DECISION ON ADMISSIBILITY AND MERITS

(delivered on 5 December 2003)

Case no. CH/99/3375

E. Ž.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 5 November 2003 with the following members present:

Ms. Michèle PICARD, President
Mr. Mato TADIĆ, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Giovanni GRASSO
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN

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 52, 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant, a former police officer (criminal inspector) in Bihać, complains of the length of the proceedings before the courts concerning the termination of his employment and the connected claim for unpaid salaries.

II. PROCEEDINGS BEFORE THE CHAMBER

2. The application was received on 21 December 1999 and registered on the same day.

3. On 9 May 2003 the First Panel relinquished jurisdiction over the case in favor of the plenary Chamber.

4. On 3 June 2003 the Chamber decided to transmit the application to the respondent Party for its observations on admissibility and merits.

5. On 11 August 2003 the respondent Party submitted its written observations. On 31 October the applicant submitted his observations in reply.

6. The Chamber deliberated the case on 7 February, 9 May, 3 June, 8 October, 3 and 5 November 2003. The Chamber adopted the present decision on the latter date.

III. FACTS

7. The applicant was an employee of the Ministry of Interior of Bosnia and Herzegovina - Public Security Station (hereinafter "the PSC") Bihać, and worked as a criminal inspector until 16 July 1994, when he was suspended and later dismissed from his position.

8. On 18 July 1994 the applicant was served a decision on suspension. On 24 July 1994 the applicant filed an appeal against the procedural decision on suspension of 16 July 1994 to the Ministry of Interior of the Republic of Bosnia and Herzegovina (hereinafter: "the Ministry").

9. On 24 August 1994, the PSC Bihać issued an act on terminating the applicant's employment as of 16 July 1994. The applicant emphasizes that the act at issue was never delivered to him but was only placed on the notice board on 25 August 1994. From there it was soon removed and he was not in a position to learn its content.

10. On 1 September 1994, after having obtained a copy of the act, the applicant filed an appeal to the Ministry against the decision on termination of his employment.

11. On 20 October 1994, the applicant filed an action initiating civil proceedings before the Bihać First Instance Court (currently the Municipal Court Bihać). He requested the annulment of the procedural decision on termination of his employment and compensation for unpaid salaries, as well as the payment of the contributions for pension and disability insurance.

12. The applicant alleges that seven different judges dealt with his case. He states that every time a certain panel was about to resolve the case, the president of the court changed the presiding judge.

13. On 13 November 1996, the Bihać Municipal Court issued a partial judgement establishing that the Ministry's decision on terminating the applicant's employment was not legal and ordering the Ministry to reinstate the applicant to work. The claim for compensation for the damage due to lost incomes would be decided on by a subsequent decision. The decision is valid and final as of 18 May 1997. The applicant alleges that a validity clause was put on the judgement only on 28 August 1998 when, after numerous written and oral requests, he received a letter confirming the validity.

14. On 9 February 1999 the applicant addressed the Municipal Court with a request to continue the court proceedings in relation to his claim for lost salaries as of June 1994 until 31 December 1998. He requested that his work book entry regarding his years of service be amended so as to reflect that his employment ended on 31 December 1998. The applicant then stated that he did not want to be reinstated to the position from which he was suspended any more because since 1 January 1999 he has been employed by the Federal Mine Action Centre.

15. On 21 July 1999, the applicant addressed the Bihać Municipal Court informing it about his situation and requesting that his dispute before this court be concluded.

16. On 11 October 2000, the Bihać Municipal Court issued a judgement establishing that the procedural decision on termination of the applicant's employment was illegal and ordering the defendant to disburse compensation for the salaries. It refused the applicant's request for payment of contributions for pension insurance.

17. On 29 November 2000, the Bihać Municipal Court issued a procedural decision on correction of the above mentioned judgement, as a consequence of the applicant's oral intervention and the errors noticed in writing of the judgement. The applicant and the defendant, respectively, appealed against the judgement and procedural decision.

18. On 26 July 2001, the Bihać Cantonal Court, deciding upon appeals, annulled the judgement and the procedural decision and returned the case to the Bihać Municipal Court for renewal of proceedings. The Cantonal Court instructed the Municipal Court to establish whether the partial judgement of 13 November 1996 (see paragraph 13 above) was valid.

19. On 30 January 2002 the Bihać Municipal Court, by its new procedural decision, established that its partial judgement of 13 November 1996 was valid. The defendant appealed against this procedural decision.

20. On 23 October 2002, the Bihać Cantonal Court refused the appeal as ill-founded and upheld the first instance procedural decision.

21. On 12 March 2003, the applicant filed a request for enforcement of the partial judgement of 13 November 1996 (see paragraphs 13 and 19 above), requesting his reinstatement into work. On 22 May 2003 Municipal Court in Bihać issued a procedural decision allowing the enforcement.

22. On 11 July 2003, the Ministry, complying with the decision on enforcement, issued a procedural decision reinstating the applicant into work and offering him the position of the archivist. By that decision the applicant was obliged to come to work on 15 July 2003.

23. The applicant filed an objection against the procedural decision of 11 July 2003, considering that he was suspended from a position with police authorisation and should have been reinstated to a similar position. On 30 July 2003, the Ministry rejected the applicant's objection as ill-founded.

24. On 16 September 2003 the Ministry called the applicant again requesting him to declare, within the time limit of five days, whether he accepts the position of archivist, in accordance with the procedural decision of 11 July 2003. It appears that the applicant did not reply to the Ministry's letter, although he received it on 26 September 2003.

25. On 6 October 2003 the Ministry issued a procedural decision terminating the applicant's employment with the Ministry as of 1 October 2003.

