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Date: 4/10/2021

DH-DD(2021)970

Meeting: 1419th meeting (December 2021) (DH)

Item reference: Action Plan (30/09/2021)

Communication from Bosnia and Herzegovina concerning the cases DOKIC v. Bosnia and Herzegovina (Application No. 6518/04) and MAGO v. Bosnia and Herzegovina (Application No. 12959/05)

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Réunion : 1419e réunion (décembre 2021) (DH)

Référence du point : Plan d'action (30/09/2021)

Communication de la Bosnie-Herzégovine concernant les affaires DOKIC c. Bosnie-Herzégovine (requête n°6518/04) et MAGO c. Bosnie-Herzégovine (requête n° 12959/05) ***(anglais uniquement)***

BOSNA I HERCEGOVINA
Ministarstvo za ljudska prava i izbjeglice
Ured zastupnika/agenta Vijeća ministara BiH
pred Europskim sudom za ljudska prava
SARAJEVO

BOSNIA AND HERZEGOVINA
Ministry for Human Rights and Refugees
Office of the Agent of the Council of Ministers
before the European Court of Human Rights
SARAJEVO

Number: 11 – Ai – 3/10 - 636 /21
Sarajevo, 30 September 2021

Mr Nikolaos Sitaropoulos
Head of the Department

Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the European
Court of Human Rights
Council of Europe
Strasbourg

Subject: ***Đokić v. Bosnia and Herzegovina*** **(app. no. 6518/04),**
Judgment of 27 May 2010, final on 4 October 2010

Mago and Others v. Bosnia and Herzegovina **(app. no. 12959/05 et al.),**
judgment of 3 May 2012, final on 24 September 2012

Joint Revised Action Plan

I Case description

These cases concern violations of the applicants' right to peaceful enjoyment of their property on account of their inability to repossess their pre-war military flats in the Federation of Bosnia and Herzegovina ("Federation") (violations of Article 1 of Protocol No. 1).

Between 1983-1987 the applicants or their spouses were allocated the military flats which they left when the hostilities broke out, while continuing their military service with the armed forces of other successor States. In 1992, the applicant in *Đokić* bought the flat and although he paid the full price the authorities refused to register his title. Between 1998-1999 the applicants made an application for the restitution of the flats. Their restitution claims were eventually rejected between 2003-2007.

The European Court's findings in both judgments disclosed a structural and complex problem in the Federation . It found that pursuant to the Federation laws (namely, Section 39e of the Privatisation of Flats Act 1997 and Section 3a of the Restitution of Flats Act 1998) two categories of buyers were not entitled to repossess pre-war flats and to register a title to them. The first category concerns those who served in foreign armed forces after the 1992-1995 war and the second concerns those who acquired occupancy or equivalent rights to a military flat in a successor State of the SFRY (*Đokić* §37, *Mago* §54). The Court concluded that under the

above-mentioned laws, the applicants had been treated differently merely because of their service in the armed forces of former Yugoslavia and on the ground of their ethnic origin, (*Đokić,* § 60; *Mago and Others* §§102, 103,).

The European Court furthermore observed that in accordance with the Privatisation of Flats Act 1997, compensation was calculated in a way that the value of a flat was to first be calculated at a rate of approximately EUR 300 per square metre, the age of the flat was to then be taken into consideration with the depreciation of 1% of its value for each year (*Đokić* § 37). However, in July 2006 the Federation amended Article 39e of the Privatisation Flats Act 1997, so that at the time when the *Đokić* judgment was rendered, the European Court found that the applicant had only been entitled to a refund of the amount actually paid for the flat plus interest at the rate applicable to overnight deposits (which was less than EUR 3,500) (*Đokić,* §37) . On 30 March 2012, in its decision U 15/11, the Constitutional Court of Bosnia and Herzegovina also declared this method of calculation unconstitutional and ordered the Parliament of the Federation to amend it.

II Individual Measures

Measures have been taken to bring the impugned violations to an end and to provide adequate redress to the applicants.

