DECISION ON ADMISSIBILITY AND MERITS

(delivered on 10 January 2003)

Case No. CH/02/8767

Fedai UNAL

against

BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 5 December 2002 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
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. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, 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 Articles VIII(2) and XI of the Agreement and Rules 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a Turkish citizen who, at the time of his application in January 2002, lived together with his wife and four children in Bihać, Bosnia and Herzegovina, where he owns a business. The application concerns the fact that the applicant was forced to leave Bosnia and Herzegovina after his residence permit was revoked. The Ministry of Interior of the Una-Sana Canton granted the applicant a permit for temporary residence in Bosnia and Herzegovina for the period from 27 February 2001 until 25 February 2002. On 30 November 2001 the Ministry for Human Rights and Refugees of Bosnia and Herzegovina revoked the applicant's temporary residence permit and ordered him to leave the territory of Bosnia and Herzegovina within three days from the date on which the procedural decision becomes valid and to stay away from the territory of Bosnia and Herzegovina for the period of five years. On 31 January 2002, the Chamber ordered the respondent Party, as a provisional measure, to take all necessary steps to prevent the expulsion of the applicant. The provisional order expired on 11 March 2002. The applicant then left Bosnia and Herzegovina on his own motion on 23 March 2002 with the intention to return as soon as he was allowed to.

2. The case raises issues under Articles 6, 8 and 13 of the Convention and under Article 1 of Protocol No. 7 to the European Convention on Human Rights ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced to the Chamber on 31 January 2002 and registered on the same day. The applicant requested the Chamber to issue an order for provisional measure preventing his expulsion.

4. On 31 January 2002 the President of the Chamber decided to issue a provisional measure ordering the respondent Party to take all necessary steps to prevent the expulsion of the applicant. On 1 February 2002 the Chamber transmitted the case to the respondent Party for its observations on admissibility and merits under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 7 to the Convention.

5. On 1 February 2002 the Agents of the respondent Party informed the Chamber that they received the order which they transmitted to the Chairman of the Council of Ministers and to the competent Ministries.

6. On 5 February 2002 the Chamber decided to extend the order for provisional measures until 11 March 2002.

7. On 12 February 2002 the respondent Party transmitted its observations in the case.

8. On 6 March 2002 the Chamber decided not to extend the order for provisional measure beyond 11 March 2002.

9. On 12 March 2002 the Chamber informed both the respondent Party and the applicant that the order for provisional measure had expired.

10. On 15 March 2002 the Chamber sent a letter to the applicant's lawyer requesting additional information: whether an administrative dispute had been initiated; information about the applicant's family, his activity in Bosnia and Herzegovina, and whether he submitted a request to the competent organs for extension of his residence in Bosnia and Herzegovina.

11. On 20 March 2002 the Chamber received the reply to its letter. According to this reply, the applicant submitted a complaint about the decision on revocation of residence permit to the Ministry of Human Rights and Refugees.

12. On 28 March 2002 the Chamber requested the applicant to submit information with regard to the citizenship and age of the members of his family. This information was received on 5 April 2002.

13. On 17 April 2002 the Chamber re-transmitted the case to the respondent Party asking for observations with respect to Article 8 and Article 6, paragraph 2 of the Convention. In addition, the respondent Party was asked to submit information regarding the question whether the applicant has in fact been convicted of drug-related offences or whether the INTERPOL database only showed that there had been an investigation. The Chamber never received any reply.

14. On 31 July 2002 the Chamber asked the applicant's lawyer for his observations with respect to Article 8 and Article 6, paragraph 2 of the Convention. The Chamber never received a reply to this request.

15. On 24 October 2002 the Chamber received a letter from the applicant's lawyer with further information.

16. On 5 February, 6 March, 12 April, 4 September, 6 November, 2 December and 5 December 2002 the Chamber deliberated on the admissibility and merits of the case. On the latter date it adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

17. The applicant is a Turkish citizen. According to his undisputed statement he came to Bosnia and Herzegovina in 1985 and in 1991 was granted a permit for temporary residence. He then built a house in Bihać. After the death of his son in 1992 in Bosnia and Herzegovina, the applicant returned to Turkey until 1998, when he came back to Bosnia and Herzegovina.

18. The applicant, at the time of his application in January 2002, lived together with his wife and four children in Bihać. Two children, S. Unal born in 1974 and R. Unal born in 1975 are children from his wife. These two children are Turkish citizens. The applicant has also two children born outside marriage, J. Raković, born in 1971, and M. Raković, born in 1984. These two children are citizens of Bosnia and Herzegovina. According to the applicant's submissions his wife is a citizen of Bosnia and Herzegovina by birth.

19. The applicant owns an export-import company in Bihać. He alleges that it is worth 1.000.000 Convertible Marks ("KM"), and that in 2002 it employed around 30 people.

20. The Ministry of Interior of the Una-Sana Canton granted the applicant a permit for temporary residence in Bosnia and Herzegovina for the period from 27 February 2001 until 25 February 2002.

21. On 30 November 2001 the Ministry for Human Rights and Refugees of Bosnia and Herzegovina issued a procedural decision revoking the applicant's temporary residence permit and ordering him to leave the territory of Bosnia and Herzegovina within 3 days from the date on which the procedural decision becomes valid (pravosnažno)[1]. The decision further ordered him to stay away from the territory of Bosnia and Herzegovina for a period of 5 years. The decision was delivered to the applicant on 29 January 2002.

22. The procedural decision on the revocation of the applicant's temporary residence permit was based on Article 30 paragraph 1(c) of the Law on Immigration and Asylum in conjunction with Article 20 of the Law on Immigration and Asylum. The decision refers back to the decision of the Una-Sana Canton in Bihać of 26 October 2001 which states that the applicant is registered with INTERPOL in connection with criminal investigations concerning the trafficking with heroin in Austria and Germany in 1993 and 1994. The applicant claims that he was never convicted for any of these offences and

[1] For the purposes of the present case it is important to recall that the laws on administrative procedure in Bosnia and Herzegovina draw a distinction between "final" decisions (*konačno rješenje*) and "valid" decisions (*pravosnažno rješenje*). A "final" (*konačno*) decision is final within the administrative proceedings, there is no appeal within the administration against it, but the initiation of an administrative dispute before a competent court is possible. Once this judicial remedy has been exhausted, or the deadline to initiate the administrative dispute has expired, then the decision is "valid" (*pravosnažno*). However, a "final" decision is immediately enforceable upon delivery to the person concerned, unless the law provides otherwise.

that by its decision of 4 March 1997 the District Court of Feldkirch (Austria) acquitted him from the criminal offence that was the subject matter of the procedure. The Chamber notes that it remains unclear whether the applicant stood trial and whether this decision was a decision of acquittal at the end of a trial or whether the decision of 4 March 1997 was only a procedural decision by the court to end an investigation against the applicant. It also remains unclear whether there have been any other criminal proceedings against the applicant. The respondent Party has not replied to the Chamber's request to state whether the INTERPOL data showed that the applicant had ever been convicted or only had been the subject of an investigation.

