DECISION ON ADMISSIBILITY AND MERITS
(delivered on 7 April 2000)

Case no. CH/97/50

Edita RAJIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 3 April 2000 with the following members present:

Mr. Giovanni GRASSO, Acting President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the aforementioned application introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Article VIII(2) and Article XI of the Agreement and Rules 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant, a citizen of Bosnia and Hezegovina, is a teacher of arts from Semizovac near Vogošća, Canton of Sarajevo. She is of Croat origin and married to a person of Serb origin. She had been working in elementary schools in Semizovac and Vogošća since 1983. During the war, when Vogošća was controlled by Serb forces, the applicant remained there and continued to work as an arts teacher. After the end of the war and the integration of Vogošća into the Federation of Bosnia and Herzegovina, the applicant wished to continue to work in the schools. However, she was not invited to come to work but was told to participate in a competition for posts following which she was not employed. The applicant sought legal redress to regain her post but her civil action has been rejected in the first instance. Her appeal and the case-file have not yet been transmitted to the Cantonal Court in Sarajevo, the competent second instance court.

2. The case primarily raises issues under Article 6 of the European Convention on Human Rights (hereinafter "ECHR") and in regard to discrimination in the enjoyment of the right to work and related rights as guaranteed by Article 6 of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR") and Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 10 July 1997 and registered on 18 August 1997. The applicant is represented by Ms. Senija Poropat, a lawyer practising in Vogošća. The applicant requested the Chamber to issue a provisional measure ordering the respondent Party to pay her salary as if she had been working as of 1 April 1996 until her re-employment, in order for her to be able to support her two under-age children. The Chamber rejected the request on 5 April 1998.

4. On 17 April 1998 the Chamber transmitted the application to the Federation of Bosnia and Herzegovina. The Federation submitted its observations on 14 May 1998 and suggested the possibility of a friendly settlement. The applicant replied on 29 June 1998 and submitted her compensation claim.

5. On 1 December 1998 the Chamber requested the Federation to specify the terms of a friendly settlement.

6. The applicant's lawyer answered on 7 December 1998, informing the Chamber that there had not been any development in the proceedings before the Cantonal Court in Sarajevo since 21 April 1998. She added that her client wished to pursue her compensation claim but would not insist on being reinstated into the post at the elementary schools in Vogošća and Semizovac as she had found employment in another school as of 1 March 1998.

7. As the Federation had not replied, on 29 January 1999 the Chamber repeated the request for information on a specific settlement proposal, establishing a time-limit of two weeks. As no information was received, the Chamber decided on 13 March 1999 to continue the consideration of the admissibility and merits of the case.

8. The applicant sent additional letters on 5 April, 3 June, 7 August and 18 October 1999 and 22 February 2000. In the letter of 5 April 1999 she specified her compensation claim in different terms than in her earlier submission. The Federation replied on 10 June, 15 July and 28 September 1999.

9. The Chamber deliberated on the case on 12 March, 10 June, 7 September and 4 and 5 October 1999 and on 9 March and 3 April 2000. On the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

A. The particular facts of the case

10. The applicant is a teacher of arts from Semizovac near Vogošća, Canton of Sarajevo. She is of Croat national origin and married to a person of Serb origin. She has been working in elementary schools in Semizovac and Vogošća since 1983. During the war, when Vogošća was controlled by Serb forces as of the end of April 1992, many persons from Vogošća fled to the territories held by the Army of the Republic of Bosnia and Herzegovina.

11. All schools on the territory under Serb control were suspended by a decision of the Vogošća "Municipal (exile) War Presidency" of 8 September 1993. Schooling continued in one school in Kobilja Glava on the territory held by the Army of the Republic of Bosnia and Herzegovina. According to the decision this school took over ("succeeded into") all rights and obligations of the suspended elementary schools. Meanwhile the applicant remained in Vogošća and continued to work as an arts teacher in the schools there which continued to function under Serb control and management. She did not contact the school in Kobilja Glava on the other side of the frontline.