26. The proceedings concerning the applicant's request for compensation for lost salaries are still pending before the Municipal Court in Bihać.

IV. RELEVANT LEGAL PROVISIONS

A. The regulations on labour relations

27. The Law on Fundamental Rights in Labour Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of the SFRY nos. 60/89 and 42/90) was 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). It provides in relevant part:

> Article 80
>
> "(1) A worker… has the right to appeal against the decisions which [competent organ of the employer] issues on his rights, obligations and responsibilities."
>
> "(2) An appeal…can be filed to the [competent body of the employer] within 15 days from the day when the decision …was delivered to him…"
>
> Article 83
>
> "(1) A worker who is not satisfied with the final decision of the competent body in the organization, or if that organ fails to issue a decision within 30 days from the day the request or appeal is lodged, has the right to seek protection of his right before competent court within the next 15 days."

28. The Law on Labour (Official Gazette of the Federation of Bosnia and Herzegovina – hereinafter "OG FBiH" – 43/99) entered into force on 5 November 1999. It contained the following relevant provision:

> Article 103.
>
> An employee who considers that the employer violated any of his right deriving from labour relation, can within 15 days…request the employer to enable him to exercise that right.
> …
>
> If the employer within 15 days does not comply with the request from paragraph 1 of this Article, an employee can, within next 15 days, request the protection of that right before the competent court.

The above mentioned provision was amended by the Law on Amendments to the Law on Labour (OG FBiH no. 32/00) extending the time limit for seeking protection of violated rights before the court to one year from the date when the employee learns of a violation of his right.

B. Legislation on civil service

29. The Law on State Administration (consolidated text) of the Republic of Bosnia and Herzegovina was published in the Official Gazette of the Republic of Bosnia and Herzegovina (OG RBiH), no.26/93. In its relevant part it regulated the labour relations of the civil servants and their right to access to court, as follows:

> Article 332
>
> The head of the administrative organ decides…on the rights and obligations of the employees deriving from labour relation…
>
> Article 333
>
> An employee who considers his right has been violated by the decision of the head of the administrative organ, has the right to object against that decision to the official…

Article 335

> Against the decision…issued upon the objection, an employee has the right to protection of his right before the competent regular court…

30. The part of the Law regulating the labour relations of the employees stayed in force until 1998 when the Federation enacted the Law on Labour Relations and Salaries of the Employees in the Administrative Organs in the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, no.13/98). However, this law regulated the right of employees to access to court in basically the same way.

31. On 1 July 2003 the new Law on the Civil Service in the Federation of Bosnia and Herzegovina (OG FBiH, no.23/03) entered into force. Article 3 of the Law on Civil Service dictates that "The recruitment and the professional career advancement of a civil servant shall be based upon open competition and professional merit." Article 4 of the Law on Civil Service lists the following "Principles of the Law": legality, transparency and publicity, accountability, efficiency and effectiveness, professional impartiality and political independence. Disciplinary measures against civil servants, including termination, are governed by a set of rules aimed at ensuring the objectivity and transparency of disciplinary proceedings (Articles 55 to 60).

32. Article 5 of the Law on Civil Service lists categories of public servants who are not covered by the Law, among them "members of the police and the armed forces".

33. The Law on Civil Service does not explicitly establish what judicial remedies a civil servant can pursue against decisions affecting his employment.

C. The Law on Internal Affairs

34. The Law on Internal Affairs of Federation of Bosnia and Herzegovina (OG FBiH, nos. 1/96 and 19/98), as well as the subsequent Law on Internal Affairs of the Federation of Bosnia and Herzegovina (OG FBiH, no. 19/03), regulate the rights of the police officers. Article 69 of the 2003 Law on Internal Affairs, which is identical to Article 49 of the 1996 Law on Internal Affairs, provides that:

> "The Laws,… other regulations … governing the labour relations, salaries, health and pension insurance of the civil servants and employees…in Federal administration organs, apply also to employees of the Ministry [of Interior], unless this law otherwise provides"

The Law on Internal Affairs does not regulate the question of access to court against decisions affecting a policeman's employment status. Therefore, access to judicial remedies against the decision affecting a policeman's employment is the same as under the Law on Civil Service.

35. Article 70 of the 2003 Law on Internal Affairs provides that a labour relationship with the Ministry of Internal Affairs can only be established on the basis of a public competition (*javni konkurs*). This represents a significant change from the 1996 Law on Internal Affairs, which allowed the establishment of a labour relationship with the Ministry of Internal Affairs also without public competition.

D. Law on Civil Procedure

36. Article 434 of the Law on Civil Procedure (OG SFRY no. 4/77,36/77,36/80, 69/82, 57/89, 20/90, 27/90 and 35/91), taken over as a law of the Republic of Bosnia and Herzegovina (OG RBiH nos. 2/92 and 13/94) stipulated that, in disputes concerning employment, the court shall pay special attention to the need to resolve such disputes as a matter of urgency.

37. Furthermore, the Law in relevant parts provided as follows:

Article 329

> If there are several claims,... and only some of them are mature for the final decision the court ... can issue a judgement in regard to matured claims(partial judgement).
> ...
> In relation to the remedies and enforcement, the partial judgement is considered as independent judgement.
>
> Article 333
>
> The court during the whole course of the proceedings watches if the matter of the proceedings has already been validly decided, and if it determines that proceedings were initiated upon a matter that has been validly decided, it will reject the action.
>
> Article 334
>
> The court is bound by its judgement as soon as it is pronounced.

38. On 11 November 1998 the new Law on Civil Procedure of the Federation of Bosnia and Herzegovina entered into force (OG FBiH no. 42/98 and 3/99). However, that law regulated the relevant issues basically in the same way as the previous law (see paragraph 34 above).

