

Department of Human Rights and Communities

Fraudulent Property Transactions in the Pejë/Peć Region

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1. Executive summary

This report contains an account of claims over property in the Pejë/Peć region addressed by the Housing and Property Directorate (HPD), the Housing and Property Claims Commission (HPCC), and the Kosovo courts. It sets out the main problems concerning the full implementation of the HPD/HPCC mandate and international human rights standards.¹ The HPD/HPCC was a mass claims mechanism set up to resolve property claims resulting from the 1999 conflict and the legacy of discrimination in housing and property rights in Kosovo. Its decisions are final and binding and must be recognized by Kosovo courts. The OSCE has identified a series of property ownership transfer cases throughout Kosovo and they seem of greater magnitude in the Pejë/Peć region.

In assessing the current situation with respect to property rights cases, the OSCE notes that in cases where the HPCC found illegal activity in the transfer of ownership of properties belonging to displaced persons, delays in procedures before Kosovo courts to annul those illegal transfers might additionally impede ownership rights of displaced persons. Illegal property ownership transfers have in some cases resulted in inaccurate property registration in the cadastre. Apart from the fact that delayed procedures before Kosovo courts in some cases have caused problems with regard to the full implementation of the HPCC mandate, the accurate registration of property right holders within the immovable property rights register is fundamental in promoting the rule of law for all communities in Kosovo.

Having in mind that the Kosovo Property Agency (KPA) and the Kosovo Property Claims Commission (KPCC) will likely face the same problems regarding property restitution of agricultural and commercial properties, the resolution of these fraudulent property transactions will set a clear precedent for the Kosovo judiciary.

The report concludes with recommendations on how to resolve the problems identified.

¹ Article 1, Protocol 1, European Convention on Human Rights and Fundamental Freedoms (the Convention), establishing the right to the peaceful enjoyment of possessions and prohibiting the deprivation of possession with some exceptions; Article 13 of the Convention, g13 (guaranteeing the right to “an effective remedy before a national authority”), and Article 6(1), guaranteeing the right to a fair trial.

2. Introduction

The OSCE has identified a significant number of sales of property belonging to Kosovo Serb displaced persons that have been sold without their knowledge.² The means by which these properties have been sold varies but includes falsified powers of attorney, personal identification documents, and court stamps. Given their absence, displaced persons do not become aware of such transactions until after some time has passed.

The HPD/HPCC during its mandate dealt with a considerable group of such cases connected to serious allegations that several properties belonging to “Category C claimants”³ were being sold without their knowledge. The HPD/HPCC was established as a quasi-judicial organ by virtue of an UNMIK Regulation⁴ and operated outside the legal system, having its own rules of procedure and evidence for the resolution of claims which were adjudicated upon a recommendation from the HPCC.

These fraudulent transactions have enabled perpetrators to sell property on behalf of or “personally” by the owners who remain displaced from Kosovo and have not consented to the transaction.

Transactions have been conducted on the basis of forged documentation that results in serious human rights violations constituting an impediment to return and property restitution for displaced persons.

According to HPD data, there are 70 cases where the HPD suspects criminal activity. It must be emphasised that the HPD dealt only with residential property and not with agricultural or commercial property, which are the subject of claims filed with the Kosovo Property Agency (KPA) and which are being brought before the Kosovo Property Claims Commission (KPCC).

Bearing in mind that the cases filed with the KPA may unearth evidence of similar alleged criminal activity, the OSCE is concerned that the number of alleged fraud related to real estates other than residential property could be significantly greater.

² The OSCE Mission in Kosovo Monthly Report - March 2009: Improper handling of fraudulent property transaction cases may breach public authorities’ official duties and individuals’ property rights. Previously reported on this issue: July 2005 Monthly Report, “Civil courts admit into evidence and include as basis for their judgments invalid property documents and counsels fail to challenge such practice”; November 2005 Monthly Report, “Civil courts’ failure to report alleged criminal offences to the responsible authorities breaches the applicable law”; April 2006 Monthly Report, “Civil courts accept and try property cases that fall outside their jurisdiction”; Legal Representation in Civil Cases, June 2007; Review of the Civil Justice System, June 2006.