12. After the end of the war and the conclusion of the General Framework Agreement for Peace, as Vogošća became part of the Federation of Bosnia and Herzegovina (on 23 February 1996), the applicant informed the school authorities that she wished to continue working in the schools. However, when the school year began in April 1996 she was not invited to come to work but was told to participate in a competition to be held in order to determine the suitable candidates to fill the advertised vacant positions. Such a competition was advertised on 14 August 1996. She took part in the competition but was not re-employed.

13. On 3 September 1996 the Semizovac school informed the applicant that her post had been filled with another teacher. On 9 September 1996 the school issued a procedural decision terminating her employment retroactively as of 2 May 1992. The reasoning stated that she had failed to report to the school after the integration into the territory of the Federation within the time-limit prescribed by Article 10 of the applicable Decree with Force of Law on Labour Relations of 23 November 1992 (see paragraph 24 below).

14. On 13 September 1996 the applicant appealed to the Steering Board of the school. On 4 October 1996 she was informed that her objection had been rejected as she only came third in the competition mentioned above and as she had not reported to work within the given time-limit. On 11 October 1996 the applicant appealed against the decision and stated that she did not have an obligation to report within that time-limit because her employment relationship had not been terminated. Moreover, she underlined that she in fact had reported to the school after the integration on 26 February 1996 and had thereafter talked several times with the school director.

15. Additionally, on 10 September 1996 the applicant submitted a petition to the labour inspection in Vogošča. On 14 October 1996 she was informed by the labour inspection that an investigation had been carried out on 3 October 1996. The investigation established that the applicant had not reported to work within the time-limit prescribed by Article 10 of the 1992 Decree and that, for this reason, it was decided to allocate the post to somebody else.

16. On 21 October 1996 the applicant initiated court proceedings before the Sarajevo Municipal Court II. She requested the court to annul the procedural decision terminating her employment, to re-instate her into her position, to pay the contributions and to recognise the period as of 1 February 1996 until her re-employment as "years of service". On 16 April 1997 the court requested the applicant to specify the remedies sought with the original court action of 21 October 1996. On 23 April 1997 the applicant's new representative, Ms. Poropat, submitted a completed action.

17. The completed action satisfied the requirements imposed by the rules of procedure of the court. A hearing was held on 28 May 1997. The applicant was not satisfied with the judge and objected against her with an action of 30 May 1997, *inter alia* submitting that the judge delayed the proceedings on purpose. The objection was rejected by the President of the Municipal Court II as ill-founded on 13 June 1997. The court held hearings on 9 September, 8 October and 18 November 1997.

18. On 18 November 1997 the court rendered a judgment, refusing the applicant's request and finding that it was correct not to re-employ her. The judgment referred to Article 15 of the 1992 Decree and relied on the reasoning that the applicant had reported back to work late and that she "put herself on the aggressor's side", which as such would have constituted a reason to terminate her employment. Therefore, the court concluded that she was not entitled to be re-employed and that there was no ground for giving her priority over other candidates in the competition. The judgment contained an instruction on the available legal remedy and the information that an appeal had to be submitted to the municipal court within 8 days of receipt of the judgement.

19. The court encountered difficulties in transmitting the judgment to the applicant's new representative. It was not recorded when the representative received the judgment. On 21 April 1998 the applicant submitted her appeal to the Municipal Court II in Sarajevo. To date, the judge in charge of the case at the Municipal Court has not transmitted the appeal and the case-file to the Cantonal Court in Sarajevo, the competent second instance court. Neither has the appeal been declared inadmissible. The President of the Municipal Court stated on 30 June 1999, upon the request of the Agent of the Federation, that there was no evidence in the case file as to when the representative had received the judgment. The President further stated that the Municipal Court had addressed several requests to the representative who had failed to inform the court of the date of receipt.

20. In the meantime, on 22 December 1997 the applicant's representative brought criminal charges to the public prosecutor against Mr. Sefer Mrkulić, director of the school, for having given false testimony before the Municipal Court. Allegedly, Mr. Mrkulić denied wrongfully that the applicant had reported and handed over keys and school documentation to him. On 8 November 1999 the Municipal Prosecutor in Sarajevo rejected those charges.