23. The procedural decision also stated that the decision shall be final (konačno), but that an administrative dispute before the Court of Bosnia and Herzegovina may be initiated.

24. At the time of the procedural decision revoking the applicant's residence permit the Court of Bosnia and Herzegovina did not exist. On 15 March 2002 the applicant deposited a complaint for the opening of administrative dispute proceedings before the Court of Bosnia and Herzegovina with the Ministry of Human Rights and Refugees of Bosnia and Herzegovina. He expected that the Ministry would forward the complaint to the judicial body competent to deal with the question. The Ministry has not forwarded the complaint to any court in Bosnia and Herzegovina.

25. On 23 March 2002 the applicant left Bosnia and Herzegovina. He states that he intends to return as soon as he is allowed to.

IV. RELEVANT LEGISLATION

26. The Law on Immigration and Asylum is published in the Official Gazette of Bosnia and Herzegovina ("OGBiH"), No. 23/99. It entered into force on 31 December 1999. It regulates amongst other issues the right of aliens to stay on the territory of Bosnia and Herzegovina.

27. Article 15 provides as follows:

> "In the sense of the present law:
>
> (a) short stay is a stay on the territory of Bosnia and Herzegovina for three months unless otherwise specified by the visa;
>
> (b) temporary residence is a stay on the territory of Bosnia and Herzegovina for a period of not over one year, unless otherwise specified by the residence permit;
>
> (c) permanent residence is a stay on the territory of Bosnia and Herzegovina for an unlimited period, unless otherwise specified by law or international agreements."

28. Article 16 provides as follows:

> "If an alien wants to stay longer than the duration of the short stay, he/she must apply for a temporary residence permit."

29. Article 17 provides as follows:

> "A temporary residence permit may be issued for justified reasons such as marriage with a citizen of Bosnia and Herzegovina or education, employment or business as specified in the work permit granted, or medical treatment.
> A temporary residence permit may be issued with a validity of one year, or for the time of validity of the alien's passport, if that passport is valid for less than one year.
> A temporary residence permit may be extended."

30. Article 20 provides as follows:

"A temporary residence permit may be refused to an alien if:

(a) he/she has entered the territory of Bosnia and Herzegovina without respecting the conditions of entry as laid down in the present law.

(b) he/she has no sufficient means of subsistence, except in the case of family members who are financially dependent.

(c) he/she has not been granted the necessary work permit or permit to exercise, as self-employed, an economic activity.

Neither a temporary nor a permanent residence permit shall be granted to an alien who:

(a) is registered as an international offender by the department for the relations with Interpol within the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina;

(b) constitutes a threat to the public order of Bosnia and Herzegovina."

31. Article 22 provides as follows

"Decisions of refusal of residence permits shall be reasoned and issued through a written order, specifying that an appeal may be lodged with the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina.
The applicant whose application has been denied has a period of fifteen days from receiving the notification of the decision, to lodge an appeal; he/she cannot be expelled from the territory of Bosnia and Herzegovina before the expiry of that period.
An applicant having lodged an appeal shall not be expelled from the territory of Bosnia and Herzegovina until a final decision has been taken by the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina.
The final decision of the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina shall be reasoned on legal grounds and issued through a written order."

32. Article 23 provides as follows:

"Where serious grounds exist for believing that the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina would have decided differently than the competent Entity authority, the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina may, within a period of one month after the receipt under Article 21 (5) of a decision granting a residence permit, review the decision and issue a final decision either confirming or revoking it. The competent authority of the Entity which made the decision, as well as the applicant whose residence permit is under review, are entitled to be heard during this proceeding and must cooperate with requests for relevant information.
The final decision of the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina shall be reasoned on legal grounds and issued through a written order."

33. Article 29 provides as follows:

"An alien may be expelled from Bosnia and Herzegovina
(a) if he/she remains on the territory of Bosnia and Herzegovina after his/her residence permit has expired or has been revoked according to Articles 30 to 32.
(b) if he/she is convicted by a court in Bosnia and Herzegovina of a criminal offence and sentenced to more than four years imprisonment."

34. Article 30 provides, insofar as is relevant, as follows:

> "Visas and residence permits may be revoked
>
> (a) if the alien has deliberately furnished false particulars or has deliberately concealed circumstances of importance in the award of the permit;
> (b) ...
> (c) if his/her presence constitutes a threat to public order and security. ...."

35. Article 36 provides as follows:

> "Decisions of expulsion are taken by the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina."

36. Article 38 provides as follows:

> "An alien may appeal to the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina against the refusal of entry order taken on the territory of Bosnia and Herzegovina by the competent authority of the Entity.
>
> An alien may appeal to the appeals panel as defined in Article 53 against an expulsion order by the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina.
>
> The execution is stayed pending an appeal according to this Article."

37. Article 41 provides as follows:

> "An alien against whom a decision on expulsion has been made shall leave the country within one month of the notification of the final decision, failing provisions to the contrary in the order. Otherwise, the expulsion order shall be enforced by the competent police or service in accordance with this and other law regulating this matter."

38. Article 53 provides, insofar as is relevant, as follows:

> "For the purpose of this Law, the Council of Ministers shall establish an appeals panel. (...)"

2. Law on the Council of Ministers and Ministries of Bosnia and Herzegovina

39. Article 39 of the Law on the Council of Ministers and Ministries of Bosnia and Herzegovina (OG BiH No. 11/00) provides as follows:

> "The Ministry of Human Rights and Refugees shall undertake actions for the protection of human rights and rights of refugees, immigration, emigration and asylum in accordance with the Constitution of Bosnia and Herzegovina and the General Framework Agreement for Peace in Bosnia and Herzegovina, international conventions and laws and other acts of authorised institutions of Bosnia and Herzegovina, and co-ordinate tasks on rights of refugees and, in that respect, achieve co-operation with the Entities."

40. Article 43 provides as follows:

> "The Ministry of Civil Affairs and Communications shall be competent for the areas of citizenship, politics and regulations on the application of international and inter-Entity criminal law, including relations with Interpol; establishment and functioning of mutual and international communication means; organisation of inter-Entity transport."

3. The Law on Administrative Procedure

41. At the time relevant for the present case no Law on Administrative Procedure existed at the state level. The Chamber notes that in the meantime Bosnia and Herzegovina adopted the Law on Administrative Procedure, which came into force on 20 October 2002. It is published in OG BiH No.29/02.