The applicants expressly agreed to compensation *in lieu* of restitution of the flats concerned. The European Court therefore considered that the respondent State should pay the applicants the current value of their flats. The Court furthermore clarified that the applicants should be paid EUR 1 000 per square meter of their pre-war flats. Accordingly, the European Court awarded the applicants amounts ranging from EUR 53 000 to EUR 85 000 in respect of pecuniary damage sustained. The European Court also awarded the applicants just satisfaction amounting to EUR 5 000 each, in respect of non-pecuniary damage sustained (*Đokić*, §§ 72, 74 and *Mago and Others*, §§ 121, 123).

The amounts of just satisfaction awarded to the applicants were disbursed within the timeframe indicated by the European Court. The payment of just satisfaction therefore ensured that the violations at hand have been brought to an end and that the applicants were redressed adequately for both heads of damage sustained.

III General Measures

In response to the European Court's judgments, a number of measures have been taken to address the root cause of the impugned violations and, in particular, to ensure that individuals in a similar situation are adequately compensated. However, the legislative measures are still outstanding.

It is recalled in this respect that the Federation Government adopted action plans in 2011 (DH-DD(2011)259) and in 2013 (DH-DD(2013)1229) in response to the European Court's judgments in *Đokić* and *Mago and Others* respectively. These action plans set out the measures to be taken with a view to preventing similar violations, including introducing a compensation scheme in line with the European Court's indications in these cases.

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A. Measures taken

The authorities in particular identified similar cases with a view to providing adequate compensation to individuals who had been given military flats in the Federation, amended the contested provision of section 39e of the Privatisation of Flats Act 1997 and ensured publication and dissemination of the European Court's judgments to the relevant authorities.

(i) Measures aimed at identifying individuals in a similar situation as the applicants in these cases

Pursuant to the action plans adopted by the Government of the Federation, the competent authorities were tasked with identifying individuals in a similar situation as the applicants in these cases. At the outset, the authorities set out criteria for identifying these individuals on the basis of the European Court's findings and second, identified the number of individuals concerned. The aim of this exercise was to establish the number of flats concerned and to assess the financial resources required for their compensation. It is clarified that the authorities of the Federation decided not to offer the restitution of the flats concerned in kind but to offer adequate compensation to their owners or occupancy right holders in lieu of their restitution.

Accordingly, the authorities of the Federation set the criteria for identification of the similar cases set out below.

1. First, individuals in the situation similar to the applicant in *Đokić* should meet the following criteria:

   - a valid contract with the armed forces of the former Yugoslavia was signed; and
   - the Federation authorities awarded no compensation for the military flat concerned; and
   - the individual concerned did not acquire an occupancy or equivalent right to a military flat in a successor State of the former Yugoslavia;

2. Second, individuals in the situation similar to the applicants in *Mago and Others* should meet the following criteria:

   - to be pre-war occupancy right holder whose request for reinstatement in the Federation was rejected under section 3a of the Restitution of Flats Act 1998; and
   - the individual concerned did not acquire an occupancy or equivalent right to a military flat in a successor State of the former Yugoslavia; and
   - the individual concerned exhausted all available effective legal remedies, as defined by the European Court in *Mago and Others* (§ 81). The European Court held that the cancellation of an occupancy right was an instantaneous act rather than a continuing situation. Consequently, the European Court noted that the six-month period started to run with regard to each case when the decision cancelling the occupancy right entered into effect under the rules of administrative procedure or, if an applicant used further

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remedies, such as an appeal to the Human Rights Chamber or a constitutional appeal, when the final decision was rendered in the process of exhaustion of domestic remedies. It therefore emphasised that only remedies which were effective could be taken into account as applicants could not extend the strict time-limit imposed by the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which had no power to offer effective redress for the complaint in issue (*Mago and Others.*, §§81-87). Subsequently to *Mago and Others*, the European Court dismissed similar applications in the single judge formation on this ground.

3. Identification and determining the number of individuals in the similar situation as the applicants in these cases.

Bearing in mind the above-mentioned criteria, the Federation Government took steps to establish the number of individuals who, similarly to the applicants in *Đokić*, had a valid purchase contract in respect of military flats in the Federation before the war, but did not succeed in registering their title and those individuals who, similarly to the applicants in *Mago and Others*, had occupancy rights on these flats but were rejected their restitution.

In this respect, it was necessary to establish cooperation and to exchange data with the authorities of the successor States of the former Yugoslavia, primarily with Serbia and Montenegro, in particular with a view to establish whether the individuals concerned were given military flats in those countries after the war.