21. The applicant found new employment in a school in Stup in the Municipality of Novi Grad Sarajevo as of 1 March 1998.

B. Relevant domestic law and practice

1. Employment legislation

22. At the relevant time, working relations were governed by the following three laws: 1) the Law on Fundamental Rights in Working Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of the SFRY nos. 60/89 and 42/90), taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – no. 2/92); 2) the former Socialist Republic Law on Working Relations (Official Gazette of the Socialist Republic of Bosnia and Herzegovina no. 20/90), as applicable in accordance with the provision on the continuation of laws as contained in Article 2 of Annex II to the Constitution of Bosnia and Herzegovina (Annex 4 to the Agreement); and 3) the Decree with Force of Law on Labour Relations during the State of War and Immediate Threat of War (OG RBiH no. 21/92 of 23 November 1992), adopted as the Law on Labour Relations by the Assembly of the Republic of Bosnia and Herzegovina (OG RBiH no. 13/94). This legislation applied to labour relations in general except for those within state organs, which were regulated separately. It did apply, however, to those employed in public services, such as school teachers and bus drivers. It remained in force until the enactment by the Federation of Bosnia and Herzegovina of the Labour Law (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "OG FBiH" – no. 43/99) which entered into force on 5 November 1999.

23. Article 75 of the Law on Fundamental Rights in Working Relations of the SFRY provided for the termination of a working relationship. Paragraph 2 of that Article reads:

> "The working relationship ends without the consent of the employee,... if he or she stayed away from work for five consecutive days without good cause".

24. The Law on Labour Relations provided in Article 10:

> "An employee can be sent on unpaid leave due to his or her inability to come to work in the following cases:

if he or she lives or if his or her working place is on occupied territory or on territory where fighting is taking place.
...
Unpaid leave can last until the termination of the circumstances mentioned above, if the employee demonstrates, within 15 days after the termination of these circumstances, that he or she were not able to come to work earlier. During the unpaid leave all rights and obligations of the employee under the employment are suspended."

25. Article 15 of the Law on Labour Relations provides:

"The employment is terminated, if, while under a compulsory work order, the employee stayed away from work for more than 20 consecutive working days without good cause, or if he or she took the side of the aggressor against the Republic of Bosnia and Herzegovina."

2. The Law on Civil Procedure

26. The Law on Civil Procedure (OG FBiH no. 42/98) regulates the right to appeal. According to Article 429, an appeal in employment matters has to be submitted within 8 days after the receipt of the challenged first instance judgement. According to Article 339, the appeal shall be submitted to the court which issued the challenged judgment.

27. Article 340 stipulates that, if an appeal is submitted outside the above time-limit or is incomplete or not allowed, the appeal can be rejected by a procedural decision of the President of a panel of the first instance court without a hearing.

28. According to the general provisions of Article 360-363, an appeal is possible against a procedural decision of the first instance court if the law does not exclude it. The higher instance court will consider the appeal and can decide according to the following three options: (1) reject it as out of time, incomplete or not allowed; (2) refuse it as ill-founded and confirm the procedural decision of the first instance court; or (3) accept it and change or annul the procedural decision of the first instance and return the case for re-examination to the first instance court.

29. The law also contains provisions on the delivery of a judgment. In order to establish when time-limits commence, the court shall record when the parties to the proceedings have received the judgment. Normally, delivery is confirmed by the certificate of delivery (Article 139). However, Article 139(7) provides for the possibility for the court to verify delivery in another way.

30. Article 426 stipulates that, in proceedings concerning labour relations, the court shall generally have regard to the urgency of such matters, especially in scheduling hearings and setting time-limits.

3. Statement of the Joint Civil Commission for Sarajevo

31. The Joint Civil Commission for Sarajevo met on 11 April 1996 in order to proceed with its work on the implementation of peace in Sarajevo under the auspices of the then Deputy High Representative Michael Steiner. Representatives of the Federal and Municipal Governments and the Serb residents of Sarajevo took part in the meeting and reached, *inter alia*, a decision on "professional workers", containing the following rules:

- Persons employed in professional jobs before the war have the right to return to their former workplaces without any reapplication procedure. They are already qualified. They may be required to submit a registration signalling that they intend to return to their jobs, but upon doing so, they must be re-employed.
- Persons hired during the war can be asked to re-apply. Any such process must be carried out without discrimination on the basis of ethnicity, and the principle of employment reflecting the ethnic composition of each area should be maintained.