4. The Law on the Court of Bosnia and Herzegovina

42. The Law on the Court of Bosnia and Herzegovina (OG BiH no. 29/00 of 30 November 2000; OG FBiH no. 52/00 of 12 December 2000; OG RS no. 40/00 of 27 November 2000) became effective as of 8 December 2000. The Law provides for a competent court at the state level. Article 14 provides for administrative jurisdiction of that court, which shall be carried out by the Administrative Division, as follows:

> "1. The Court is competent to decide actions taken against final administrative acts or silence of administration of the institutions of Bosnia and Herzegovina and its bodies, Public Agencies, Public Corporations, institutions of the Brcko District and any other organisation as provided by State Law, acting in the exercise of a public function.
>
> "2. The Court shall have, in particular, jurisdiction over the following:
>
> > "a) The assessment of the legality of individual and general enforceable administrative acts adopted under State law, performed in the exercise of public functions by the authorities listed in paragraph 1 of this Article, for which judicial review is not otherwise provided by law. ..."

43. In accordance with Article 51(2), an action within the administrative jurisdiction of the Court of Bosnia and Herzegovina "must be lodged within two months from the day following the day the applicant is notified, or received the act or the decision complained of, or from the day of the publication of the regulation challenged".

5. Decision of the High Representative of 8 May 2002 on the appointment of judges and on the establishment of the Court of Bosnia and Herzegovina

44. On 8 May 2002, the High Representative issued a decision on the appointment of judges and on the establishment of the Court of Bosnia and Herzegovina (OG BiH no. 10/02 of 24 May 2002; OG FBiH no. 20/02 of 29 May 2002). In making the decision, the High Representative recalled that, according to the Declaration of the Peace Implementation Council, "the establishment of judicial institutions at the State level, which meet an established constitutional need to deal ... with administrative and electoral matters, is a precondition for the establishment of the rule of law in Bosnia and Herzegovina". He further considered the Law on the Court of Bosnia and Herzegovina (see paragraph 123 above), which was enacted "to ensure the effective exercise of the competencies of the State of Bosnia and Herzegovina and respect for human rights and the rule of law in the territory of Bosnia and Herzegovina". Accordingly, the Decision states in Article 3 that "from the date of this Decision the Court of Bosnia and Herzegovina shall be established".

45. The Decision of 8 May 2002 appoints seven judges as the Plenum of the Court and the Appellate Division of the Court of Bosnia and Herzegovina (Articles 1 and 4). They are authorised to adopt rules of procedure and to determine the organisational structure of the Court (Article 4). The Decision further specifies that "the initial primary task of the Appellate Division shall be to discharge the electoral appeals competence" (Article 5).

46. The inaugural session of the Appellate Division of the Court of Bosnia and Herzegovina was held on 6 June 2002. At that time, the High Representative, Paddy Ashdown, stated "I consider it a priority that the Criminal Division and the Administrative Division of the Court are established by the end of this year". The Administrative Division is not presently operative.

V. COMPLAINTS

47. The applicant alleges violation of his right of access to court as protected by Articles 6 and 13 of the Convention with respect to the fact that the Court of Bosnia and Herzegovina did not exist. He further claims a violation of his right to stay in Bosnia and Herzegovina and work there and of the right to make use of his private property in Bihać including his import-export business, which would suffer from his absence. He therefore alleges a violation of Article 1 of Protocol No. 1 to the Convention. The applicant further complains that an expulsion would separate him from his family, resulting in a violation of his rights to private and family life as protected by Article 8 of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the facts

48. The respondent Party acknowledges the fact that no Court of Bosnia and Herzegovina had been established at the time of the facts that give rise to the applicant's complaints.

49. Notwithstanding explicit requests by the Chamber, the respondent Party never clarified the question whether the applicant was in fact convicted for drug-related crimes or whether the registration with INTERPOL was only due to the fact that investigations against the applicant had been conducted in Austria and Germany.

2. As to the admissibility

50. With respect to the admissibility Bosnia and Herzegovina points out that the applicant has not exhausted domestic remedies. In particular, the respondent Party claims that the applicant, in light of the fact that no Court of Bosnia and Herzegovina was operative, could have exercised his right to court protection by addressing the Supreme Court of one of the entities. In addition, it claims that the applicant could have appealed to the Ministry, which ordered the decision on expulsion, i.e. the Ministry for Human Rights and Refugees of Bosnia and Herzegovina. The respondent Party alleges that the applicant failed to do so.

51. In addition the respondent Party argues that the application is inadmissible under the six months rule in Article VIII(2)(a) of the Agreement, as less than six months passed from the date of the applicant's complaint against the revocation of his residence permit until the date of filing the application.

3. As to the merits

52. As to the merits of the dispute, the respondent Party finds the revocation of the residence permit justified in light of the fact that the applicant uses different identities and is registered with INTERPOL in connection with investigations conducted in Germany and Austria regarding heroin smuggling and illegal immigration. The respondent Party concludes that the proceeding revoking the applicant's residence permit was conducted in accordance with the Law on Immigration and Asylum. Bosnia and Herzegovina did not make any observations with regard to Article 8 of the Convention, the right to private and family life, and Article 6, paragraph 2 of the Convention, presumption of innocence.

B. The applicant

1. As to the facts

53. The applicant claims that he was "validly acquitted for the criminal offence" in connection to which the applicant was registered in the INTERPOL data-base by the decision of the District Court of Feldkirch, Austria, of 4 March 1997. In addition, he claims that he does not have a criminal past.

54. The applicant further claims that on 26 February 2002 he applied to M.H., the officer competent for aliens in the Una-Sana Cantonal Ministry of Interior, in order to extend his residence permit. The applicant requested from the officer the forms necessary to apply for the extension of his temporary residence. The officer refused to give him the necessary forms and to receive the request. The applicant does not submit any written evidence to substantiate this allegation but names the officer as a potential witness.

2. As to the admissibility

55. With regard to the question of exhaustion of domestic remedies, the applicant points out that on 15 March 2002 he had sent a complaint ("tužba") for the opening of court proceedings before the Court of Bosnia and Herzegovina to the Ministry of Human Rights and Refugees of Bosnia and Herzegovina in the hope that the Ministry would forward the complaint ("tužba") to the judicial organ competent to deal with the question.

3. As to the merits

56. With regard to the merits, the applicant maintains his complaints.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Exhaustion of domestic remedies

57. The respondent Party argues that the applicant failed to exhaust domestic remedies with regard to the revocation of his residence permit and, in particular, that the applicant could have initiated an administrative dispute before the Supreme Court of one of the Entities. In addition, the respondent Party argues that the applicant could have appealed to the Ministry for Human Rights and Refugees of Bosnia and Herzegovina. The respondent Party alleges that the applicant failed to do so.