V. COMPLAINTS

39. The applicant complains that he was discriminated against in the enjoyment of his right to work on the ground of his political opinion. He states that the PCS terminated his employment in 1994 because he did not want to become a member of the ruling political party (the SDA). The applicant also complains of violation of his right to a fair trial within a reasonable time, protected under Article 6(1) of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to admissibility

40. The respondent Party considers the application inadmissible because the Ministry enforced the partial judgement of the Municipal Court in Bihać complying with the decision on enforcement and offering the applicant a position corresponding to his qualifications. The respondent Party asserts that the application in this part should be struck out. Also, the respondent Party reminds the Chamber that on 30 July 2003 the Ministry rejected the applicant's objection against the procedural decision reinstating him into the position of archivist. The applicant could have initiated civil proceedings against the Ministry's decision. Therefore, the respondent Party considers the application inadmissible for non-exhaustion of domestic remedies.

41. In relation to the compensation claim for lost salaries, the respondent Party considers the application inadmissible for non-exhaustion of domestic remedies because the proceedings before the domestic courts are still pending.

2. As to the merits

42. The respondent Party considers the application ill-founded. The Federation alleges that the Municipal Court issued a partial judgement in favour of the applicant. Also, it points out that it considers the length of proceedings upon the applicant's action quite reasonable. The Federation asserts that there is no violation of the applicant's right to a fair hearing within reasonable time, taking into account that the partial judgement in the applicant's favour was enforced. In regard to the compensation claim, the respondent Party blames the applicant's lawyer for contributing to the delay in the proceedings. It also argues that the applicant's case concerns a particularly complex issue, and that a lot of facts have to be established before the court issues a judgement.

B. The applicant

43. In his submissions of 31 October 2003, the applicant argues that in 1994 he was discriminated against on the basis of his political opinion. He further alleges that the former Deputy Chief of the State Security Service in Bihać, and presently the Minister of Interior of the Una-Sana Canton, tried to discredit him, trying to present the applicant as follower of the "Autonomy movement" in the Krajina. The applicant also repeats his allegations on the alleged pressure on the Municipal Court in Bihać by the PSC.

44. The applicant alleges that the proceedings upon his compensation claim before the Municipal Court in Bihać are still pending, and that the hearing scheduled for 10 October 2003 was postponed due to the duration of another hearing scheduled by the court for that day. The next hearing will probably also have to be postponed because the MUP has not yet submitted the data on salaries requested. He also suspects that the Cantonal Public Attorney deliberately causes delays in the proceedings.

45. Further, the applicant alleges that he is not satisfied with the offer of the MUP for a position as archivist. The applicant considers that the position of the archivist is not corresponding to his qualifications and knowledge, because he has always performed police functions and never worked on administrative positions. Therefore he has no knowledge of administrative jobs. He alleges that on 3 September 2003 he initiated new civil proceedings before the court against the MUP, requesting the annulment of the decision on assigning him on the position of archivist.

46. Finally, the applicant states that the courts and police institutions in Una-Sana Canton are not impartial, but under direct influence of the governing SDA party.

VII. OPINION OF THE CHAMBER

A. Admissibility

47. Before considering the merits of the case, the Chamber must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII of the Agreement. In accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept [...]. In so doing, the Chamber shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted [...] (c) The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

1. Competence *ratione materiae*

(a) The jurisprudence of the European Court of Human Rights in the Pellegrin case

48. The respondent Party has not objected to the admissibility *ratione materiae* of the application. Nonetheless, the Chamber has examined the question whether it is competent under the Agreement to consider the applicant's complaint that, in deciding on whether his employment relationship with the Ministry of Interior was lawfully terminated, the courts have failed to conclude the proceedings within a reasonable time. The Chamber has considered it appropriate to raise this matter *proprio motu* because in case no. CH/02/10476 *Lugonjić v. BiH* (decision on admissibility of 1 April 2003) the Second Panel of the Chamber declared the application inadmissible on the ground that "because the dispute concerns the applicant's position as a police officer, the application does not concern the determination of the applicant's "civil rights" within the meaning of Article 6 of the Convention" (paragraph 20). In reaching this conclusion, the Second Panel had relied on the case law of the European Court of Human Rights, in particular on its decision in the *Pellegrin v. France* case (judgement of 8 December 1999, Reports of Judgements and Decisions 1999-VIII). Also the First Panel of the Chamber has in the past relied on the criteria set forth in the *Pellegrin* judgment in examining its competence to state whether proceedings regarding disputes relating to the

recruitment, career and termination of civil servants have complied with the requirements of Article 6(1) of the Convention (see cases no. CH/98/1309 et al., *Kajtaz & Others*, decision on admissibility and merits of 7 September 2001, Decisions July-December 2001, paragraphs 138-139).

49. On 8 December 1999, the European Court of Human Rights, sitting as a Grand Chamber, issued its judgement in the *Pellegrin v. France* case. In this judgement the Court acknowledged that its previous case-law concerning the applicability of Article 6 of the Convention to disputes related to the recruitment, careers, termination, salaries and pensions of civil servants did not provide criteria which would allow governments to foresee with sufficient certainty which disputes fall under Article 6(1) of the Convention and which do not. The previous case-law of the Court had relied on two criteria: whether the dispute concerned a matter in which the respondent Party had used "discretionary powers", and whether the right asserted by the applicant before the domestic courts was of an "economic" nature (see para. 59 of the *Pellegrin* judgment).

50. In the *Pellegrin v. France* judgement the Court set out to establish a "new criterion to be applied". This new criterion purports to be a purely "functional" criterion based on an "autonomous interpretation of the term 'civil servant'" (i.e. no consideration given to whether the dispute raised by the 'civil servant' is of a primarily economic nature or not).