- In cases where workplaces no longer exist, former employees should be placed on a waiting list until jobs are available. Persons placed on such a list will not lose seniority or pension status.

IV. COMPLAINTS

32. The applicant complains that her rights under Article 6 of the ECHR have been violated due to the length of the proceedings. Moreover, she alleges that the Sarajevo Municipal Court II has not been impartial. In addition, she asserts that the court had not treated her case urgently, as prescribed by the Law on Civil Procedure.

33. The applicant also alleges that her rights under the CERD have been violated because employment was given mainly to teachers of Bosniak origin. She complains about discrimination and states that she has not been re-employed because of her Croat descent. In addition, the applicant alleges a violation of the Decision of the Joint Civilian Commission for Sarajevo of 11 April 1996.

V. SUBMISSIONS OF THE PARTIES

A. The respondent Party

34. The Federation of Bosnia and Herzegovina claims that the applicant has not exhausted available domestic remedies. Further, it states that the application should be struck out as the applicant does not wish to pursue her request for re-instatement.

35. In its observations of 14 May 1998 the Federation admitted that the appeal of the applicant against the judgment of the Municipal Court was filed in time as there were problems to transmit the judgment to her new representative. It conceded that it might be doubtful whether the court had correctly applied the substantive law. The Federation also stated that it expected the Cantonal Court to correct the judgment and pointed out that this would confirm that there are effective domestic remedies available to the applicant. The Federation requested the Chamber to await the decision of the Cantonal Court and to give time for an attempt to secure a friendly settlement in the case.

36. In its observations of 10 June 1999 the Federation withdrew its earlier concessions and stated that the offer of a friendly settlement had been made by mistake. It argued that the procedure that led to the dismissal of the applicant and the appointment of another teacher and the court proceedings were conducted according to the law, especially that an employer had a discretionary right to decide whom to employ. Further, the Federation submitted that the applicant has not been discriminated against in any respect and that she only objected against the judge because of her Bosniak descent.

37. In its submissions of 28 September 1999 the Federation added that the application as well as the compensation claim should be rejected as the applicant had found other employment.

B. The applicant

38. The applicant explained that her reporting to work had been delayed as it was impossible during the war and until the integration of Vogošća on 23 February 1996 to communicate between Vogošča and Sarajevo. Therefore, the people of Vogošča were not aware of the provisions of the 1992 decree on labour relations, the continuation of the schooling in Kobilja Glava or the publication of the Decision on the Cessation of the State of War on 22 December 1995. For all these reasons, she could not contact the school in Kobilja Glava.

39. The applicant further stresses that she has not been under a compulsory work order. In addition, the applicant protests against being described as a "person who joined the side of the aggressor". She submits that all she did was teaching children arts; she never acted against the interests of the Republic. Moreover, the applicant claims that the re-employment of teachers after the war favoured teachers of Bosniak descent.

VI. OPINION OF THE CHAMBER

A. Admissibility

40. Before considering the case on the merits the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. According to Article VIII(2)(a), the Chamber shall take into account whether effective remedies exist and whether the applicant has demonstrated that they have been exhausted. In this regard, it is incumbent on a respondent Party arguing non-exhaustion to show that there was a remedy available to the applicant and to satisfy the Chamber that the remedy was an effective one.

41. In the present case, the Federation argues that the applicant had at her disposal effective domestic remedies that have not yet been exhausted. The Chamber recalls that the applicant initiated civil proceedings against the Semizovac school before the Municipal Court II in Sarajevo on 21 October 1996 and that that court rendered a judgment in the case on 18 November 1997. The applicant's representative appealed against the judgment on 21 April 1998. The appeal and the case-file have not yet been sent from the Municipal Court to the Cantonal Court.