58. Article 38 of the Law on Immigration and Asylum provides that an alien has the right to appeal against a decision on expulsion to the appeals panel set up by the Council of Ministers according to Article 53 of the Law on Immigration and Asylum. This form of appeal is an administrative appeal. However, the procedural decision of 30 November 2001 states that it is final ("konačno") in the administrative procedure, so that no administrative appeal is possible. In addition, it appears that the appeals panel of the Council of Ministers had not been constituted at the relevant time. Therefore the applicant could not have been required to exhaust this remedy which, although provided for by law, did not exist.

59. The procedural decision of 30 November 2001 stated that an administrative dispute before the Court of Bosnia and Herzegovina may be initiated. It is a fact undisputed by the respondent Party that at the time in question no such Court of Bosnia and Herzegovina existed.

60. The respondent Party argues that the applicant could have initiated an administrative dispute before an Entity court. The Chamber finds that, in light of the fact that the decision of 30 November 2001 explicitly refers to the Court of Bosnia and Herzegovina, the applicant could not be expected to go before an Entity court. In addition, the applicant has submitted the complaint necessary to initiate an administrative dispute ("tužba") to the Ministry of Human Rights and Refugees of Bosnia and

Herzegovina, the Ministry that issued the decision of 30 November 2001. In light of the fact that the Court of Bosnia and Herzegovina did not exist the Chamber finds that the applicant tried his best to exhaust the domestic remedies indicated to him by the respondent Party.

61. Accordingly, the Chamber finds that the applicant has complied with the requirement set out in Article VIII(2)(a) of the Agreement. The Chamber therefore decides not to declare the application inadmissible on the ground that the applicant has not exhausted the effective domestic remedies.

2. The six months rule

62. Bosnia and Herzegovina further objects to the admissibility of the application in that the applicant failed to wait for six months after the final decision in his case, as purportedly required by Article VIII(2)(a) of the Agreement. As the Chamber has explained in the cases nos. CH/02/8679 *et al., Boudellaa et al.,* decision on admissibility and merits of 3 September 2002 *(*paras. 154-155*)* the applicant was not obliged to wait for six months before submitting an application; on the contrary, he was obliged to file an application within six months. The applicant hence complied with Article VIII(2)(a) of the Agreement.

3. Alleged violation of Article 6, right to access to court

63. The applicant claims that, because of the non-existence of the Court of Bosnia and Herzegovina, his right of access to court under Article 6 of the Convention has been violated, as there was no court he could address to challenge the procedural decision revoking his residence permit.

64. The Chamber recalls that it is established case law of the European Court of Human Rights that decisions regarding the entry, stay and deportation of aliens do not concern the determination of civil rights and obligations or criminal charges. Article 6 of the Convention is therefore inapplicable to proceedings regarding such matters (see Eur. Court HR, *Maaouia v. France,* case No. 39652/98, judgement of 5 October 2000). It follows therefore that the complaint regarding access to court under Article 6 of the Convention is inadmissible *ratione materiae.*

4. Alleged violation of Article 6, paragraph 2, the right to be presumed innocent until proven guilty

65. The Chamber recalls that the applicant complains that his right to be presumed innocent until proven guilty was violated, as the procedural decision to revoke his residence permit was based on the presumption that he was involved in drug related offences. He claims that he was acquitted by the District Court in Feldkirch for one of the offences in relation to which he is registered with INTERPOL and that he does not have a criminal past.

66. Article 6, paragraph 2 provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

67. The Chamber recalls that the presumption of innocence is one of the elements of a fair criminal trial required by Article 6. However both the European Commission and Court of Human Rights have held that it may be infringed not only by a judge or court hearing a criminal case, but also by other public authorities. In its decision *Boudellaa et al.* (*ibid*, para. 238-250) the Chamber has found that the presumption of innocence also protects an accused person against statements made and decisions taken outside the scope of the criminal proceedings themselves, at least where there is a sufficient link to the criminal proceedings.

68. The Chamber notes, however, that the applicant in the present case, as opposed to the situation in the *Boudellaa* case, is undisputedly not subject to any criminal proceedings in Bosnia and Herzegovina.

69. In addition, the decision on revocation of the applicant's residence permit of 30 November 2001 merely states that "it was established that the named person does not meet the requirements necessary for granting temporary residence" provided for by Article 20, paragraph 2 (a) of the Law on Immigration and Asylum of Bosnia and Herzegovina. Article 20 of the Law on Immigration and Asylum explicitly provides that "neither a temporary nor a permanent residence permit shall be granted to an alien who: (a) is registered as an international offender by the department for the relations with Interpol within the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina." The Chamber notes that the term "offender" ("prestupnik") in Article 20 is a non-technical term from which it cannot be understood whether a person has been in fact convicted of a criminal offence. The decision does not contain any conclusion as to the applicant's guilt.

70. The Chamber cannot find that the procedural decision of 30 November 2001 explicitly or indirectly presumes the applicant to be guilty of a criminal offence. In conclusion, the Chamber finds Article 6, paragraph 2 of the Convention is not applicable in the present case. It follows that this part of the application is inadmissible in accordance with Article VIII(2)(c) of the Agreement.

5. As to the alleged violation of Article 1 of Protocol No. 1 to the Convention, the right to peaceful enjoyment of possessions

71. The applicant also complains about a violation of his right to peaceful enjoyment of possessions. He claims that by being forced to leave Bosnia and Herzegovina he would loose his import-export firm with 30 employees in Bihać in a value estimated by him to be one million Convertible Marks.

72. The applicant has not substantiated why the expulsion would interfere with his property rights guaranteed by Article 1 of Protocol No. 1 of the Convention. In any case, it does not appear that the applicant's property has been taken from him in any way. Therefore, despite his expulsion, the firm remains the applicant's property. In addition, the applicant seems free to appoint someone to run his business for him. The Chamber further notes that also after the expiry of his residency permit in February 2002 he could not be sure that it would be prolonged. Therefore, the Chamber finds that the applicant's expulsion does not directly interfere with the applicant's rights to peaceful enjoyment of possessions.

73. The Chamber finds that the complaint does not disclose any appearance of a violation of the Article 1 of Protocol No. 1 to the Convention. It follows that, in so far as the applicant complains about his peaceful enjoyment of possession, the application is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement.

6. Conclusion on admissibility

74. For the reasons set out above the Chamber declares the applicant's complaints under Article 6 to the Convention, access to courts, Article 6, paragraph 2 of the Convention, presumption of innocence, and Article 1 of Protocol No. 1 to the Convention inadmissible.

75. The Chamber finds that, no grounds for inadmissibility having been established with regard to the remainder of the application, i.e. the complaints of violations of Articles 8 and 13 of the Convention and the questions it raises with regard to Article 1 of Protocol No. 7 to the Convention, it is to be declared admissible.