To this end, in March 2012 the Government of the Federation set up a commission tasked with the exchange of data in respect of military flats with Serbia and Montenegro. In communication with the authorities of these countries the commission established the number of individuals concerned (see below). On 9 July 2015, the commission presented its report to the Federation Government and ended its operation. Pursuant to the Federation Government's instructions, the commission handed over its documents and database to the Federation Common Affairs Service.

Notably, the following data was established with respect to individuals in the same situation as the applicant in *Đokić*:

- 490 individuals who had a purchase agreement for their military flat in the Federation before the war;

- 49 of these agreements are invalid because they do not meet the statutory requirements under section 39e;

- 108 of these agreements for which the relevant information is still missing about the allocation of the flat from the housing fund of the former JNA;

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It therefore follows that 333 individuals had valid purchase agreements for their military flats in the Federation before the war. In respect of these individuals, the above-mentioned commission established the following data:

- 103 of these individuals acquired an occupancy or equivalent right to a military flat in a successor State of the former Yugoslavia but nevertheless might qualify for the compensation in lieu of restitution;

- 230 of these individuals did not acquire an occupancy or equivalent right to a military flat in a successor State of the former Yugoslavia and might qualify for the compensation in lieu of restitution.

As regards individuals in the same situation as the applicants in *Mago and Others*, the following data was established:

- 1,032 occupancy right holders were rejected under section 3a;

- 456 of these individuals acquired an occupancy or equivalent right to a military flat in a successor State of the former Yugoslavia after the war and therefore, do not qualify for compensation;

- 576 of these individuals did not acquire an occupancy or equivalent right to a military flat in a successor State of the former Yugoslavia after the war and therefore, might qualify for compensation in lieu of restitution.

In aggregate, around 800 individuals are in the same situation as the applicants in *Đokić* and *Mago and Others*. It is recalled that in its decision adopted at the 1294th meeting (DH) (September 2017) the Committee of Ministers noted with satisfaction that the field of beneficiaries eligible to benefit from the compensation scheme appeared to be in line with the European Court's findings (in that the scheme would exclude only holders of occupancy rights on military flats who have already been granted equivalent occupancy rights elsewhere).

It was estimated by the authorities that it would be necessary to secure around EUR 6 million for the compensation of the above individuals in lieu of restitution of their pre-war flats.

(ii) Publication and dissemination measures

The European Court's judgments in both cases have been translated and published in official gazettes, notably in the Official Gazette of Bosnia and Herzegovina No. 20/11 dated 21 March 2011 and No. 93/12 dated 20 November 2012 respectively.

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These judgments have also been published on the website of the Office of the Government Agent (www.mhrr.gov.ba/ured_zastupnika/odluke/?id=170). They have therefore been made available to the professionals and public at large alike.

The judgments have also been disseminated to the Federation authorities in charge of taking measures to implement these judgments, including to the Federation Government with a note on the European Court's findings in these cases.

B. Measures taken in response to the last Committee's decision

In response to the last decision of the Committee of Ministers adopted at its 1369th meeting, 3-5 March 2020 (DH), the authorities would like to outline the progress achieved regarding the execution of these two cases.

(i) Legislative measures

The authorities consider that the execution of these judgments requires that the legislative amendments are introduced to align relevant legal provisions of the Privatisation of Flats Act 1997 in line with the Convention standards.

To this end, it is recalled that the competent authorities prepared draft amendments to section 39e of the Privatisation of Flats Act 1997 with a view to introducing a compensation scheme for the above individuals concerned. Pursuant to these draft amendments, the eligible beneficiaries would be entitled to apply for compensation within 180 days following the adoption of the amendments. Compensation amounting to EUR 300 per square meter shall be payable to the pre-war owners of military flats and to those who held occupancy rights to such flats who have not been granted occupancy right elsewhere. The compensation shall be payable in two equal annual instalments. For further details of this scheme see: DH-DD(2016)825 and DH-DD(2017)698.

In its latest above-mentioned decision , the Committee of Ministers exhorted the authorities of Bosnia and Herzegovina to adopt the foreseen legislative reform. In response, the authorities would like to provide the following information. The draft amendments were examined by the Parliamentary Assembly of the Federation. In particular, on 23 June 2020, at its 12th regular session, House of Representatives of the Parliamentary Assembly of the Federation approved draft amendments and called on the Government of Federation to schedule a public debate on the draft.