42. The Chamber notes that the Municipal Court encountered problems when transmitting its judgment to the applicant's representative and has no record of the date of delivery. It has therefore requested the applicant's representative to indicate when she received the judgment. As the representative failed to provide this information, the court refused to transmit the appeal and the case-file.

43. The Chamber notes that, according to the Law on Civil Procedure, the receipt of a judgment by the parties concerned is normally verified by the certificate of delivery. However, the law provides for other ways by which the court can verify the date of delivery. There is no provision that places the burden of proof of whether an appeal has been submitted in time on the applicant or the representative. Hence, if a court cannot determine when a judgment has been delivered, there appears to be no ground on which to conclude that the appeal has not been submitted in time and refuse to transmit it to the higher instance court, as was done in the present case. In any event, the Municipal Court would have had the possibility to reject the appeal by a procedural decision against which the applicant could have appealed. This was not done in the present case. Thus, the failure of the Municipal Court to process the applicant's appeal seems to be based on a wrong application of domestic law. The Chamber further recalls that the respondent Party conceded in its submission of 14 May 1998, although later retracted, that the applicant's appeal might be regarded as having been lodged in time as there were problems to transmit the judgment to her representative.

44. The Chamber therefore concludes that the applicant had no effective remedy at her disposal for the purposes of Article VIII(2)(a) of the Agreement. In these circumstances the Chamber finds that the application is not inadmissible under that provision, notwithstanding the fact that the domestic judicial proceedings are still pending.

45. As no other ground for inadmissibility of the application has been established, the application is declared admissible.

B. Merits

46. Under Article XI of the Agreement the Chamber must next address the question whether the facts found disclose a breach by the Federation of its obligations under the Agreement. Under Article I of the Agreement, the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms", including the

rights and freedoms provided for by the ECHR and the other international agreements listed in the Appendix to the Agreement.

47. Under Article II of the Agreement, the Chamber has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the ECHR and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the 16 international agreements listed in the Appendix. Under Article I(14) of the Agreement, the Parties shall secure to all persons within their jurisdiction the enjoyment of the aforementioned rights and freedoms without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth or other status.

48. The Chamber has held in the case of *Hermas* (case no. CH/97/45, decision on admissibility and merits delivered on 18 February 1998, paragraph 118, Decisions and Reports 1998) that the prohibition on discrimination is a central objective of the General Framework Agreement to which the Chamber must attach particular importance. Under Article II(2)(b) it has jurisdiction to consider alleged or apparent discrimination in the enjoyment of the rights and freedoms provided for in, *inter alia*, the ICESCR and the CERD.

1. Discrimination in the enjoyment of the right to work, free choice of employment and protection against unemployment, as guaranteed by the ICESCR and the CERD

49. The Chamber will first consider the allegation of discrimination under Article II(2)(b) of the Agreement in relation to Article 6(1) of the ICESCR and Articles 1(1) and 5(e)(i) of the CERD which, as far as relevant, read as follows:

> Article 6(1) of the ICESCR:
>
> "The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."
>
> Article 1(1) of the CERD:
>
> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."
>
> Article 5 of the CERD:
>
> "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> …
> (e) Economic, social and cultural rights, in particular:
> (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just an favourable remuneration.
> …"

(a) Impugned acts and omissions

50. The Chamber notes that the working relationship between the applicant and her employer had existed since 1983 and that the applicant continued to work in elementary schools in Semizovac and Vogošća after 1992, throughout the war and until the area of Vogošća was integrated into the Federation of Bosnia and Herzegovina in February 1996. Although she was not invited to come to

work as of April 1996, her employment was not officially terminated until the procedural decision of 9 September 1996 issued by the Semizovac school that applied retroactively as of 2 May 1992.

51. Further acts possibly attracting the responsibility of the Federation concern the vacancy notice for the post of the applicant for which a competition was held in August 1996, even though her employment relationship had not been officially terminated, and the Municipal Court's failure to act in the applicant's case.