B. Merits

76. Under Article XI of the Agreement the Chamber must address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement.

1. Article 1 of Protocol No. 7 of the Convention

77. The applicant complains that the procedural decision of 30 November 2001, which revokes his residence permit and expels him from the territory of Bosnia and Herzegovina by ordering him to leave within three days from the date on which the decision becomes valid and banishing him from return for five years after his expulsion, constitutes a violation of his rights under Article 1 of Protocol No. 7 of the Convention.

78. Article 1 of Protocol No. 7 reads as follows:

> "(1) An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
> a. to submit reasons against his expulsion,
> b. to have his case reviewed, and
> c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> (2) An alien may be expelled before the exercise of his rights under paragraph 1(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

a. The requirement to be "lawfully resident"

79. Article 1 of Protocol No. 7 to the Convention on "procedural safeguards relating to the expulsion of aliens" was added to afford minimum guarantees to aliens in the event of expulsion from the territory of a Contracting Party (see Explanatory Report on Article 1 of Protocol No. 7 to the Convention). Article 1 paragraph 1 of Protocol No. 7 to the Convention provides that no lawful resident may be expelled from the territory of a Contracting State except in pursuance of a decision reached in accordance with the law. It also provides for minimum of procedural safeguards including the applicant's right to submit reasons against his expulsion and to have his case reviewed.

80. The Chamber must examine whether the applicant was lawfully resident within the meaning of Article 1 of Protocol No. 7 to the Convention and the scope of protection offered by Article 1 of Protocol No. 7 to the Convention in his case.

81. The Chamber recalls that the applicant is a Turkish citizen who was granted a permit for temporary residence in Bosnia and Herzegovina for the period from 27 February 2001 until 25 February 2002 by the Ministry of Interior of the Una-Sana Canton in accordance with Article 21 of the Law on Immigration and Asylum.

82. On 29 January 2002 the applicant received a procedural decision issued by the Ministry of Human Rights and Refugees on 30 November 2001 which reads in relevant parts as follows:

> "The temporary residence of Unal Fedai, citizen of Turkey, holder of passport No. TR-K-966506 granted upon the procedural decision of the Ministry of Internal Affairs of Una-Sana Canton, Bihać, for the purpose of employment for the period from 27 February 2001 until 25 February 2002, is terminated.
>
> Fedai Unal is expelled from the territory of Bosnia and Herzegovina for a period of five years and is ordered to leave the territory of Bosnia and Herzegovina within three days from the date on which this procedural decision becomes valid, under threat of execution by force."

83. The procedural decision of 30 November 2001 contains in essence two decisions: firstly, a decision to revoke the applicant's residence permit and secondly a decision on expulsion. As both decisions, the revocation of temporary residence permit and the decision on expulsion are issued at the same time and in one document, the Chamber finds that at the moment the decision on expulsion was issued, the applicant must still be considered to be an alien lawfully resident in the territory of Bosnia and Herzegovina for the purpose Article 1 of Protocol No. 7 to the Convention.

b. As to the question whether the applicant's case falls within the scope of protection of Article 1 of Protocol No.7 to the Convention

84. As noted in paragraph 1 above, from 31 January 2002 to 11 March 2002, the Chamber's order for provisional measure not to expel the applicant was in force. The applicant left Bosnia and Herzegovina on 23 March 2002 on his own motion without being forcibly expelled.

85. Article 1 of Protocol No. 7 to the Convention does not only provide a protection in cases in which an expulsion by force already took place but it must be understood to also provide protection as soon as there is a decision ordering expulsion or any other serious threat of expulsion. A more restrictive interpretation of Article 1 of Protocol No. 7 to the Convention would result in an unsatisfactory protection of the alien's right. The procedural requirements set out in Article 1 of Protocol No. 7 to the Convention, subject only to paragraph 2 of Article 1 to Protocol No. 7 of the Convention, can only be satisfied if an applicant may challenge his expulsion while still being in the country of which he was a lawful resident.

86. The decision of 30 November 2001 ordered the applicant to leave "the territory of Bosnia and Herzegovina within three days from the date on which this procedural decision becomes valid, under threat of forcible execution." In addition the procedural decision of 30 November 2001 purports to be final in the administrative procedure.

87. The applicant understood the decision of 30 November 2001 to mean that he was ordered to leave Bosnia and Herzegovina within three days after receiving the decision or to be expelled by force. Therefore the applicant applied to the Chamber to be protected from forcible expulsion by a provisional measure order.

88. The Chamber finds that in light of all circumstances of the present case it cannot be said at what exact time the respondent Party would have carried its threat to forcibly evict the applicant. In any case, once the applicant received the decision on expulsion on 29 January 2002, he was entitled to the protection of Article 1 of Protocol No. 7 to the Convention.

c. As to the rights under Article 1, paragraph 1 of Protocol No. 7 to the Convention "a) to submit reasons against his expulsion" and "b) to have his case reviewed"

89. Paragraph 1 of Article 1 of Protocol No. 7 to the Convention provides that the expulsion of an alien can only take place after minimum procedural rights have been respected, including the right to submit reasons against his expulsion and the right to have his case reviewed. In other words, paragraph 1 of Article 1 of Protocol No. 7 to the Convention requires that an alien be given at least the possibility to have arguments against his expulsion taken into account by the executive.

90. The Chamber will now examine whether the applicant had the opportunity to submit reasons against his expulsion to the relevant domestic organs and to have his case reviewed.

91. The decision of 30 November 2001 reads at the end: "No appeal is allowed but an administrative dispute may be initiated. The lawsuit should be initiated before the Court of Bosnia and Herzegovina within two months from the date of receipt of this procedural decision."

92. It is undisputed by the respondent Party that the Court of Bosnia and Herzegovina did not exist at the relevant time.

93. The Chamber notes that the Law on Immigration and Asylum provides for a review procedure in cases of expulsion. According to Articles 38 and 53 of the Law on Immigration and Asylum an alien may appeal against a decision on expulsion to the appeals panel of the Council of Ministers. However, at the time of the delivery of the decision on expulsion to the applicant the appeals panel of the Council of Ministers does not appear to have been established in practice either.