The crucial part of the *Pellegrin* judgement reads:

> "65. The Court notes that in each country's public-service sector certain posts involve responsibilities in the general interest or participation in the exercise of powers conferred by public law. The holders of such posts thus wield a portion of the State's sovereign power. The State therefore has a legitimate interest in requiring of these servants a special bond of trust and loyalty. On the other hand, in respect of other posts which do not have this "public administration" aspect, there is no such interest.
>
> 66. The Court therefore rules that the only disputes excluded from the scope of Article 6 § 1 of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police. In practice, the Court will ascertain, in each case, whether the applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. ... ".

51. The Chamber has considered carefully whether it shall continue to follow the test set forth in paragraph 66 of the *Pellegrin* judgment, keeping in mind that this test was established only four years ago by the Grand Chamber of the European Court of Human Rights in order to create a higher degree of legal certainty regarding the applicability of Article 6. Such a decision should not be lightly departed from. Nonetheless, the Chamber has concluded that the Agreement requires it to interpret Article 6 of the Convention more broadly, so as to include the proceedings in the applicant's case within the scope of the "determination of a civil right" for the purposes of Article 6.

(b) Compatibility of judicial proceedings not complying with the principles set forth in Article 6 of the Convention with the concept of the rule of law

52. As a starting point the Chamber recalls the fundamental nature of the right of access to a fair hearing before an independent and impartial tribunal enshrined in Article 6. The Chamber recalls that the European Court of Human Rights held in one of the first decisions regarding the scope of Article 6(1) of the Convention, the *Delcourt* judgment, that "in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision" (Eur. Court HR, *Delcourt v. Belgium* judgment of 17 January 1970, Series A no. 11, paragraphs 25). In applying this general principle, the European Court of Human Rights has found in the *Delcourt* case (against the objections of the respondent Party) that Article 6 (1) is applicable to appeals proceedings

before the Belgian *Cour de Cassation*. Similarly, the Chamber has found that, in the light of this principle, proceedings upon a petition to reopen a case already concluded by a final and binding judgement cannot be excluded from the scope of Article 6 (1) (case no. CH/98/548, *Ivanović*, decision on admissibility of 9 March 2000).

(c) The "special bond of trust and loyalty" as a reason to exempt disputes relating to the employment, the career and the termination of civil servants from the scrutiny of impartial and independent courts administering a fair hearing

53. Because of the fundamental nature of the right to a fair hearing before an independent and impartial tribunal enshrined in Article 6, any restriction of this right must be supported by compelling reasons. As four judges of the European Court of Human Rights observed in their opinion dissenting from the Court's *Pellegrin* judgment, "[t]he new criterion therefore deprives a whole category of persons, those whose duties involve participation in the exercise of powers conferred by public law, of a fundamental safeguard in a State governed by the rule of law, namely the right of access to a court and to a fair hearing".

54. The European Court of Human Rights reasons that, because holders of posts such as the applicant's, a policemen, "wield a portion of the State's sovereign power", the State "has a legitimate interest in requiring of these servants a special bond of trust and loyalty". This special bond of trust and loyalty appears to require, according to the *Pellegrin* judgment, that disputes relating to the employment, the career and the termination of civil servants need not be subject to the scrutiny of impartial and independent courts administering a fair hearing.

55. The Chamber observes that in the course of the last eighteen months Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina have given themselves a number of new laws governing the civil service, with the aim of providing for the selection, management, career progression, compensation and social benefits of public employees in such a way as to foster professionalism and political independence of the civil service. Article 4 of the Federation Law on Civil Service (see paragraph 31 above) lists the following "Principles of the Law": legality, transparency and publicity, accountability, efficiency and effectiveness, professional impartiality and political independence. Article 3 of the Law on Civil Service dictates that "The recruitment and the professional career advancement of a civil servant shall be based upon open competition and professional merit." This process of reform of the civil service shows that the "special bond of trust and loyalty" required from certain civil servants does not mean that their employment, careers and termination cannot be subjected to objective and transparent criteria and have to remain in the realm of political discretion or mere arbitrariness. From the point of view of the civil servants, the new civil service legislation of this country guarantees that by entering into that "special bond of trust and loyalty", civil servants do not waive their right to have decisions affecting their rights and status taken and reviewed in proceedings that uphold the principle of the rule of law.

56. While Article 5 of the new Law on Civil Service excludes members of the police from its application, the Chamber observes that this does not limit the applicability of the above principles underlying the new civil service legislation to members of the police. Article 69 of the 2003 Law on Internal Affairs provides that all laws and regulations governing the labour relations of civil servants in the administrative organs of the Federation apply also to employment with the MUP, unless otherwise provided. No provision of the 2003 Law on Internal Affairs excludes the application of the above principles to the police. On the contrary, many specific provisions the 2003 Law on Internal Affairs aim at reducing the differences between the rules governing civil service in the police and civil service in other administrative organs of the Federation and increasing legality, transparency and publicity, accountability, professional impartiality and political independence also in the police service. A significant example in this respect is that, while the 1996 Law on Internal Affairs allowed hiring into the police also without public competition, Article 70 of the 2003 Law on Internal Affairs provides that a labour relationship with the Ministry of Internal Affairs can only be established on the basis of a public competition (*javni konkurs*).

(d) Access to judicial review under domestic laws and the application of Article 6

57. Moreover, the laws governing the applicant's employment as a criminal inspector have at all times provided the right of access to a court with regard to decisions affecting his labour relation. Until the new Federation Law on Civil Service entered into force, the labour relation of employees of the Ministry of Internal Affairs was, in this respect, governed by the same rules applying to all other employees, public and private: against the final decision of the employer it was possible to initiate a civil action before the competent court (see paragraphs 27-30 above), as the applicant did in 1994. As no provision of the 2003 Law on Internal Affairs excludes the principle of access to a court against decisions affecting the labour relation of policemen, under Article 69 of the Law the rules applicable to civil servants in the other administrative organs of the Federation apply, and the principle of access to a court remains untouched.