³ Section 1.2(c) of United Nations Mission in Kosovo Regulation 1999/23 defined the third category of residential property claims (“category C claims”), which could be filed with the HPD as follows: “Claims by natural persons who were the owners, possessors or occupancy right holders of residential real property prior to 24 March 1999 and who do not now enjoy possession of the property, and where the property has not voluntarily been transferred.”

⁴ Section 2 of UNMIK Regulation 1999/23 created the HPD/HPCC which was the independent quasi-judicial component of the property restitution mechanism and was conferred with exclusive jurisdiction to “*settle private non-commercial residential property disputes until the SRSG determine[d] that local courts [were] able to carry out the mandate entrusted to the Commission*”.

The HPD managed to ascertain the pattern of fraud and the titles of most of the residential premises affected throughout Kosovo were awarded to the rightful owner.⁵ However, the problem that remains is the need for invalidation of the fraudulent transactions in court and cadastral records. This was not in the mandate of HPD. Once a property title is certified by a court or the cadastre it has a legal effect. Theoretically in two or three years the possessor of a counterfeit contract that has been certified by a court and/or registered in the cadastre could again initiate the court procedure requesting repossession.

For this reason all owners were advised by the HPD to initiate a court procedure in which they would request invalidation of the alleged fraudulent property transaction. The results are however very poor. According to the Danish Refugee Council's Legal Assistance Programme in Serbia, out of 49 cases registered by them four procedures were concluded so far.⁶ There could be several reasons for these delays. Civil proceedings can take a long time, and many courts have heavy caseloads with significant backlogs.⁷

3. Fraudulent property transactions

Fraudulent transactions need to be legally processed at two levels: through criminal procedure in order to establish the existence of fraudulent transactions, and through civil procedure in order to declare the fraudulent contracts as null and void.

Of great importance in the whole process of illegal transaction of displaced persons' properties is the fact that in most of these cases the *bona fide* owners are not in actual possession of the property.

Furthermore, the owners do not have any contact with or control over their property. In most of the cases they have found out about the fraudulent transaction by coincidence, when the transaction is already completed and someone else is registered as the owner. Therefore, forgers first misuse the current situation of displacement of real owners and then, using falsified documents, formally follow the above-mentioned procedure of verification and finalize the fraud.

The 40 reported cases are from Pejë/Peć, Klinë/Klina, Istog/Istok, Gjakovë/Djakovica and Deçan/Dečani, although there are some cases in other parts of Kosovo as well.

⁵ In at least ten cases adjudicated by the HPCC, a real estate agency from Pejë/Peć was involved into the fraudulent transactions. After the expertise, the power of attorneys or purchase contracts used in these fraudulent transactions appeared to be forged.

⁶ Out of this caseload, four cases have resulted in a verdict by the Klinë/Klina municipal court annulling the contract and they are pending appeals. While one has resulted in a final verdict by Pejë/Peć municipal court and is pending the necessary procedures for changing the cadastral records. [Source: Legal Assistance Programme to the Institutions of the Government of Serbia dealing with Refugees and Interim Displaced Persons funded by European Union, Danish Refugee Council.]

⁷ See OSCE Review of the Civil Justice System, June 2006.

4. Role of the courts in civil and criminal proceedings

The OSCE knows of approximately 40 civil cases in the Pejë/Peć region in which plaintiffs allege that their immovable property was sold through the use of falsified documents. Those proceedings generally involve the plaintiff asking the court to void the sale and order the cadastre to correct its records. The victims of such illegal transactions are usually displaced persons, mostly Kosovo Serbs, whose absence from Kosovo makes them and their property particularly susceptible to such crimes. Victims also include buyers of these properties, who may not have known they had purchased the property from someone other than its rightful owner.