94. As noted above, on 15 March 2002 the applicant addressed the Ministry of Human Rights and Refugees with a complaint against the decision ordering his expulsion in form of a claim for opening court proceedings ("tužba") before the Court of Bosnia and Herzegovina. He hoped to effectively challenge the procedural decision and that the Ministry would forward the complaint to the relevant organ. The Chamber notes that the Ministry of Human Rights and Refugees never replied to the applicant. Furthermore it does not appear that it took any action at all with regard to the applicant's submission. In particular, the Ministry neither considered itself the arguments brought forward by the applicant against the expulsion order nor forwarded the complaint to any other organ competent to review the case.

d. Conclusion

95. The Chamber concludes that the applicant had no possibility to effectively submit reasons against his expulsion as his arguments were not considered by any competent institution. He also could not exercise his right to have his case reviewed. In particular, in practice no mechanism existed to review the applicant's expulsion. Neither the Court of Bosnia and Herzegovina indicated in the decision itself functioned at the relevant time, nor the appeals panel of the Council of Ministers referred to in the Law on Immigration and Asylum. The Chamber finds consequently that the applicant's rights under paragraph 1 a) and b) of Article 1 of Protocol No. 7 to the Convention have been violated.

2. Article 13 of the Convention

96. The applicant claims that there was no effective remedy available for him against the procedural decision ordering his expulsion which affected his right not to be unlawfully expelled as protected by Article 1 of Protocol No. 7 to the Convention, his right to enjoy his property as protected by Article 1 of Protocol No. 1 to the Convention and his right to family life as protected by Article 8 of the Convention.

97. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

98. The Chamber notes that all violations that the applicant alleges have their origin in the decision of expulsion of 30 November 2001. The Chamber notes that in the present case it seems that the applicant in fact did not have any effective legal remedy against the procedural decision of 30 November 2001 as the legal remedy indicated to him in the decision by the authorities of the respondent Party, the Court of Bosnia and Herzegovina, did not exist at the relevant time. The Chamber finds however, that in the present case the procedural safeguards required under Article 1 of Protocol No. 7 to the Convention constituted exactly the remedy required under Article 13. Under the circumstances of the case, therefore, Article 1 of Protocol No. 7 to the Convention constituted a *lex specialis* with regard to Article 13 of the Convention. In conclusion the Chamber does not find it necessary to examine the case under Article 13.

3. Article 8 of the Convention

99. The applicant claims that the procedural decision ordering him to leave the country would separate him from his family in Bosnia and Herzegovina. He would therefore be a victim of a violation of Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

100. The Chamber reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities (the "negative obligation", not to interfere with private and family life). Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In striking this balance, the State enjoys a certain margin of appreciation (see e.g. European Court of Human Rights, *Keegan v. Ireland,* judgment of 26 May 1994, Series A No. 290, p. 19, para. 49, and *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, Series A No. 297-C, p. 56, para. 31).

101. The Chamber finds also that the extent of a State's obligation to admit to its territory relatives of its own native citizens and relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory (see, among other authorities, Eur. Court, *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* judgment of 28 May 1985, Series A No. 94, pp. 33-34, para. 67). Furthermore, according to the well established jurisprudence of the European Court of Human Rights "the duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country." (Eur. Court, *ibid,* para. 67).

102. The separation from his family is a clear interference with the applicant's right to family life. The applicant's wife and two of his children are citizens of Bosnia and Herzegovina. It is therefore necessary for the Chamber to determine whether the fact that the applicant was separated from his wife and his four children living in Bihać satisfied the conditions laid down in paragraph 2 of Article 8 of the Convention, namely whether it was "in accordance with the law", whether it pursued one or more of the legitimate aims listed in paragraph 2 of Article 8 of the Convention and whether it was "necessary in a democratic society" to attain such aim or aims.

a. As to whether the impugned act was "in accordance with the law"

103. The interference with the applicant's rights under Article 8 of the Convention in the present case is the fact that, as a result of the expulsion order of 30 November 2001, which in addition bars the applicant from returning to Bosnia and Herzegovina for a period of five years, the applicant is separated from his wife and his four children who live in Bihać.

104. The Chamber recalls Article 20 of the Law on Immigration and Asylum of Bosnia and Herzegovina, which provides that:

> "Neither a temporary nor a permanent residence permit shall be granted to an alien who: a) is registered as an international offender by the department for the relations with INTERPOL within the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina".

105. The Chamber notes that the decision of 30 November 2001 was based on the reasoning that, for the reasons provided for in Article 20 a) of the Law on Immigration and Asylum, the applicant does not meet the requirements for being granted a residence. It is undisputed that he is registered with

INTERPOL. Article 20 of the Law on Immigration and Asylum uses the non-technical term “offender” which does not require a conviction (see paragraph 69 above). The Chamber is satisfied that the ground for the decision ordering the applicant to leave the country is based on the applicable law.

b. “Legitimate aim”

106. The respondent Party considered that the interference in question, the separation of the applicant from his family by expelling him from Bosnia and Herzegovina, pursued aims that were fully consistent with the Convention, namely the protection of public order and security. The Chamber agrees that the prevention of disorder and crime constitutes a legitimate aim, and that the applicant’s expulsion can be seen to pursue this aim.

c. "Necessary in a democratic society"

107. The Chamber must next examine whether in the particular circumstances of the present case the interference was proportionate to the aims pursued. The Chamber notes that only two of the applicant’s four children are nationals of Bosnia and Herzegovina whilst the other two are Turkish nationals. According to the submissions of the applicant’s lawyer, the applicant’s wife is a citizen of Bosnia and Herzegovina. It appears that the applicant retained close ties with Turkey that went beyond mere nationality. He lived in Turkey for forty years of his life until 1985 when he moved to Bosnia and Herzegovina. In 1992 after the death of his son he returned to Turkey and came back to Bosnia and Herzegovina in 1998. In addition, the applicant does not claim that he has cut all ties with Turkey.

108. The Chamber acknowledges that it is for the respondent Party to prevent disorder and crime, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens and notably to order the expulsion of aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8 of the Convention, be necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, among other authorities, Euro. Court, judgment of *Beldjoudi v. France*, decision of 26 March 1992, Series A No. 234-A, p. 27, para. 74). In determining whether the interference was "necessary", the European Court of Human Rights in its jurisprudence “makes allowance for the margin of appreciation that is left to the Contracting States in this field” (see, for instance, *Boughanemi v. France*, decision of 24 April 1996, Reports 1996 II para. 41).

109. The Chamber’s task consists of ascertaining whether the separation of the applicant from his family struck a fair balance between the relevant interests, namely the applicant’s right to respect for his private and family life, on the one hand, and the prevention of disorder and crime, on the other.

110. As noted in paragraphs 69 and 105 above, the term "offender" in Article 20 of the Law on Immigration and Asylum can apply to a person not actually convicted of a criminal offence. Although the applicant according to his undisputed claims was never criminally convicted, he was registered with INTERPOL and used several different identities. These facts justified the respondent Party’s decision to expel the applicant.