58. The Chamber recalls that the European Court of Human Rights held in the above-mentioned *Delcourt* judgment that "a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6" (paragraphs 25-26, "such courts" referring to appeals jurisdictions). Also the Chamber has held in a previous case concerning the scope of Article 6 that, when the domestic laws provide for access to judicial proceedings in a certain matter, "it is incompatible with the concept of rule-of-law in a democratic society that the most basic rules of fair trial should not apply to the relevant proceedings (...). The Chamber cannot overlook the consequences of the opposite view, i.e. that a tribunal need neither be independent, nor impartial, when it decides upon a request to re-open a criminal case in which it is alleged that a miscarriage of justice has occurred, or that a tribunal may divest itself of the restraints placed upon it by the concept of fair trial and even embrace arbitrariness and caprice" (case no. CH/98/548, *Ivanović*, decision on admissibility of 9 March 2000, paragraph 48). The same idea is expressed by the judges of the European Court of Human Rights dissenting in the *Pellegrin* case, when they state that "we do not understand why someone who participates in the exercise of powers conferred by public law, and who, under domestic law, has access to an independent tribunal in connection with disputes concerning employment, is not entitled to a judicial decision within a reasonable time".

(e) Interpretation of the scope of Article 6 of the Convention in the light of the other international agreements listed in the Appendix to the Agreement, in particular the ICCPR

59. Finally, the Chamber has taken into account that the Agreement (as well as the Constitutions of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina) provides that the Federation shall respect not only the rights set forth in the European Convention on Human Rights, but also in a number of other international human rights instruments, among them the International Covenant on Civil and Political Rights (ICCPR). While under Article II(2)(b) of the Agreement the Chamber's jurisdiction with regard to the rights enshrined in the ICCPR is limited to discrimination in the enjoyment of those rights, the Chamber finds that it is called to keep in mind the Parties' commitment to respect the rights protected in the ICCPR also in construing the provisions of the European Convention on Human Rights.

60. In this respect the Chamber notes that Article 25(c) of the ICCPR protects the right of every citizen, without distinctions based on sex, race, political opinion and other grounds and without unreasonable restrictions, to "have access, on general terms of equality, to public service in his country". In Article 2(3)(a) of the ICCPR, the Parties undertake "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy". In Article 2(3)(b) of the ICCPR, the Parties recognise that, while the power to grant remedies can be entrusted not only to judicial, but also to legislative, administrative and other authorities, judicial remedies should be developed.

61. This general preference for judicial remedies is reflected also in the broad wording of Article 14 of the ICCPR, the provision enshrining the right to a fair trial (and thus corresponding to Article 6 of the Convention).

Article 14 ICCPR reads in relevant part:

> "1. All persons shall be equal before the courts and tribunals. In the determination of … his *rights and obligations in a suit at law*, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. …"

62. In its views in *Casanovas v. France*, Communication 441/1990 (10 August 1994) (CCPR/C/51/D/441/1990), the UN Human Rights Committee decided to give a broader scope to Article 14 (the fair trial article) of the International Covenant on Civil and Political Rights (ICCPR) than the European Court and Commission had given to Article 6 of the Convention. In this case, which concerned the dismissal of a member of the fire brigade from his employment, France objected to the competence *ratione materiae* of the Committee. France argued that the procedure before the Administrative Tribunal does not involve "rights and obligations in a suit at law", and that the Committee should interpret Article 14 of the ICCPR as the European Commission and Court had interpreted Article 6 of the Convention. The Committee rejected this argument and stated:

> "that the concept of "suit at law" under article 14, paragraph 1, was based on the nature of the right in question rather than on the status of one of the parties. The Committee considered that a procedure concerning a dismissal from employment constituted the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, of the Covenant. Accordingly, on 7 July 1993, the Committee declared the communication admissible."

The Committee had, already before the *Casanovas* case, applied the right to a fair trial in Article 14 in a case involving a dispute about the termination of employment of a member of the police (*Muñoz Hermoza v. Peru*, Communication 203/1986 (4 November 1998).

63. To sum up, the Chamber concludes that the right to equal access to public office, the preference for judicial review as a remedy for alleged violations of human rights and the broad scope Article 14, which encompasses suits at law concerning the employment, the career and the termination of civil servants, as provided for in the ICCPR, also argue against the exclusion of the applicant's case from the scope of Article 6 of the Convention. As stated above, while Article II(2)(b) gives the Chamber jurisdiction to consider alleged violations of the ICCPR only in conjunction with discrimination, the Chamber finds that a consistent interpretation of the Agreement warrants that, in interpreting the Convention, the Chamber take into account also the Parties commitment in Article I of the Agreement to respect rights guaranteed in the ICCPR.

(e) Limitations on the Chamber's approach

64. For the reasons stated, the Chamber considers that the term "determination of a civil right" in Article 6 of the Convention should, as a rule, be interpreted as covering disputes of civil servants, whether or not they "participat[e] in the exercise of powers conferred by public law" and "wield a portion of the State's sovereign power". The Chamber observes, however, that there remain positions in the public service, in particular in its highest ranks, which cannot be afforded the guarantees of Article 6 of the Convention, because appointment to them and termination from them necessarily involves the exercise of wide discretion (see case no. CH/02/12470, *Obradović v. BiH and the Federation of BiH*, decision on admissibility and merits of 7 November 2003, paragraph 96).

