation Secretariat of Municipal and Housing Affairs of the MA Gjilan/Gnjilane with its decision no. 06-03-360-53 dated 12 December 1990 obliged the claimant to release the apartment owned by the respondent, which was located in Gjilan, K 3 1st floor apartment no. 11 with the surface of 64,84 square/meters. The said decision became final on 22 January 1991 since it was confirmed by the second instance decision no. 03-360-8-91. Since the claimant did not fulfill the obligation the same Secretariat on 18 March 1991 issued a conclusion no. 06-03-360-53 by which the execution of the afore-mentioned decisions was permitted.
The conclusion no. 06-03-360-53 dated 18 March 1991 has been submitted as evidence while the decisions no. 06-03-360-53 dated 12 December 1990 and no. 03-360-8-91 dated 22 January 1991 were not since the parties are not in their possession.

The same apartment has been allocated to the RS by the decision no. 1923/90 dated 25 January 1991. RS was the employee of the respondent since 1975, appointed in the duties of the team leader for the transport, whose residential matter was not solved since he lived with his family in one-room apartment of 34 square/meters.

Later, on 12 March 1993 the contract on purchase of apartment has been concluded and the apartment was bought by RS. It is clear from the said contract that RS was a holder of the occupancy rights on the basis of the contract on use no. 01-3601019 dated 1 April 1991**;** he submitted the request no. 1270/14 for purchase of the apartment and paid the agreed price in amount of 4 756 653 dinars.

As evidence also a Request on release the flat no. 204 dated 13 July 1999 has been administrated. It has been issued by the administrator employed at the respondent.
The claimant stated in his statement that the said request was issued by the director at that time also known as administrator who knew his problems and made a request in order his property, the apartment no. 11 at the address K 3, to be vacated. However this was not possible because the apartment was under UNMIK administration. He alleged that the request was made by administrator, there was no previous decision of any competent

body and also no legal basis were needed since everybody have known that the property had been taken based on discrimination. After the violent measures were imposed over 90 % of the Albanian officials were dismissed from employment. The small minority who remained working were ones who agreed with the measures. The claimant stated that his apartment was given to one of the employees who cooperated with them.

On 22 October 1999 the decision on temporary use of apartment was also issued upon which the flat, which was used and left by Milos Trojic, was allocated to the claimant for temporary use.
The claimant stated that another apartment was allocated to him for temporary use until the issue with his previous one would not be resolved. However he could not move into this apartment since it was usurped by other people.

The claimant and also RS filed claims with Housing and Property Directorate (hereinafter: HPD) which were registered under case no. DS200088. The claimant filed a claim as category A Claimant and RS as category C Claimant.

With the Cover Decision no. HPCC/D/234/2005/A&C dated 16 December 2005 the Housing and Property Claims Commission (hereinafter: HPCC) decided and refused the category A claim (the claim filed by the claimant) and the determination of legal relief, if any, that may be available to the category A Claimant under the applicable law as a result of the allegedly irregular manner in which the claimed property (apartment no. 11 at the address K 3) was allocated to the category C Claimant (RS), has been addressed to the competent local court. With the same decision the category C Claimant (RS) was given the possession of the disputed property.

At first the court emphasizes that according to the UNMIK Regulation No. 1999/23 (hereinafter: UNMIK/REG/1999/23) and UNMIK Regulation No. 2000/60 (hereinafter: UNMIK/REG/2000/60) the HPD and HPCC were mandated to process and adjudicate all housing and property claims related to property rights.

Pursuant to Section 2.1 of UNMIK/REG/1999/23 the HPCC (the “Commission”) is an independent organ of the Directorate which shall settle private non-commercial disputes concerning residential property referred to it by the Directorate until the Special Representative of the Secretary-General determines that local courts are able to carry out the functions entrusted to the Commission.

Furthermore pursuant to Section 2.7 of the UNMIK/REG/1999/23 final decisions of the Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo.

Pursuant to Section 3.1 of the UNMIK/REG/2000/60 no claim for restitution of residential property lost between 23 March 1989 and 24 March 1999 as a result of discrimination may be made to any court or tribunal in Kosovo except in accordance with UNMIK Regulation No. 1999/23 and the present regulation.

The Commission is entitled to refer issues arising in connection with a claim, which are not within its jurisdiction to a competent local court or administrative board or tribunal as foreseen in Section 22.1 of the UNMIK/REG/2000/60.

Also pursuant to the Section 2.5 of the UNMIK/REG/1999/23 the Commission may refer specific separate parts of such claims to the local courts or administrative organs, if the adjudication of those separate parts does not raise the issues listed in section 1.2.

The court determines that afore-mentioned UMNIK Regulations shall be applied in the present civil dispute.

First of all the court emphasizes that the Cover Decision no. HPCC/D/234/2005/A&C dated 16 December 2005 issued by HPCC (hereinafter: HPCC Decision) is considered as final.

As it has been already stated that with the HPCC Decision the category A claim filed by the claimant was refused. Thus the court is not allowed to review the said decision and in supporting its decision in this civil dispute, emphasizes the following facts.

The claimant's claim filed with HPCC was considered as category A claim according to the Section 1.2 of the UNMIK/REG/1999/23 and Section 2.2 of the UNMIK/REG/2000/60.

Pursuant to the Section 2.2 of the UNMIK/REG/2000/60 any person whose property right was lost between 23 March 1989 and 24 March 1999 as a result of discrimination has a right to restitution in accordance with the present regulation. Restitution may take the form of restoration of the property right or compensation.