Subsequently, draft amendments were examined by the second chamber of the Parliamentary Assembly of the Federation. At the 9th regular session of the House of Peoples of the Parliamentary Assembly of the Federation held on 18 February 2021, draft amendments did not receive sufficient support of the MPs (with 21 votes in favor, two against and 12 abstentions).

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Following the failure of the legislative initiative, the Ministry of Spatial Planning of the Federation prepared a document (hereinafter „Information") on the execution of the present judgments and the below mentioned judgments of the Constitional Court of Bosnia and Herzegovina. This document was examined by the Government of the Federation on 1 April 2021. At this session, the Government of the Federation adopted a Conclusion which was sent to the Parliamentary Assembly of the Federation so that it takes a stand and provide guidelines on further action in this particular matter. In this regard, the House of Representatives of the Parliamentary Assembly of the Federation at its 21st regular session held on 27 April 2021 took note of the above-mentioned Information and adopted the Conclusion instructing the Government of the Federation to prepare new draft amendments to Privatisation of Flats Act 1997 and to table it to both Chambers of Parliamentary Assembly of the Federation.

In light of the above, the Secretary of the Government of the Federation tasked the Ministry of Spatial Planning of the Federation to comply with the Conclusion at issue and prepare new draft amendments to the Privatisation of Flats Act 1997 to be approved by the Government of the Federation. Pursuant to the 2021 Annual Planning issued by the Ministry of Spatial Planning of the Federation preparation of these draft amendments constitutes a priority for the Ministry considering the European Court's judgments in the present cases.

The Government of the Federation remains committed to undertake activities within its competence so that necessary legislation is adopted which would implement the present judgments.

(ii) Change of the case-law

In the latest above-mentioned Committee of Ministers' decision the Committee invited the authorities of Bosnia and Herzegovina to present information on the judgment of the Constitutional Court of Bosnia and Herzegovina of 31 January 2019 concerning compensation in a similar case and which gave effect to the Convention and the European Court's case-law, as well as on the follow-up given to this judgment by the lower courts.

In response, the authorities have a pleasure to inform the Committee of Ministers that, pending the adoption of the above legislation, domestic case-law took a proactive approach so that property rights of individuals in the applicants' situation are protected at domestic level and that they are redressed for the negative consequences of the violations sustained. Relevant information in this regard is set out below.

1. Case-law of the Constitutional Court of Bosnia and Herzegovina

In its above-mentioned judgment (no. AP 2916/16), the Constitutional Court of Bosnia and Herzegovina found a violation of property rights protected under Article II / 3.k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention on account of the failure of the lower courts to comply with their constitutional obligation to direct apply the European Convention and the present judgments in a case similar to the applicants'. In its judgment, the Constitutional Court of Bosnia and Herzegovina overturned the lower courts' judgments (refusing the appellant's claim for compensation calculated on the basis of the market value of the flat) and remitted the appellant's case to the Supreme Court of the Federation. Pursuant to this judgment, such interference with the

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appellant's right to peaceful enjoyment of possessions could not be considered "lawful" within the meaning of the European Convention. The Constitutional Court of Bosnia and Herzegovina particularly highlighted the following:

> "in the absence of provisions prescribing the amount of compensation in accordance with the decisions of the European and Constitutional Courts, regular courts should have taken into account the case law of the European Court and the Constitutional Court in such cases that, pursuant to the Constitutional Court of Bosnia and Herzegovina, provides sufficient information so that compensation can be determined in proceedings before regular courts. By acting in the opposite way, the regular courts, despite the fact that the competent authority did not execute the binding decisions of the European and Constitutional Courts and set up the appropriate legislative framework, failed to adequately protect the appellant's right to property. Such an interpretation of the regular courts, but also the failure of the competent legislative and executive authorities to act in accordance with the binding decisions of the European and Constitutional Courts, placed an excessive burden on the appellant because it bears harmful consequences for non-enforcement of binding court decisions. Such a legal situation has been going on for a long time, although the decisions of the European and Constitutional Courts follow the principles that should be followed in resolving the issue of compensation for the inability of persons in this situation to enjoy their property without hindrance. In addition, the Constitutional Court notes that it cannot be assumed how long such a situation will last, which is why the interpretation given by the regular courts would mean that appellants, but also other persons in the same situation, are still denied the right to property on the basis of a conclusion that there is no law, that directly contravenes with the decisions of the European Court and the Constitutional Court, which is contrary to the principle of the rule of law from Article II / 1. of the Constitution of Bosnia and Herzegovina. "