(f) Conclusion

65. Considering (i) that the laws of the Federation provide that the recruitment, careers and termination of civil servants, including police officers, shall be governed by objective and transparent decision-making, (ii) that the Federation laws provide full access to the courts to civil servants for disputes concerning termination of their employment, (iii) that the principle of rule of law requires that judicial bodies comply with the requirements set forth in Article 6 of the Convention, and (iv) that also the Federation's commitment to respect the rights of the applicant guaranteed by the ICCPR requires a broad interpretation of the scope of Article 6 of the Convention, the Chamber concludes that the applicant's law suit concerns the "determination of his civil rights" for the purposes of Article 6.

2. Regarding the claim of discrimination in the termination of employment

66. The Chamber notes that the applicant complains of discrimination in the enjoyment of his

right to work due to the termination of his employment by the Ministry. However, the Chamber observes that the Ministry issued a decision terminating his employment on 24 August 1994 and that on 20 October 1994 he initiated civil proceedings before the First Instance Court in Bihać, requesting the annulment of the procedural decision terminating his employment. The Chamber notes that the applicant did not raise the discrimination claim in the proceedings before the court. Hence, the alleged discrimination in the applicant's right to work occurred before the entry into force of the Agreement on 14 December 1995. In accordance with generally accepted principles of international law, the Agreement cannot be applied retroactively. It is thus outside the competence of the Chamber *ratione temporis* to decide whether events occurring before the entry into force of the Agreement gave rise to violations of human rights (see, e.g., case no. CH/96/1 *Matanović v. The Republika Srpska,* decision on the admissibility of 13 September 1996, Decisions 1996-1997).

67. Therefore, pursuant to Article VIII(2)(c) of the Agreement, the Chamber declares inadmissible as incompatible *ratione temporis* with the Agreement the parts of the application related to the alleged discrimination in the enjoyment of his right to work and related rights.

3. Requirement to exhaust effective domestic remedies

68. The respondent Party considers that the application in relation to the possible violation of Article 1 of Protocol No.1 to the Convention is premature, as the proceedings upon the applicant's request for compensation for lost salaries are still pending before the Municipal Court in Bihać. The Federation asserts that the applicant should have exhausted all the domestic remedies before he submitted his application to the Chamber

69. The Chamber must next consider whether, for the purpose of Article VIII(2)(a) of the Agreement, any "effective remedy" was available to the applicant in respect of his complaints and, if so, whether he has demonstrated that it has been exhausted. It is incumbent on a respondent Party arguing non-exhaustion to show that there was a remedy available to the applicant other than his application based on the Agreement and to satisfy the Chamber that the remedy was an effective one.

70. The Chamber recalls that the applicant initiated civil proceedings before the First Instance Court in Bihać on 20 October 1994, requesting the annulment of the termination of his employment and compensation for lost salaries. Although the First Instance Court issued a partial judgement ordering the applicant's reinstatement into work, the applicant's claim for compensation for lost salaries has not been determined, even in the first instance, for more than nine years. Moreover, the applicant complains of the length of the proceedings before the domestic courts determining his claim in that respect.

71. In these circumstances, the Chamber finds that the applicant can not be required, for the purposes of Article VIII(2)(a) of the Agreement, to further await the outcome of the proceedings before the Courts of the respondent Party.

4. Conclusion as to admissibility

72. The Chamber further finds that no other grounds for declaring the case inadmissible have been established. Accordingly, the Chamber declares admissible the part of the application concerning the alleged violation of Article 6 of the Convention with regard to the length of proceedings, in respect of acts or omissions which have either occurred or continued after the entry into force of the Agreement on 14 December 1995. The Chamber declares inadmissible the remainder of the applicant's complaints.

B. Merits

73. Under Article XI of the Agreement, the Chamber must next address the question of whether the facts established above disclose a breach by the respondent Party 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 in the Convention.

74. The applicant complains about the length of the proceedings before the Municipal and Cantonal Courts in Bihać. The respondent Party states that the delays were the consequence of the conduct of the applicant's lawyer.

75. Article 6 of the Convention, insofar as relevant to the present case, reads as follows:

> "1. In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."

76. The first step in establishing the reasonableness of the length of the proceedings is to determine the period of time to be considered.

77. The Chamber notes that the proceedings before the Municipal Court in Bihać were initiated by the applicant on 20 October 1994 and are still pending before the same court. However, the period which falls within the Chamber's jurisdiction did not begin on that date, but on 14 December 1995, the day when the Agreement entered into force. The proceedings have therefore been pending for nine years and 15 days, of which a period of seven years and 11 months is to be examined by the Chamber.

78. The Chamber notes that the Municipal Court in Bihać issued the partial judgement on 13 November 1996, ordering the Ministry to reinstate the applicant into work. The judgement became valid, since there was no appeal against it. However, on 11 October 2000, the Municipal Court issued a new judgement, establishing again that the Ministry's procedural decision on terminating the applicant's employment is illegal, and ordering the defendant to pay the applicant compensation for lost salaries. On 26 July 2001 the Cantonal Court, deciding upon the appeals of the applicant and the Ministry, quashed the judgement and directed the Municipal Court to determine the validity of its partial judgement of 13 November 1996. On 30 January 2002 the Municipal Court issued a procedural decision establishing the validity of the partial judgement. On 23 October 2002 the Cantonal Court refused the defendant's appeal against the procedural decision of 30 January 2002. After that, the Municipal Court continued proceedings upon the applicant's compensation claim, and, apparently, in the period from 3 December 2002 to 2 September 2003, the court scheduled six hearing, out of which three hearings were held and three hearings were postponed. The proceedings are still pending.