As it is also stated in the reasoning of the HPCC Decision a category A Claimant who seeks restitution of a property right must show that:

- he or she had a property right to residential house or apartment;
- the property right is capable for restitution;
- the right was revoked or lost;
- the loss or revocation took place between 23 March 1989 and 24 March 1999; and
- the loss or revocation was a result of discrimination.

It is considered that the claimant has acquired an occupancy right if he or she:

- has a decision taken by the allocation right holder to allocate the apartment to him or her;
- has entered into a valid contract on use; and
- has moved into apartment lawfully.

The claimant's claim filed with HPCC to restore the property right was refused since the claimant, although he occupied the apartment for some time, never entered into a contract on use or lease with the Public Housing Enterprise.

This fact was confirmed by claimant also in the civil dispute since he stated he had moved into the apartment on 10 July 1990 when the minutes on handover the apartment was compiled but he never concluded a contract on use. He also confirmed that he did not pay any rent for using the apartment.

According to all these facts the Court pursuant to the Article 391 item d) of the LCP dismissed the main claim request by which the claimant seeks to oblige the respondent to solve his residential right by returning the flat at the place called K 3, first entrance, first floor, flat number 11 in the total surface of 64,84 square/meters.

If the HPCC had found that claimant legally acquired the conditions as required in the UNMIK/REG/2000/60 his claim would have been granted. Therefore the HPCC's conclusion that such rights did not exist shall be taken as final.

The Court also rejected the claimant's alternative claim request by which he seeks to oblige the respondent to provide the claimant another adequate flat from the flats under its possession at K 4, wing B, one of the apartment no. 11, no. 13, no. 14 or no. 15.

The reasons for such a decision are the following.

With HPCC Decision the determination of legal relief, if any, that may be available to the category A Claimant under the applicable law as a result of the allegedly irregular manner in which the claimed property (apartment no. 11 at the address K 3, 1st floor) was allocated to the category C Claimant (RS), was addressed to the competent local court.

As has been already stated before with the said decision the HPCC also decided on the claim filed by RS. He filed a claim with HPCC as category C Claimant seeking an order for repossession of the apartment no. 11 at the address K 3, 1st floor.

Pursuant to the Section 2.6 of the UNMIK/REG/2000/60 he was obliged to show that he:

- had a property right, that is a right of ownership, lawful possession of, right of use of or occupancy right to the claimed residential property on 24 March 1999;
- has lost possession of the property right; and
- has not voluntarily disposed of the property right.

As RS proved the existence of a property right he was given the possession of the apartment no. 11 at the address K 3, 1st floor.
And as it is stated in point 26 of the Reasons for the Decision the allegedly discriminatory and irregular manner in which the disputed property was allocated to the category C Claimant shall be reviewed by the court to determine the legal relief, if any, that may be available to the category A Claimant under the applicable law.

On the basis of the evidence which were administrated during the main trial the Court assessed that the apartment no. 11 at the address K 3, 1st floor was allocated to RS, who was the employee of the respondent since 1975, by the decision no. 1923/90 dated 25 January 1991. He concluded also the contract on use no. 01-3601019 dated 1 April 1991. Later on 24 February 1993 he concluded the contract on purchase and bought the apartment for the price in amount of 4 756 653 dinars according to the provisions of Law on Housing.

There were no evidence proposed that could indicate the disputed apartment was allocated to RS in irregular manner; neither that the contract on use and contract on purchase of the apartment were concluded in contrast with applicable laws.

In case it would be proved that the claimed property (apartment no. 11 at the address K 3) has been allocated to the category C Claimant (RS) as a result of irregular manner also the following fact has to be emphasized.

The restitution of occupancy rights to socially owned apartments lost as a result of discrimination is regulated in the Sections 3 and 4 of the UNMIK/REG/2000/60 which

specifies that restitution for category A Claimant may take the form of restoration of the property right – restitution in kind or monetary compensation.

Since the claimant's claim for restitution of a property right was refused by the HPCC Decision; and the said decision is final and cannot be reviewed by the court; according to afore-mentioned provisions of the UNMIK/REG/2000/60 the claimant may request only a monetary compensation if all other conditions are met.
Since his alternative claim request is not in compliance with this it cannot be approved.

Irrespective of afore-mentioned, the Court has to emphasize the fact that the apartments at K 4, wing B, one of the apartment no. 11, no. 13, no. 14 or no. 15 are not in possession of the respondent. The ownership upon those apartments is disputable since there is ongoing proceeding at the Basic Court in Gjilan against the Municipal Assembly of Gjilan Fund for Construction Land and Road.

From all the above the court has assessed that in this case legal conditions are not met according to the provisions of UNMIK/REG/2000/60 and UNMIK/REG/1999/23 and decided as in enacting clause of this judgment.

Pursuant to the Article 452 paragraph 1 of the LCP the court decided that the claimant shall bear his own costs and expenses. The respondent did not request reimbursement of his costs.

Legal remedy:

The parties may file an appeal against this judgment in the Court of Appeals through the Basic Court of Gjilan/Gnjilane within fifteen (15) days of the day the copy of the judgment has been served to the parties.

Basic Court of Gjilan/Gnjilane
C. no. 336/06
19 April 2013

Drafted in English,
an authorized language

Presiding Judge
Franciska Fiser