It is highlighted that the Constitutional Court of Bosnia and Herzegovina when reaching the above conclusion, directly referred not only to the present judgments but also to the European Court's findings in the *Vijatović v. Croatia* (50200/13) case indicating that the lack of a sufficiently precise and foreseeable statutory provision may be remedied by domestic courts giving a clear and precise interpretation as well as those expressed in the *Köpke v. Germany* (420/07) case pointing out that in the absence of provisions which prescribe the conditions under which interference with the rights and freedoms protected by the European Convention and its protocols may occur, these rights may be adequately protected through a consistent case-law of domestic courts.

The above judgment of the Constitutional Court of Bosnia and Herzegovina now constitutes its well-established case-law in similar cases. In a number of following judgments[1], the Constitutional Court of Bosnia and Herzegovina found violations of the appellants' property rights and remitted the cases back to the Supreme Court of the Federation of Bosnia and Herzegovina while pointing out to the need to calculate compensation for non-ability to use pre-war military flats on the basis of their market value.

2. Case-law of the Supreme Court of the Federation of Bosnia and Herzegovina

In response to the present judgments and pending the finalisation of the legislative reform, the Supreme Court of the Federation of Bosnia and Herzegovina also changed its case-law. In particular, in its judgment of 20 June 2019 (no. 65 0 P 046060), adopted in response to the above-mentioned first judgment of the Constitutional Court of Bosnia and Herzegovina, the Supreme Court of the Federation, in the fresh proceedings accepted the appellant's appeals on the points of law. It thus reversed the lower courts' decisions rejecting the appellant's claim for compensation on account of his inability to use his pre-war military flat in Sarajevo. In this

[1] See, *inter alia*, the Constitutional Court's judgment dated 4 June 2020, case no. AP 4671/18 and judgment dated 24 September 2020, case no. AP 4993/18.

final judgment, the Supreme Court ordered the Federation to pay the appellant an amount of compensation corresponding to the market value of his flat. The Supreme Court of the Federation extensively referred to the above findings of the Constitutional Court of Bosnia and Herzegovina highlighted that the amount of *sui generis* compensation was determined taking into account the case-law of the Constitutional Court of Bosnia and Herzegovina and of the European Court in the *Đokić* case.

The authorities would like to stress that the above principles are now routinely applied by the Supreme Court of the Federation. In particular, in its subsequent judgments (no. 65 0 P 154611 20 Rev 2 and no. 65 0 P 051256 20 Rev 3) dated 8 October 2020 and 16 December 2020, respectively, the Supreme Court of the Federation accepted the appeals on the points of law lodged by the owners of pre-war military flats (or their successors) and ordered the Federation to pay them compensation calculated on the basis of the market value of the flats at issue. In its judgments, the Supreme Court of the Federation referred to the findings of the Constitutional Court of Bosnia and Herzegovina stressing that in the absence of clear and foreseeable legislative provisions relevant for the calculation of the compensation at issue, domestic courts have a constitutional obligation to directly apply the European Convention and binding judgments in the present cases, particularly that in *Đokić*, which took into account the then current value of the flat when calculating the amount of just satisfaction awarded.

It is expected that the Supreme Court of the Federation will apply case-law in all similar cases. Thus, individuals in the applicants' situation can now obtain compensation at domestic level before domestic courts.

IV JUST SATISFACTION

The just satisfaction awarded has been paid to the applicants in compliance with the European Court's indications and within the set time-frame.

V CONCLUSION

The authorities consider that the individual measures taken have ensured that the violations at hand have ceased and that the applicants are provided redress for any negative consequences.

The authorities shall continue on a regular basis to inform the Committee of Ministers of the Council of Europe on all further activities undertaken by the relevant authorities in Bosnia and Herzegovina on general measures for the prevention human rights violations found in this group of cases.

Acting Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights
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