79. The reasonableness of the length of proceedings is to be assessed having regard to the criteria laid down by the Chamber, namely the complexity of the case, the conduct of the applicant and of the relevant authorities and the other circumstances of the case (*see, e.g.,* case no. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 10, Decisions and Reports 1998; Eur. Court HR, *Rajcevic v. Croatia*, judgment of 23 July 2002, paragraph 36).

80. The respondent Party alleges that the length of the proceedings is primarily a consequence of the conduct of the applicant's lawyer and of other external elements, i.e. the complexity of the case (see paragraph 39 above).

81. The Chamber notes that the legal issues in the applicant's case are whether his employment as a police officer was terminated in accordance with the law, as well as his compensation claim due to lost salaries. The Chamber cannot find that the issues are of a particularly complex nature.

82. Further, the Chamber finds that there is no indication that the applicant has in any way contributed to the delay of the proceedings. On the contrary, the applicant has made use of all the

possible remedies when faced with the inaction of the court and tried to urge a conclusion of the proceedings, but to no avail. The Federation's argument that the applicant through his lawyer contributed to the length of the proceedings, because he did not state precisely his compensation claim, does not establish that he has contributed to the length of the proceedings. The applicant's lawyer could not have stated his claim precisely, because she objected to the data on salaries obtained by an employee on the position previously held by the applicant, which were submitted by the Ministry. After the court had requested the new data, the Ministry submitted it only on 4 June 2003, and the applicant had objections to it, too.

83. On the other hand, the applicant alleges that the Municipal Court in Bihać was under significant pressure from the PSC Bihać, which caused that several judges were replaced while dealing with his case. When the partial judgement of 13 November 1996 was finally issued, the applicant had to urge the court several times to put the validity clause on the judgement. The court did it only on 28 August 1998, which is, according to the applicant, consequence of the court's partiality and its dependence on the ruling political party. Although, from the facts in the case-file it can not be established whether the court was under undue influence of the PSC Bihać or not, the Chamber takes note that the Municipal Court in Bihać has significantly prolonged the proceedings by causing delays in establishing the validity of its partial judgement of 13 November 1996, and it took it almost two years to put the validity clause on it. Moreover, on 11 October 2000 the Municipal Court issued a second judgement determining the same legal issue (legality of the termination of the applicant's employment), which had already been determined by partial judgement. In this way the Municipal Court violated the principle of *res iudicata* and created the legal confusion which had to be resolved by the decision of the Cantonal Court of 26 July 2001.

84. Thereafter, although the validity of the 13 November 1996 partial judgement was established on 28 August 1998 (see paragraph 13 above), the Municipal Court, for the second time, had to establish its validity. Furthermore, the new procedural decision of the Municipal Court in that respect provided the Ministry with the opportunity to appeal against it. This caused another set of second instance proceedings which were only concluded by the Cantonal Court's procedural decision of 23 October 2002. During all that time, the applicant was prevented from requesting the enforcement of the valid partial judgement, and from having the Municipal Court decide upon his compensation claim. The Federation does not explain why it required almost six years to establish the validity of the partial judgement, which was not appealed against. The Chamber finds that this prolongation in the proceedings can be imputed only to the respondent Party.

85. Finally, it appears that the proceedings upon the applicant's compensation claim are still pending. It appears that three hearings have been held and three hearings have been postponed since 3 December 2002, when the Municipal Court continued proceedings after the validity of partial judgement had been finally established. The Chamber can not find the justified reasons for these delays in proceedings.

86. Having considered all these elements, the Chamber finds that the length of the proceedings has been unreasonable and that the respondent Party is responsible for this. The Chamber therefore concludes that the Federation of Bosnia and Herzegovina has violated the applicant's right to a fair hearing within a reasonable time under Article 6 paragraph 1 of the Convention.

VIII. REMEDIES

87. Under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures. The Chamber is not necessarily bound by the claims of an applicant.

88. The applicant requests the Chamber to order the respondent Party to resolve his civil proceedings before the courts and to order respondent Party to pay him compensation for lost salaries.

89. The Chamber notes that it has found a violation of the applicant's right to a fair hearing within a reasonable time as guaranteed by Article 6 paragraph 1 of the Convention. Therefore, the Chamber considers it appropriate to order the respondent Party to take all necessary steps to ensure that the applicant's compensation claim is decided before the court by a final and binding decision no later than 5 May 2004.

90. The Chamber considers it appropriate to award a sum to the applicant in recognition of the sense of injustice he has suffered as a result of his inability to have his case decided before the domestic courts.

91. Accordingly, the Chamber will order the respondent Party to pay to the applicant, by 5 January 2004, the sum of 2000 Convertible Marks (*Konvertibilnih Maraka*) in recognition of his suffering as a result of his inability to have his case decided within a reasonable time.

92. The Chamber further awards simple interest at an annual rate of 10% on the sum awarded in the preceding paragraph or any unpaid portion thereof as of the expiry of the above one-month period until the date of settlement in full.

IX. CONCLUSION

93. For the above reasons, the Chamber decides,

1. by 9 votes to 4, to declare the application admissible insofar as it relates to alleged violations of the right to a fair hearing within a reasonable time under Articles 6 paragraph 1 of the Convention, in respect of the acts and omissions that occurred after 14 December 1995, the date when the Agreement entered into force;

2. unanimously, to dismiss the remainder of the application as inadmissible;

3. by 9 votes to 4, that there has been a violation of the applicant's right to a fair hearing within a reasonable time under Article 6 paragraph 1 of the European Convention on Human Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

4. by 9 votes to 4, to order the Federation of Bosnia and Herzegovina to take all necessary steps to ensure that the applicant's compensation claim is decided before the court by a final and binding decision not later than 5 May 2004;

5. by 9 votes to 4, to order the Federation of Bosnia and Herzegovina to pay to the applicant, not later than 5 January 2004, 2000 Convertible Marks ("*Konvertibilnih Maraka*") by way of compensation for non-pecuniary damages;

6. by 9 votes to 4, to order the Federation of Bosnia and Herzegovina to pay simple interest at the rate of 10 (ten) per cent per annum over the above sum or any unpaid portion thereof from the date of expiry of the above one-month period until the date of settlement in full; and

7. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Human Rights Commission within the Constitutional Court no later than 5 May 2004 on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex: Separate dissenting opinion of Mr. Andrew Grotrian, joined by Ms. Michèle Picard and Mr. Dietrich Rauschning

ANNEX

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Andrew Grotrian, joined by Ms. Michèle Picard and Mr. Dietrich Rauschning.