Besides the serious breaches of the Kosovo civil and criminal law, such cases also violate international human rights law in so far as they affect a person's right to protection of property, to a determination of civil rights within a reasonable time, and to an effective remedy.

a. Civil law aspects of fraudulent property transactions

In cases monitored by the OSCE, properties appear to have been sold fraudulently through various methods: a) with authorizations verified with a false court stamp, b) with authorizations verified in courts outside Kosovo with a regular court stamp but by using falsified identification documents, c) by verifying contracts before Kosovo courts using falsified identification with the name and surname of a real owner, and d) by using falsified court judgments to register property in cadastral books. As such, the transactions usually involve the following three parties: an alleged real owner of the property, most often a displaced person not in contact with or with no factual possession of the property; an alleged falsifier of the authorization, very often one of the parties to the sales contract; and a purchaser of the land, whether *bona fide* or not.

Before civil courts, plaintiffs normally allege that the respondent purchased the property from a seller whose authority to sell was based on a falsified authorization. In eight cases verified by the OSCE, the authorization was purportedly stamped in a court in Bar. Plaintiffs also produced as evidence authorizations bearing the stamp of courts in Mitrovicë/Mitrovica, Belgrade, Kragujevac, Smederevo, Berane, Podgorica, Rožaje, and Ulcinj.

The authorizations generally purport to give the named person (the seller) authority to sell the plaintiff's property on behalf of the plaintiff. They bear the apparent signature of the plaintiff and often an indication of what type of identification was used to verify the plaintiff's identity.

The authorizations themselves frequently contain contradictions or discrepancies. In some cases, the individual granting the authorization is deceased or the birth date listed in the authorization is decades different than the granter's actual birth date and visible age. Also, in three monitored cases, the authorization stamped outside of Kosovo contains the same date as the verified sale contract stamped inside Kosovo, giving rise to questions as to the feasibility of effecting an authorization and a sale on the same day. Both documents are signed by the same person - the allegedly

authorized seller. Courts often fail to give sufficient weight in favour of the plaintiff to these facts.

In many civil cases, the plaintiff is suing only the buyer of the property, who may have unknowingly purchased the property from an individual not authorized to sell the land. The seller, who is the individual most likely responsible for the transaction allegedly depriving the plaintiff of his or her property, is not always summoned to court as a party or a witness.

During the monitoring of ten civil cases by the OSCE, Kosovo courts did not take into account a final and legally enforceable decision of the Housing and Property Claims Commission.⁸ Further, in the early stages of at least 17 civil cases, the plaintiff asked the court to issue a temporary injunction preventing the municipal cadastral office from allowing any change in the property ownership records until the court issues a judgment. In only three of those cases did the court issue a ruling on the plaintiff's request.

Of the cases monitored by the OSCE, courts have rendered five judgments in favour of the plaintiff and dismissed or rejected three claims. Most cases are pending. The plaintiff's attorney in four cases has requested a judge from the European Union Rule of Law Mission in Kosovo (EULEX) to take over the case. In at least one case, the parties report that an EULEX judge has been appointed.

As with many other civil disputes, proceedings on fraudulent property transaction cases frequently suffer recurring delays. Repeated postponements, continual summoning problems, and change in the legislation mean many of these cases have dragged on for five or more years; some have yet to be still at the preparatory stage. The issue of unreasonably long proceedings, besides being a concern in itself, also bears a direct impact on a plaintiffs' right to the peaceful enjoyment of their properties in so far as it delays annulment procedures and precludes the full exercise of displaced persons' ownership rights.

b. Criminal law aspects of fraudulent property transactions

Despite the criminal acts that may have been committed in relation to these civil cases, plaintiffs often do not file a criminal report but bring their first legal action in the civil justice system.

Civil courts often neglect to correct this error by failing to recognize the priority of criminal law in these issues. In cases where a plaintiff's first attempt to address the alleged illegal sale of his or her property involved the criminal justice system, Kosovo's civil courts often do not take into account the binding judgment of a criminal court.⁹ In some cases, the initial criminal proceedings occurred in courts outside of Kosovo. Specifically, in monitored cases, plaintiffs have presented

⁸ See Article 2.7, UNMIK Regulation 1999/23, on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission (15 November 1999).