111. The Chamber finds that the applicant lived most of his live in Turkey. Also his children are between the ages of 18 and 31 and it may be assumed that they are sufficiently grown up to care for themselves. Finally the applicant failed to show that there were obstacles to establishing family life in Turkey, his home country, or that there were special reasons why that could not be expected of him and his family. Hence, the Chamber, whilst taking into consideration that the applicant’s wife is of Bosnian origin, concludes that the applicant can also maintain his family life in Turkey where he can establish a new home and that it is not necessary for him to stay in Bosnia and Herzegovina for that purpose.

d. Conclusion as to Article 8 of the Convention

112. Balancing the arguments on both sides whilst bearing in mind the margin of appreciation the respondent Party enjoys when deciding whom to grant a residence permit and for how long, the Chamber does not find that the applicant's separation from his family was disproportionate to the legitimate aims pursued. There has accordingly been no violation of Article 8.

VIII. REMEDIES

113. Under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the respondent Parties to remedy the established breaches of the Agreement. In this connection, the Chamber shall consider issuing orders to cease and desist, monetary relief, and provisional measures.

114. The Chamber notes that the applicant does not ask for a specific remedy or explicitly make any compensation claim.

115. The Chamber has found a violation of Article 1 of Protocol No. 7 to the Convention.

116. The Chamber is of the opinion that the finding of a violation of Article 1 of Protocol No. 7 to the Convention in itself is satisfaction enough to remedy the violation found.

IX. CONCLUSION

117. For these reasons, the Chamber decides,

1. unanimously, to declare inadmissible the complaints with regard to the right to access to court as protected under Article 6 of the European Convention on Human Rights;

2. by 13 votes to 1, to declare inadmissible the complaint with regard to the right to be presumed innocent as protected under Article 6, paragraph 2 of the European Convention on Human Rights;

3. unanimously, to declare inadmissible the complaints with regard to the right to peaceful enjoyment of possessions as protected under Article 1 of Protocol No. 1 to the European Convention on Human Rights;

4. by 13 votes to 1, to declare admissible the application under Articles 8 and 13 of the European Convention on Human Rights and under Article 1 of Protocol No. 7 to the European Convention on Human Rights;

5. by 13 votes to 1, that Bosnia and Herzegovina violated the right of the applicant to submit reasons against his expulsion and to have his case reviewed, as guaranteed by Article 1 of Protocol No. 7 to the European Convention on Human Rights, the respondent Party thereby being in breach of Article I of the Human Rights Agreement;

6. unanimously, that it is not necessary to consider the case under Article 13 of the European Convention on Human Rights;

7. by 11 votes to 3, that there has been no violation of the right to family life as protected by Article 8 of the European Convention on Human Rights; and

8. by 12 votes to 2, that the present decision constitutes sufficient satisfaction to remedy the violations found.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Partly dissenting opinion of Mr. Manfred Nowak
Annex II Partly dissenting opinion of Mr. Dietrich Rauschning

ANNEX I

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Manfred Nowak:

PARTLY DISSENTING OPINION OF MR. MANFRED NOWAK

I voted against conclusions nos. 7 and 8 because, in my opinion, the main violation of Bosnia and Herzegovina in this case concerns Article 8 of the Convention, and because I consider it cynical to assume that this decision constitutes sufficient satisfaction for the applicant.

Article 8 of the Convention protects the right to privacy, which includes the protection of private and family life, one's home, correspondence, sexuality and other aspects. There can be no doubt that the decision to revoke the residence permit of the applicant, to order him to leave the territory of Bosnia and Herzegovina within 3 days and to stay away from Bosnia and Herzegovina for a period of 5 years constitutes a far-reaching interference with his right to privacy. After all, the applicant has been living in Bosnia and Herzegovina since 1985 (with the interruption of 6 years during and immediately after the war), is married to a Bosnian citizen, has two children with Bosnian citizenship, built a house in Bosnia and Herzegovina where he lives and built up an export-import company in Bosnia and Herzegovina, owned by him, with some 30 employees. Consequently, there can be no doubt that the centre of the private, family and business life of the applicant has been in Bosnia and Herzegovina for many years.

On the other hand, the right to privacy is not an absolute right, and governments may interfere with this right for the protection of certain public interests, as specified in Article 8 (2). But such interference must be "necessary in a democratic society", i.e. be justified by a "pressing social need" and, in particular, be proportionate to the legitimate aim pursued. The principle of proportionality requires not only the Government of Bosnia and Herzegovina, but also the Chamber to strike a fair balance between the private interests of the applicant to have his right to privacy protected and the public interests involved when assessing whether an interference is justified or not.

In the present case, the public interest invoked by the respondent Party was the protection of public order and security. The case law of the European Court of Human Rights and other international monitoring bodies shows that fairly far-reaching interferences with the right to privacy might be justified if the applicants have been found guilty of criminal offences (see, *inter alia,* the judgments in the cases of *Moustaquim v. Belgium* of 18 February 1991, Series A, Vol. 193; *Beldjoudi v. France* of 26 March 1992, Series A, Vol. 234; *Nasri v. France* of 13 July 1995, Series A Vol. 320; *Boughanemi v. France* of 24 April 1996, Reports 1996 II; *Dalia v. France* of 19 February 1998; Reports 1998-I, p 91; *Mehemi v. France* of 26 September 1997, Reports 1997-VI, p 1971; *Boultif v. Switzerland* of 2 August 2001). The more these offences are serious, the stronger the interference might be. On the other hand, the private interests involved also have to be duly taken into account. The longer one lives in a country and the more one has been integrated into a society, the stronger the pressing social need of the government must be to expel a person in order to protect public order and security. That is why in most of the cases cited above, the European Court has found a violation of Article 8 notwithstanding the fact that the applicants had been actually convicted of fairly serious criminal offences.

Already in the early expulsion case of *Berrehab v. The Netherlands* (Judgment of 21 June 1988, Series A Vol. 138), the European Court of Human Rights found a violation of Article 8 because of the failure to achieve a proper balance. As to the aim pursued, the European Court emphasised "that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there – he had married a Dutch woman, and a child had been born of the marriage." (*ibid*, para 29). Although the facts of the *Berrehab* case are much more similar to those in the present case than the judgments of the European Court cited by the Chamber, this judgment has not been taken into account.

In the present case, neither the Government nor the Chamber made a serious attempt to strike a fair balance between the protection of the privacy of the applicant, who has the centre of his private, family and business life in Bosnia and Herzegovina, and the protection of public order. The Government never argued that the applicant has been tried and convicted for any criminal offence. The main reason for the expulsion order was the fact that he had been registered with INTERPOL as an "offender", which only means that investigations had been conducted against him for drug-related offences in Austria and Germany. The applicant responded that he had been acquitted by the competent court in Austria in 1997, and that he does not have any criminal past. This statement has never been disputed by the Government. To take such far-reaching measures on the mere suspicion that the applicant might have committed a criminal offence (which, in fact, he refuted), also violates the presumption of innocence in Article 6 (2) of the Convention. It is doubtful whether the provision in Article 20 of the Law on Immigration and Asylum, according to which the mere registration as a non-convicted "international offender" can be used as a legal reason to expel a long-term resident, is compatible with the Convention. In any case the authorities are bound to interpret the domestic provisions in accordance with the requirements of the Convention.