52. All these acts contain an interference with the applicant's rights under Article 6(1) of the ICESCR and under Article 5(e)(i) of the CERD, as well as a potential failure of the Federation to secure protection of those rights.

(b) Differential treatment and possible justification

53. In order to determine whether the applicant has been discriminated against, the Chamber must first determine whether the applicant was treated differently from others in the same or a relevantly similar situation. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 120, Decisions January-July 1999).

54. There is a particular onus on the respondent Party to justify otherwise prohibited differential treatment based on any ground mentioned in Article I(14) of the Agreement or in Article 1 of the CERD, such as race, colour and ethnic or national origin. In previous cases, the Chamber has taken a similar standpoint (see, e.g., the above-mentioned *Hermas* decision, paragraphs 86 et seq.; see also the above-mentioned *Zahirović* decision, paragraphs 121 et seq.).

55. The applicant has argued that she was not re-employed due to her Croat descent. The Federation based its arguments on Article 10 of the Law on Labour Relations which, *inter alia*, provided that "an employee can be sent on unpaid leave in the case if his or her working place is on occupied territory or on territory where fighting is taking place".

56. The Chamber recalls that the termination of the applicant's employment was pronounced after the entry into force of the Agreement. As the respondent Party claims, the legal foundation was the Law on Labour Relations, which provided for such termination if, *inter alia*, the employee was "on the side of the aggressor" (Article 15) or had failed to demonstrate within the prescribed deadline that he or she could not come to work earlier (Article 10).

57. Regarding the latter obligation, the Chamber notes that those teachers who remained were treated differently from those who fled the territory. The first group of teachers had a reporting duty to their former working place after the cessation of circumstances for the unpaid leave that the second group was not required to fulfil. The Chamber recognises that the reason for the differential treatment, that is to receive an indication of how many teachers wished to continue to work, was a legitimate one. The means by which this aim was sought to be achieved, the reporting obligation, can also be described as proportional.

58. The applicant has claimed that she reported to the school director immediately after the transfer of territory in February 1996 which would satisfy the conditions required by Article 10 of the Law on Labour Relations. However, the Semizovac school's decision of 9 September 1996 terminating her working relationship and the Municipal Court judgment of 18 November 1997 state the contrary. As it has not been established whether the applicant reported to the school in time, the Chamber has to examine whether the legal provisions were applied correctly and, if not, whether there were other grounds for the termination of the applicant's employment.

59. The decision of 9 September 1996 declares the employment relationship terminated as from 2 May 1992. However, the legal basis for the decision, the Decree with Force of Law on Labour Relations during the State of War and Immediate Threat of War was issued after that date, namely on 23 November 1992. Moreover, Article 10 of the Decree provided for the termination of employment

only if the employee had failed to contact her employer after the cessation of the particular circumstances prompting the unpaid leave, a prerequisite that could hardly have been met on 2 May 1992. Against a retroactive application of the decision of 9 September 1996 it can especially be argued that, under Article 10, all rights and obligations of the employee were suspended, but the employment contract remained valid. The Chamber also takes note of the fact that the position previously held by the applicant was announced as vacant before the decision of 9 September 1996 was issued and communicated to her.

60. The Municipal Court stated in its judgment of 18 November 1997 that the applicant, by staying on occupied territory, "put herself on the side of the aggressor". The Chamber considers that this finding is discriminatory in itself, *de facto* on grounds of national and ethnic origin since it applied in practice almost exclusively to persons of non-Bosniak origin. It is also in contradiction to the statement of the Joint Civil Commission for Sarajevo of 11 April 1996 (see paragraph 31 above), in which representatives of authorities of the Federation of Bosnia and Herzegovina agreed not to conduct re-application procedures for persons who worked before the war. Furthermore, it seems hard to conceive that someone is "on the side of the aggressor" if that person, like the applicant, remained where she used to live and continued doing what she used to do, i.e. teaching arts to elementary school children.