⁹ See article 12, Law on Contested Procedure, Official Gazette of the Socialist Federal Republic of Yugoslavia 4/1977, 36/1980, and 66/1982, 12 February 1982 (1982 Law on Contested Procedure); see article 14, Law on Contested Procedure, Kosovo Official Gazette, 20 September 2008 (2008 Law on Contested Procedure).

evidence of criminal proceedings or judicial determinations of fact from courts in Bar and Rožaje.

Given that such immovable property transactions are typically made using falsified authorizations, there is a strong *prima facie* case that such transactions were preceded or accompanied by criminal acts, such as falsifying documents¹⁰ or legalisation of false content.¹¹ Under these circumstances, civil courts which receive claims or complaints related to fraudulent transactions should refer the information on the potential criminal element to the police or prosecutor's office for further investigation into the apparent criminal misconduct.¹² Prosecutors must initiate criminal investigations against specified persons if there is a reasonable suspicion that they committed a criminal offence.¹³ When criminal cases are referred for prosecution, civil courts often do not stay the civil proceedings pending the outcome of the criminal case as permitted by law.¹⁴

Public prosecutors have initiated and conducted criminal investigations in relation to fraudulent transactions of immovable property in at least nine cases in Klinë/Klina municipality and in forty cases in Pejë/Peć municipality. These criminal cases do not entirely overlap with the previously-mentioned number of approximately 40 civil cases from the entire Pejë/Peć region involving fraudulent property transactions of which the OSCE is aware.

It appears that not all cases of fraudulent property transactions have been referred to the prosecution for investigations into apparent criminal activity. Also, in the cases which did result in formal criminal charges, prosecutors sometimes appear to have undercharged the suspects. For instance, some defendants are charged only with the crime of legalisation of false content,¹⁵ despite the fact that from their testimonies and other evidence adduced, it appears that they may also have committed the crime of unlawful occupation of real property¹⁶ or falsifying documents.¹⁷ In some cases prosecution was barred by the statute of limitations.¹⁸

¹⁰ Articles 332 and 333, Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/25, 6 July 2003 (Criminal Code of Kosovo). On 22 December 2008, Kosovo promulgated Law No. 03/L-002 on Supplementation and Amendment of the Provisional Criminal Code of Kosovo, which left the code substantially the same as the 2003 law, though a paragraph addressing guilty pleas was added and the name of the code was changed.

¹¹ Article 334, Criminal Code of Kosovo.

¹² Article 197, Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003 (Kosovo Code of Criminal Procedure). On 22 December 2008, Kosovo promulgated the Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26, which left the code substantially the same as the 2003 law, though a section on guilty plea agreements was added, an article on the length of police-ordered detention was amended, and the name of the code was changed.

¹³ Article 220(1), Kosovo Code of Criminal Procedure.

¹⁴ Article 213, 1982 Law on Contested Procedure; Article 278.2, 2008 Law on Contested Procedure.

¹⁵ Article 334, Criminal Code of Kosovo.

¹⁶ Article 259, Criminal Code of Kosovo.

¹⁷ Article 332, Criminal Code of Kosovo.

¹⁸ The law prescribes a statutory limitation of three years for the prosecution of the crime of falsifying documents, and of five years for the prosecution of the crime of legalisation of false content; see article 332 in conjunction with article 90(1)5, and article 334 in conjunction with article 90(1)4 of the Kosovo Code of Criminal Procedure, respectively. The statutory period is sometimes missed, because the victims of such fraudulent transactions are often displaced persons with no factual possession over their

Kosovo public prosecutors should be commended for investigating and prosecuting criminal offences related to fraudulent property transactions. Nevertheless, the scale and systematic re-occurrence of these transactions coupled with the fact that they often involve the same alleged perpetrators suggests the criminal justice response has yet to achieve a deterrent effect.

5. Conclusions and recommendations

To effectively prevent the re-occurrence of such crimes in the future, the problem of fraudulent property transactions needs to be addressed at two ways: criminal proceedings need to be initiated in order to establish the commission of a criminal offence and bring to justice suspected offenders, and through civil proceedings in order to declare the said contracts null and void and restore the parties to their original conditions, to the extent possible.

The court's role in verifying property contracts implies the court may have some liability in these apparent fraudulent transactions. Court clerks should inquire further when presented with contracts for the sale of a displaced person's property, in particular when those contracts involve an authorized seller rather than the property owner himself or herself, and when the authorization bears a stamp from a court outside of Kosovo. Though the OSCE has seen no evidence of malfeasance on the part of court office staff, clerks should be aware of potentially problematic document verification requests. Temporary injunctions regarding cadastral records should be issued swiftly whenever required, while courts should summon and hear all persons and examine all documents necessary for a fair resolution of the dispute.

Any apparent criminal aspect should be referred to the public prosecution office for investigation, and prosecutors should investigate and prosecute criminal offences related to fraudulent property transactions in a rigorous and expeditious manner. The European Court of Human Rights has held that when an interference with the right to peaceful enjoyment of possessions is perpetrated by a private individual, a positive obligation arises for the authorities to ensure that in their domestic legal system "property rights are sufficiently protected by law, and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained".¹⁹ Moreover, "where the interference is of a criminal nature, [the] obligation will in addition require that the authorities conduct an effective criminal investigation and, if appropriate, prosecution".²⁰

Criminal proceedings should be conducted efficiently and swiftly, because criminal proceedings can have ramifications in the outcome of civil proceedings in fraudulent transaction cases. In general, cases of fraudulent property transactions should be resolved with particular diligence and expedience, since often what is at stake in such

property and only become aware of such frauds and report them to the authorities after some time has passed.

¹⁹ *Blumberga v. Latvia*, ECHR Judgment of 14 October 2008, paragraph 67.

²⁰ *Ibidem*, paragraph 67, with reference, *mutatis mutandis*, to *M.C. v. Bulgaria*, ECHR Judgment of 4 December 2003, paragraphs 151-153.

cases is not just a person's attempt to re-establish possession over his or her rightful property but ultimately a displaced person's effort to re-gain a home and return to normal life.²¹

In the interests of promoting justice, the rule of law, and confidence in the court system, judges, prosecutors, parties, and lawyers should work to ensure these cases proceed in a fair and efficient manner.

In light of these observations, the OSCE makes the following recommendations:

- Courts and other public entities should always report information on alleged fraudulent transactions to the police and/or the office of the public prosecutor.
- Police and public prosecutors should swiftly and rigorously investigate and prosecute criminal activities related to property transactions.
- Civil courts should use facts established in the course of criminal proceedings or in HPCC proceedings involving fraudulent property transactions.
- Courts should identify where errors/delays in the implementation of criminal and property law have occurred and find possible solutions to protect the right to property and establish due process of law.
- Courts should take into consideration the final binding force of HPCC facts investigated and presented within the individual decisions and respect HPCC decisions.
- Courts should rule on requests for temporary injunctions within a reasonable time.
- The Kosovo Judicial Institute should train civil judges on the importance of resolving preliminary issues in civil proceedings.
- The Kosovo Judicial Institute should train prosecutors on investigation and prosecution of criminal offences related to fraudulent property transactions.
- Legalization office staff should be trained to identify suspicious documents.
- The European Union Rule of Law Mission may wish to consider which role it could play with regard to these property cases.

²¹ “The right to return can be seen as a derivative, constructed right made principally of the right to freedom of movement (Article 2, Protocol 4, European Convention), the right to property (Article 1, Protocol 1, European Convention) and the right to respect for family and private life (Article 8, European Convention). [...] Displaced persons and refugees have the right to return to their homes and recover their possessions.” The United Nations developed a set of standards for the protection of housing, land, and property rights in post-conflict situations called the “Pinheiro Principles”. *You are displaced, your rights are not: Compendium on sustainable property restitution and solutions to displacement in Kosovo during transition*, Final Conference Document and Recommendations (26-27 November 2007).