PARTLY DISSENTING OPINION OF MR. ANDREW GROTRIAN, JOINED BY MS. MICHÈLE PICARD AND MR. DIETRICH RAUSCHNING

I disagree with the opinion of the majority to the effect that Article 6 of the Convention was applicable to the proceedings at issue in this case. In my view the Chamber should have applied the case-law developed by the European Court of Human Rights in the case of *Pellegrin v. France* and other similar cases, and held that Article 6 did not apply. On that basis it should either have declared the case inadmissible as being incompatible *ratione materiae* with the Agreement or alternatively it should have held on the merits that there was no violation of Article 6 on the ground that it was inapplicable.

Article 6 of the Convention, so far as relevant provides:

"In the determination of his civil rights and obligations....everyone is entitled to a fair and public hearing within a reasonable time..."

The majority recognise that, in finding Article 6 to be applicable, they are departing from case-law established in a decision of a Grand Chamber of the European Court and that such a decision "should not be lightly departed from" (see para. 51 of the Decision). They conclude, however, that "...the Agreement requires [the Chamber] to interpret Article 6 of the Convention more broadly, so as to include the proceedings in the applicant's case within the scope of 'the determination of a civil right' for the purposes of Article 6" (*ibid*).

In my opinion the Agreement neither requires nor permits the Chamber to give the Convention a different interpretation in Bosnia and Herzegovina to that which it bears in the other States Parties to it. The Convention is a multilateral international treaty and it would be wrong in principle to hold that it bore different meanings from state to state. Local conditions may be taken into account in applying the Convention, for instance in deciding whether an interference with a protected right is "necessary in a democratic society", since the States Parties have a "margin of appreciation" in relation to such matters and they may take into account conditions in the particular society (see e.g. *Otto Preminger Institute v. Austria* Eur. Ct HR, 1994 at para. 56). Local law must also be taken into account in deciding on the applicability of Article 6, in so far as it is necessary to consider whether a claim has some arguable basis in domestic law in order to determine whether the "right to a court" under Article 6 arises (see e.g. *James & Others v United Kingdom* Eur. Ct HR, 1986 at para. 81; *Frydlender v France,* Judgement of 27 June 2000 at para. 27). The present case, however, raises a question of legal interpretation, in particular as to the meaning of the autonomous concept of "civil rights and obligations" in Article 6 para.1 of the Convention. The answer to that question must be the same everywhere.

The majority appear to use the provisions of the Agreement, essentially a domestic constitutional instrument, and other provisions of domestic law as aids to interpretation so as to extend the scope of the Convention. I consider this approach to be wrong in principle.

The domestic law of the States Parties may, of course, provide the citizen with rights which go beyond those which are secured under the Convention. It may for instance provide for access to court in areas, such as taxation, electoral law or (as here) public employment, which have been held to be outside the scope of Article 6. The Convention is not to be interpreted as limiting such rights (see Article 53 of the Convention) but their source is to be found in domestic law and not the Convention. Such provisions of domestic law do not, however, expand the scope of Article 6 of the Convention.

It may also be the case that the provisions of other human rights treaties apply to the proceedings, in particular Article 14 of the International Covenant on Civil and Political Rights. That provision applies to "...the determination of ...rights and obligations in a suit at law..." and is thus wider in scope than

the relevant part of Article 6 of the European Convention, which applies only to the determination of "*civil* rights and obligations". The competence of the Chamber is, however, limited to considering whether there has been a breach of the rights secured by the Convention, or discrimination in relation to the rights provided for in the other international instruments referred to in the Agreement. The provisions of such other international instruments do not expand the scope of the Convention.

The decisions of the European Court of Human Rights are not formally binding on the Chamber, but its case-law should, in my view, be followed unless there is some compelling reason not to do so. I do not find any such reason here. The interpretation of Article 6 para.1 of the Convention has given rise, over the years, to many problems and much jurisprudence. In particular the scope of Article 6 in relation to the "determination of ... civil rights and obligations" has been considered by the Court on numerous occasions. It has consistently adopted the approach that it applies only to proceedings which are decisive of private rights and obligations (conceived autonomously and not by a simple reference to domestic law) and that there are thus some court proceedings to which it does not apply. The approach which it has adopted in relation to the rights and obligations of public employees in the *Pellegrin* case has been followed in other cases since (see e.g. *Frydlender v France,* Judgement of 27 June 2000). Other interpretations of Article 6 are no doubt possible and perhaps preferable. However, it is not appropriate for the Chamber to reopen questions of legal interpretation which have been decided by the Court after full consideration of the competing arguments. To do so undermines legal certainty. The approach of the majority also produces inconsistency between Bosnia and Herzegovina and other States Parties to the Convention, imposing heavier obligations on the BiH authorities than are applicable elsewhere.

(signed)
Mr. Andrew GROTRIAN

(signed)
Ms. Michèle PICARD

(signed)
Mr. Dietrich RAUSCHNING