61. Taking into account all these circumstances, the Chamber concludes that the real reason for the termination of the employment relationship was the fact that the applicant did not flee to territory held by the Republic of Bosnia and Herzegovina. The termination of working relations in pursuance of a policy of exclusion from employment of persons who were perceived to have joined the side of the aggressor involves differential treatment of individuals – mostly of non-Bosniak origin such as the applicant – and cannot be regarded as pursuing a legitimate aim, and, particularly, where the decision was based merely on the fact that the person concerned remained on the territory controlled by the Bosnian Serb administration.

62. The Chamber therefore concludes that the applicant has been discriminated against on the grounds of national and ethnic origin in her enjoyment of the right to work under Article 6 of the ICESCR. The Federation of Bosnia and Herzegovina is responsible for this violation.

63. The applicant has also claimed to have suffered discrimination in the enjoyment of her rights under Article 5(e)(i) of the CERD. That provision, in conjunction with Article 1 of the CERD, obliges a state to prohibit racial discrimination, i.e. also on the grounds of national or ethnic origin, in the enjoyment of the rights to work, to free choice of employment and to protection against unemployment. The Chamber has already found that the applicant was subject to unjustified differential treatment in her right to work according to Article 6 of the ICESCR. It has also established that this treatment was the result of discrimination on the ground of her national and ethnic origin.

64. The Chamber therefore finds it established that the applicant has been discriminated against also in the enjoyment of her rights as guaranteed by Article 5(e)(i) of the CERD, in particular her rights to work, to free choice of employment and to protection against unemployment.

2. Article 6 of the ECHR

65. The Chamber will next consider the allegation that there has been a violation of Article 6 of the ECHR in that the proceedings in the applicant's case have not been determined within a reasonable time and the Municipal Court has not been impartial. The relevant parts of Article 6 paragraph 1 provide as follows:

> "In the determination of his civil rights and obligations …, everyone is entitled to a fair … hearing within a reasonable time by an independent and impartial tribunal …"

66. Although the applicant was an employee of a public institution, her employment was governed by the Law on Labour Relations which applied to employment relations in general (see paragraph 22 above). In these circumstances, the Chamber considers that the dispute involves a determination of the applicant's civil rights and that, therefore, Article 6 paragraph 1 applies to the proceedings in the case (see, e.g., the above-mentioned *Zahirović* decision, paragraph 135).

(a) Length of proceedings

67. The Chamber recalls that the applicant initiated proceedings before the Municipal Court on 21 October 1996, that that court rendered a judgment on 18 October 1997 and that the applicant appealed against that judgment on 21 April 1998. Since the latter date no further action has been taken in the proceedings.

68. When assessing the length of proceedings for the purpose of Article 6 paragraph 1 of the ECHR, the Chamber must take into account, *inter alia*, the conduct of the applicant and the authorities and the matter at stake for the applicant (see, e.g., case No. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 10, Decisions and Reports 1998).

69. The Chamber has noted that the Municipal Court encountered problems when transmitting its judgment to the applicant's representative and that it has no record of the date of delivery. However, there is no provision that places the burden of proof of whether an appeal has been submitted in time on the applicant or the representative. The Chamber has therefore already found that, if a court cannot determine when a judgment has been delivered, it cannot refuse to transmit it to the higher instance court, as the Municipal Court has done in the present case (see paragraphs 42-43 above). In these circumstances, the Chamber considers that the conduct of the Municipal Court has caused the delay in the proceedings in question.

70. The Chamber further notes that a speedy outcome of the dispute would have been of importance to the applicant, as the question at stake concerned her employment and, thus, her ability to earn a living and support her family.

71. It follows that there has been a violation of the applicant's right to a hearing within a reasonable time under Article 6 paragraph 1 of the ECHR, for which the Federation of Bosnia and Herzegovina is responsible.

(b) Fair hearing

72. The applicant has alleged that the Municipal Court has not conducted a fair hearing when examining her case. She has also alleged that this was due to her national origin.

73. The Chamber notes that the Municipal Court has not only delayed the proceedings unreasonably when it failed to transmit the applicant's appeal to the higher instance court. It has also added in its judgment of 18 October 1997 a substantially new argument to the Semizovac school's decision of 9 September 1996, stating that the applicant "put herself on the side of the aggressor". This presumption was apparently automatic. Moreover, it could not be refuted by the applicant in the course of the hearing. In these circumstances, the Chamber finds that the hearing cannot be considered to have been fair under Article 6 paragraph 1 of the ECHR. This provision has accordingly been violated. The Federation of Bosnia and Herzegovina is responsible for this violation.

