DECISION ON ADMISSIBILITY

CASE No. CH/99/2146

Ilija BABIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 6 April 2000 with the following members present:

Mr. Giovanni GRASSO, President
Mr. Viktor MASENKO-MAVI, Vice-President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
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) of the Agreement and Rule 52 of the Chamber's Rules of Procedure:

I. FACTS

1. The applicant is a citizen of Bosnia and Herzegovina of Croat descent. By a judgment of the Cantonal Court Tuzla of 2 April 1998 he was convicted of murdering his wife, Nevenka Babić, and was sentenced to 13 years of imprisonment. Upon the applicant's appeal, the Supreme Court of the Federation of Bosnia and Herzegovina confirmed the first instance judgment by a decision of 16 June 1998.

2. While in detention on remand in Tuzla, the applicant was hospitalised for a week in April 1998 and from 25 May to 27 November 1998 to treat tuberculosis and a hydropneumothorax. After his release from hospital in November 1998, the applicant was transferred to the prison in Zenica, where he is currently under constant medical observation.

II. COMPLAINTS

3. The applicant complains of a violation of his right to a fair trial by an impartial tribunal. He also complains of a violation of his right to receive adequate medical treatment while in detention. In relation to both alleged violations the applicant complains of discrimination on grounds of his Croat origin.

III. PROCEEDINGS BEFORE THE CHAMBER

4. The application was submitted to the Chamber on 10 May 1999 and registered on the following day.

5. By letter to the Chamber of 17 May 1999 the applicant complained that he was not receiving the medical treatment he needed to cure his tuberculosis. On 7 July 1999, the Chamber received a fax from the Prison Liason Officer of the International Police Task Force in Zenica, drawing the Chamber's attention to the allegedly preoccupying state of health of the applicant.

6. By letter of 19 July 1999 the Chamber requested the assistance of the Zenica Field Office of the Organisation for Security and Co-operation in Europe (OSCE) in order to determine the state of the applicant's health. In the following weeks, the Human Rights Officer of that Office visited the applicant in detention, spoke to the director of the prison and to the prison doctor and inspected the applicant's medical records.

7. On 2 August 1999 the Chamber received a further letter from the applicant of similar content to the one dated 17 May 1999. Between May and October 1999 the applicant also repeatedly called the Chamber by phone to complain about the alleged lack of adequate medical care.

8. On 30 August 1999 the Chamber received from the applicant medical documents concerning his condition and the treatment received. In the following the Chamber received additional medical records, both from the respondent Party and the applicant himself.

9. On 15 October 1999 the Chamber transmitted the case to the respondent Party for its observations on admissibility and merits of the case, which were received on 22 November 1999.

10. On 9 December 1999 the applicant submitted observations in reply, including a claim for compensation. On 14 January 2000 the Chamber received observations from the respondent Party concerning the applicant's compensation claim.

IV. SUBMISSIONS OF THE PARTIES

A. The respondent Party

11. The Federation of Bosnia and Herzegovina asks the Chamber to declare the application inadmissible for failure to exhaust domestic remedies. It submits that the applicant has not used the available extraordinary remedies – such as a petition for re-trial - and has not demonstrated the intention to use them. It also submits that the application was not submitted within six months of the final decision, as required by Article VIII(2)(a) of the Agreement.

12. Concerning the merits, the Federation denies all allegations of negligence in the applicant's medical treatment. It also states that the applicant enjoyed during the pre-trial proceedings and his trial all the guarantees afforded by Article 6 paragraphs 1 and 3 of the European Convention on Human Rights. In particular, the Federation submits that all witnesses suggested by the applicant were heard at trial.

13. Finally, the Federation asks the Chamber to reject the applicant's compensation claim.

B. The applicant

14. The applicant maintains that the first instance court was not impartial and conducted the proceedings unfairly and that, as a result, he was inflicted too heavy a sentence (he does not deny having committed the crime he was convicted of). He states in particular that the panel of the Cantonal Court that convicted him in first instance was "mono-national", i.e. composed only of judges of Bosniak origin. Secondly, he disputes the expert opinions of the pathologist and of the neuro-psychiatrist that gave evidence at his trial. Thirdly, he complains that the president of the panel exercised undue pressure on his underage daughters during the pre-trail phase and then failed to summon them as witnesses at trial, as the applicant's lawyer had allegedly requested. Finally, the applicant complains about the allegedly close relationship between the public prosecutor and the victim's brother, which according to him influenced the sentence inflicted.