The applicant claims that the expulsion order violated his right to stay and work in Bosnia and Herzegovina, to make use of his property and his right not to be separated from his family. All these different aspects are covered by the concept of privacy and should, therefore, have been duly taken into account when balancing the respective interests involved. The Chamber, without any proper justification, only took into account the separation from his wife and grown up children and simply concluded that his family could easily join him to Turkey "where he can establish a new home" (para. 112). By not taking into account all other relevant aspects, such as his property in Bosnia and Herzegovina, his house, work and his business company, the Chamber failed to strike a fair balance.

Secondly, by referring to case law relating to family unification (judgment in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom* of 28 May 1985, Series A Vol. 94), the Chamber mixed up two different issues. This case is not about the wife of Mr. Unal trying to get an immigration visa for her Turkish husband in order to enable him to join his family in Bosnia and Herzegovina, but (as in the *Berrehab* case cited above) about an alien who had been living in Bosnia and Herzegovina for many years.

Finally, the Chamber, by referring to the "well-established international law" relating to the right of the state "to order the expulsion of aliens convicted of criminal offences" (para. 108), seems to have overlooked that the applicant has never been convicted of any criminal offence, neither in Bosnia and Herzegovina nor abroad.

Therefore, I conclude that the applicant is a victim of a violation of his right to privacy. Bosnia and Herzegovina should have been ordered, as a remedy, to repeal the decision ordering him to leave and stay away from the country. In addition, he should have been granted a fair amount of compensation for his pecuniary and non-pecuniary damages. For these reasons, I respectfully dissent.

(signed)
Manfred Nowak

ANNEX II

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Dietrich Rauschning.

PARTLY DISSENTING OPINION OF MR. DIETRICH RAUSCHNING

I cannot agree with conclusion nos. 4 and 5 and the corresponding reasoning contained in the decision on admissibility and merits. Article 1 of Protocol No. 7 to the European Convention on Human Rights (the "Convention") does not guarantee the applicant the right to submit reasons against his expulsion; rather, it forbids the expulsion of the applicant when the procedural requirements have not been met. If the right guaranteed by Article 1 of Protocol No. 7 was violated then, the proper wording of conclusion no. 5 should be that "execution of the order to expel the applicant would involve a violation" of his human rights (see case no. 96/30 *Damjanović,* decision on admissibility and merits of 5 September 1997, paragraph 49, conclusion nos.1 and 2, Decisions March 1996-December 1997). However, the applicant was not expelled, and the order to expel him was not and will not be executed. Article 1 paragraph 1 of Protocol No. 7 distinguishes between the decision pursuant to which an alien shall be expelled and the actual act of expulsion. This Article cannot be interpreted as providing that the decision on expulsion constitutes the expulsion because the impugned act envisaged in Article 1 of Protocol No. 7 is the physical act of expulsion. Since the applicant in the present case has left the country according to his legal situation, he cannot be expelled from it. Consequently, it is impossible for the respondent Party to violate the applicant's right guaranteed by Article 1 of Protocol No. 7 to the Convention.

None the less, this does not mean that an applicant cannot be protected by preventive measures when there is an imminent danger that his right not to be expelled without the procedural safeguards of Article 1 paragraph 1 of Protocol No. 7 will be violated. Accordingly, it was legitimate for the Chamber to issue an order for a provisional measure to protect the applicant. However, taking into account the fact that the applicant has left the country, his expulsion from the country is no longer possible and the imminent danger of a violation of his right also does not exist. Thus, the impugned act envisaged in Article 1 paragraph 1 of Protocol No. 7 cannot occur.

Since the impugned act that would violate the applicant's right not to be expelled absent procedural safeguards cannot occur because the applicant left the country, the substantive complaints in the application have been removed. Consequently, the application should be struck out in accordance with Article VIII(3) of the Agreement.

I also cannot agree with the reasoning on the merits. Firstly, it is doubtful that the respondent Party would have implemented the decision on expulsion of 30 November 2001 before the applicant's temporary permit to reside in Bosnia and Herzegovina expired on 25 February 2002. The authorities waited for eight weeks before they delivered the decision on expulsion to the applicant on 29 January 2002; perhaps they were waiting for the proper organs provided for in the law governing expulsion proceedings and the procedural decision of 30 November 2001 to be established. Moreover, Article 41 of the Law on Immigration and Asylum (see paragraph 37 of the decision on admissibility and merits) provides that an alien shall leave the country within one month of notification of the final decision ordering his expulsion. The applicant received such notification on 29 January 2002; therefore, he was not required to leave Bosnia and Herzegovina until the last day of February 2002. However, his permit for temporary residence expired on 25 February 2002. On that date, he was required to leave the country *ipso jure* and in addition on that date he lost his status as a lawful resident by application of the law itself. The wording of the decision on expulsion delivered to the applicant does not contradict this result. It states that he shall leave the country within three days after the decision becomes *valid*. In February 2002 the decision was *final* according to domestic administrative law, but it was not yet *valid* at that time (see footnote 1 in paragraph 21 of the decision on admissibility and merits).

On 15 March 2002, the applicant submitted reasons against the decision to expel him. He does not claim that his complaint was not received by the Ministry of Human Rights and Refugees, the Ministry that issued the decision of 30 November 2001. Eight days after his submission, the applicant left the country. I cannot share the argument set forth in paragraph 94 of the decision on admissibility and

merits, that it follows from the fact that the Ministry did not react or answer this submission, that the applicant could not submit reasons against his expulsion. The decision to expel the applicant became moot when the applicant left the country. The fact that the authorities did not review the decision on expulsion within the eight-day period between the applicant's submission and his departure from the country does not support the conclusion that the applicant was denied an opportunity to have his case reviewed. Following the applicant's departure, the authorities had understandable reasons to assume that the decision on expulsion had become moot and thus there was no need to review it further. Moreover, Article 1 paragraph 1(b) of Protocol No. 7 does not require a formal proceeding on review of the case.

The second aspect of the decision of 30 November 2001 denies the applicant entrance into the country for the next five years. However, this aspect raises the legal question of whether an alien has the right to take residence in a foreign state. Such a right is not protected by Article 1 of Protocol No. 7. Therefore, any possible legal shortcomings of this part of the decision of 30 November 2001 could not constitute a violation of the human right not to be expelled without the procedural safeguards guaranteed by Article 1 paragraph 1 of Protocol No. 7 to the Convention.

For these reasons, I dissent to the mentioned parts of the decision.

(signed)
Dietrich Rauschning