74. Concerning the applicant's particular allegation that the unfairness of the proceedings was due to her national origin, the Chamber finds the applicant has not presented sufficient evidence to support that allegation.

VII. REMEDIES

75. Under Article XI(b) of the Agreement the Chamber must next address the question what steps shall be taken by the Federation of Bosnia and Herzegovina to remedy breaches of the Agreement which it has found, including monetary relief.

76. In her initial application the applicant requested reinstatement into her position and compensation in the amount of the monthly salaries as of 1 April 1996 until her reinstatement

including interest. Since she has found other employment as of 1 March 1998, she has modified her claim accordingly.

77. As modified, the applicant has withdrawn the request for re-employment and specified her compensation claim as follows: 500 Convertible Marks (*Konvertibilnih Maraka*; KM) per month from 1 April 1996 to 1 March 1998 (in total KM 11,500) and legal expenses of KM 1,435.50. Her total claim thus amounts to KM 12.935,50.

78. The Federation objects to the claim for compensation and submits that there is no longer any basis for the compensation claim as the applicant does not pursue her request for re-employment. Regarding the claimed legal expenses, the Federation argues that the applicant contributed to the costs by her own conduct, namely by the change of her representative.

79. The Chamber finds that the applicant's compensation claim cannot be rejected on the ground that she no longer seeks re-employment. The Chamber has found the Federation in breach of its obligations under the Agreement by discriminating against the applicant on the basis of national and ethnic origin in the enjoyment of her rights under Article 6 of the ICESCR and Article 5(e)(i) of the CERD and by violating her right to a fair hearing within a reasonable time under Article 6 of the ECHR. Therefore, the Chamber finds it appropriate to award the applicant pecuniary compensation for lost income and legal expenses.

80. The Chamber notes that, according to the Official Gazette of the Federation of Bosnia and Herzegovina (nos. 5/97, 4/98 and 5/99), the average net salary in "non-economic employment relationships" (including school teachers) amounted to KM 239 in 1996, to KM 348 in 1997 and to KM 406 in 1998. Having regard to the general depreciation due to inflation and the fact that the net average salary does not include contributions to pension funds, the Chamber considers that the applicant's claim of KM 500 for each month of unemployment is, as a whole, reasonable. Her claim for compensation for lost income should thus be awarded in full. Accordingly, under this head, she is awarded a total of KM 11,500. As regards her claim for legal expenses, the Chamber finds that it is based on the value of the dispute and in accordance with the applicable Federation tariff for lawyers' fees. The Chamber considers that legal expenses incurred before the national courts and the Chamber should be compensated. However, the expenses incurred due to the criminal action taken against the school director – amounting to KM 45 plus 10 per cent tax – cannot be compensated as they are not directly related to the complaints made in the application to the Chamber. Having deducted the latter expenses, the Chamber awards the applicant KM 1,386 in compensation for legal expenses. The total compensation awarded to the applicant thus amounts to KM 12,886.

VIII. CONCLUSION

81. For these reasons, the Chamber decides,

1. by 11 votes to 1, to declare the application admissible;

2. by 11 votes to 1, that the applicant has been discriminated against in the enjoyment of her right to work as guaranteed by Article 6 of the International Covenant on Economic, Social and Cultural Rights, as well as in the enjoyment of her rights to work, to free choice of employment and to protection against unemployment under Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Human Rights Agreement;

3. unanimously, that the applicant's right to a hearing within a reasonable time under Article 6 paragraph 1 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

4. by 11 votes to 1, that the applicant's right to a fair hearing under Article 6 paragraph 1 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

5. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant the amount of 12,886 Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for lost income and legal expenses;

6. unanimously, to order the Federation to report to it by 7 July 2000 on the steps taken by it to comply with the above order.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
Acting President of the Chamber