15. As to the medical treatment received, the applicant originally maintained that in the prison in Zenica he was receiving insufficient medical care as a measure of discrimination against him on the ground of his Croat origin. He has subsequently acknowledged that he has no well-founded complaint against the treatment he has been receiving in Zenica. He insists, however, that during detention and hospitalisation in Tuzla he was not treated adequately and that now he was confronted with the serious consequences arising from that inadequate treatment. On this ground, he requests compensation in the amount of 120,000 Convertible Marks (*Konvertibilnih Maraka*, KM). The applicant withdrew the compensation claim for support, care and education of his four children.

V. OPINION OF THE CHAMBER

16. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. Under Article VIII(2)(a), the Chamber shall take into account whether the applicant has exhausted domestic remedies. According to Article VIII(2)(c), the Chamber shall dismiss any application which it considers manifestly ill-founded.

A. The complaint of lack of impartiality of the tribunal

17. The applicant complains of a lack of impartiality of the Cantonal Court in Tuzla on the ground that he was allegedly judged by a "mono-national" panel. The Chamber notes that the names of the judges as indicated by the applicant do not correspond to those indicated in the judgment of the Cantonal Court. The Chamber notes that even if the members of the panel of the Cantonal Court had all been of the same national origin, different from the applicant's, what is not proved, this fact would have been irrelevant under both the subjective and the objective test of impartiality (see case no. CH/97/51, *Stanivuk*, decision on admissibility and merits delivered on 13 May 1999, paragraph 47,

Decisions January-July 1999), as long as it was not accompanied by any proof of personal bias of the judges or of other ascertainable facts which may raise doubt as to their impartiality.

18. With regard to the allegations concerning the relationship between the public prosecutor and the victim's brother, the Chamber notes that the requirement of impartiality in Article 6 paragraph 1 of the Convention refers to the "tribunal", i.e. the judges, and not to the person exercising the function of public prosecutor. The applicant's allegation, whether it is correct or not, is thus irrelevant to the issue of the tribunal's impartiality within the meaning of Article 6 paragraph 1.

B. The complaint of lack of fairness in the trial

19. As to the applicant's allegation that the proceeding against him was unfair, the Chamber notes that the applicant is mostly complaining about the court's evaluation of the evidence before it. The Chamber recalls that, in accordance with the well-established jurisprudence of the European Court of Human Rights in this respect, it is generally for the domestic courts to assess the evidence before them. Confirming this principle, the Chamber has previously held that it is not within its province to substitute its own assessment of the facts for that of the domestic courts (see case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 10, Decisions August-December 1999). Only where it is alleged or apparent that the evaluation of the evidence by the domestic court is grossly inadequate, devoid of the appearance of fairness and has patently lead to a miscarriage of justice, the Chamber might examine the establishment of the facts by the domestic court (see case no. CH/98/638, *Damjanović*, decision on admissibility and merits delivered on 11 February 2000, paragraphs 80-82). The applicant has not substantiated his allegation that in his case the evaluation of the evidence offered by the expert witnesses lead to a miscarriage of justice. This complaint is accordingly manifestly ill-founded.

20. The applicant also complains about the failure of the Cantonal Court to call his two under-age daughters, who appear to have been eye-witnesses of the crime, as witnesses at trial. The Chamber notes that the applicant did not raise this complaint in his appeal to the Supreme Court. He did therefore not make use of the ordinary domestic remedy in this respect, and his complaint is inadmissible under Article VIII(2)(a) on this ground. Moreover, the Chamber notes that courts generally enjoy a wide margin of appreciation when it comes to the decision as to whether it is necessary to summon a minor as witness.

C. The complaint concerning the medical treatment received as a detainee

21. The Chamber notes that, after having during half a year insistently – by phone and in writing - complained to the Chamber that in the prison in Zenica he was receiving insufficient medical care as a measure of discrimination against him on the ground of his Croat origin, the applicant withdrew this allegation (paragraph 15 above). He now insists, without any substantiation, that during detention and hospitalisation in Tuzla he was not treated adequately. The Chamber finds that also this complaint is manifestly ill-founded.

V. CONCLUSION

22. For these reasons, the Chamber, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel