DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/01/7195

Dušanka MIHAJLOVIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 10 September 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned application introduced to the Human Rights Chamber for Bosnia and Herzegovina 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;

Noting that the Human Rights Chamber for Bosnia and Herzegovina ("the Chamber") ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Commission") has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 ("the 2003 Agreement") to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Article VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement, and Rules 50, 54, 56 and 57 of the Commission's Rules of Procedure:

I. INTRODUCTION

1. The subject matter of the application is the applicant's request to be designated, after her divorce, as the occupancy right holder over an apartment located at Marsala Tita no. bb/3, in Lopare, in the Republika Srpska. The proceedings before the court to establish the occupancy right were initiated in November 1991 and finally completed in November 2002. The Supreme Court of the Republika Srpska rejected the applicant's request for review in February 2004. The applicant also requests alimony for her children and herself.

2. The case raises issues under Article 6 of the European Convention on Human Rights ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

3. On 6 June 2001 the application was submitted to the Chamber. The applicant requested the Chamber to issue a provisional measure that would make it possible for her to temporarily enter into possession of the apartment until a final decision in the dispute, and she requested the Chamber to order payment of alimony for her and her children.

4. On 4 September 2002 the Chamber decided to reject the applicant's request for issuance of a provisional measure.

5. On the same date the Chamber transmitted the application to the respondent Party for its observations on the admissibility and merits in relation to Article 6 of the Convention.

6. On 4 November 2002 the respondent Party submitted its written observations on the admissibility and merits. These written observations were transmitted to the applicant on 11 November 2002.

7. On 9 December 2002 the applicant submitted her reply to the observations of the respondent Party. This reply was transmitted to the respondent Party for its comments on 17 December 2002. The respondent Party has not submitted any comments.

8. The applicant submitted letters to the Chamber and Commission on 19 December 2002, 18 August 2003, 8 April 2004, and 17 June 2004. These letters were subsequently transmitted to the respondent Party for its comments.

9. The respondent Party replied to the Commission on 24 June 2004, asking the Commission to declare the case inadmissible, referring to case no. CH/02/10711, *Šarenac v. the Republika Srpska.*

10. The Commission deliberated on the admissibility and merits of the application on 10 September 2004, when it adopted the present decision.

III. FACTS

11. On 21 June 1991 the First Instance Court in Brčko issued a judgement divorcing the applicant and her husband, I.M. Their underage son, D.M., was given into the custody of the applicant by the same judgement. The judgement ordered that I.M. was obligated to pay alimony of 20% of his monthly salary for the benefit of the underage son, commencing on 21 June 1991 and continuing until the legal basis for alimony ceases to exist.

12. On 18 November 1991 the applicant initiated proceedings before the First Instance Court in Brčko, asking the court to establish that she was the occupancy right holder over the apartment in Lopare.

13. On 9 January 1992 the First Instance Court in Brčko, deciding upon the issue of the occupancy right, issued a procedural decision establishing the applicant as the occupancy right holder over the apartment. The occupancy right of I.M. terminated, and he was obligated to move out of the apartment when the applicant provided alternative accommodation for him.

14. On 17 November 1993 the Higher Court in Bijeljina, deciding upon the appeal of the applicant's ex-husband against the procedural decision of 9 January 1992, accepted the appeal, annulled the first instance procedural decision, and returned the case to the first instance court for renewal of the proceedings.

15. On 30 December 1993, in renewed proceedings, the First Instance Court in Lopare issued a procedural decision rejecting the applicant's proposal that she be deemed the occupancy right holder over the apartment. The same procedural decision established that I.M. was the occupancy right holder and that the occupancy right of the applicant terminated. It further determined that the applicant was obligated to move out of the apartment within 15 days from the date the procedural decision became valid. The applicant lodged an appeal against this procedural decision.

16. On 15 June 1994 the Higher Court in Bijeljina, deciding upon the applicant's appeal, issued a procedural decision rejecting the appeal and confirming the procedural decision of 30 December 1993. The applicant filed a request for review.

17. In 1994 the applicant and her son moved out of the apartment and went to live with her aunt in an apartment in Lopare.

18. On 31 December 1994 the Supreme Court of the Republika Srpska, deciding upon the applicant's request for review of the procedural decisions of 30 December 1993 and 15 June 1994, issued a procedural decision accepting the request for review, annulling both procedural decisions, and returning the case to the first instance court for renewal of proceedings.

19. On 5 February 1997 the First Instance Court in Bijeljina decided that the applicant remained an occupancy right holder over the apartment and that I.M. was obligated to accept the fact that the applicant was going to move in within 15 days of the date the procedural decision became valid. It was also established that I.M. was no longer an occupancy right holder over the apartment. A proposal for a provisional measure allowing the applicant to move immediately into the apartment was rejected.

20. On 27 August 1997 the District Court in Bijeljina, deciding upon I.M.'s appeal, issued a procedural decision accepting the appeal, annulling the procedural decision, and returning the case to the first instance court for renewal of proceedings.

21. On 11 December 1997 the First Instance Court in Bijeljina decided that the applicant remained an occupancy right holder over the apartment and that I.M. was obligated to accept the fact that the applicant was going to move in within 15 days of the date when the procedural decision became valid. It was also established that I.M. was no longer an occupancy right holder over the apartment. A proposal for a provisional measure allowing the applicant to move immediately into the apartment was rejected.

22. On 30 October 1998 the District Court in Bijeljina, deciding upon the appeal of I.M. lodged against the procedural decision of 11 December 1997, issued a procedural decision accepting the appeal, annulling the procedural decision, and returning the case to the first instance court for renewal of proceedings.

23. On 26 June 1999 the First Instance Court in Bijeljina issued a procedural decision rejecting the applicant's proposal that she should be determined to be the only occupancy right holder over the apartment. It was established that I.M. was an occupancy right holder and that the applicant's occupancy right terminated. It was decided that the applicant was obligated to move out of the apartment within 15 days of the date the procedural decision became valid. A request for issuance of a provisional measure allowing the applicant to immediately move into the apartment was rejected.

24. On 29 December 1999 the District Court in Bijeljina, deciding upon an appeal of the applicant lodged against the procedural decision of 26 June 1999, accepted the appeal and altered the procedural decision. The first Instance procedural decision was altered in the sense that the applicant remained an occupancy right holder over the apartment and that I.M. was no longer an occupancy right holder. A provisional measure obliging I.M. to permit the applicant to move into the apartment immediately was issued.

25. On 26 September 2000 the Supreme Court of the Republika Srpska, deciding upon I.M.'s request for review of the procedural decision of 29 December 1999, issued a procedural decision accepting the request, annulling the procedural decision of 29 December 1999, and returning the case to the District Court for reconsideration of the applicant's appeal against the 26 June 1999 procedural decision.

26. On 16 November 2000 the District Court in Bijeljina, again deciding upon the applicant's appeal lodged against the procedural decision of 26 June 1999, accepted the appeal, annulled the first instance decision, and returned the case for renewed proceedings.

27. On 29 March 2001 the First Instance Court in Bijeljina issued a procedural decision rejecting the applicant's proposal to be the only occupancy right holder over the apartment. It was established that I.M. was the occupancy right holder, that the applicant's right terminated, and that she was obligated to move out within 15 days of the date the procedural decision became valid. The applicant lodged an appeal against the procedural decision.

28. On 28 September 2001 the District Court in Bijeljina granted the applicant's appeal, revoked the First Instance Court's procedural decision of 29 March 2001, and returned the case to the first instance court for reconsideration.

29. On 11 March 2002 the First Instance Court in Bijeljina issued a procedural decision rejecting the applicant's motion. It was established that I.M. should remain registered as the occupancy right holder over the apartment, that the applicant's occupancy right terminated, and that she was obliged to move out of the apartment. The applicant filed an appeal.

30. On 15 November 2002 the District Court in Bijeljina rejected the applicant's appeal and confirmed the First Instance Court's procedural decision of 11 March 2002. The reasoning of the procedural decision states that it is true that the proceedings in this case lasted too long, but that the applicant herself contributed to that because she often requested the exemption of the presiding Judge. The District Court found that the applicant's complaints regarding the facts had no importance and that the First Instance Court had assessed all the circumstances that were important to determine the occupancy right over the apartment.

31. The applicant lodged a request for review of this decision. On 17 February 2004 the Supreme Court of the Republika Srpska decided to reject the applicant's request for review.

IV. RELEVANT LEGISLATION

A. The Law on Housing Relations

32. Article 20 of the Law on Housing Issues (Official Gazette of Socialistic Federal Republic of Yugoslavia ("OG SFRY"), nos. 14/74 and 12/87; Official Gazette of Republika Srpska ("OG RS"), nos. 13/93 and 23/93) provides, in relevant part, as follows:

> “If, in case of divorce, the former marital spouses, who are both occupancy right holders, do not agree on who will retain this capacity, a competent court shall decide on it in extrajudicial proceedings upon the request of one of them, keeping in mind the housing needs of both spouses, their children, and other persons who live with them, the reasons for dissolving the marriage, and other social circumstances.
>
> "A former spouse, who by a court’s decision stopped being the occupancy right holder, is obliged to move out of the apartment together with other users who constitute his or her family household, once an emergency accommodation is secured for him or her.
>
> "At the proposal of the allocation right holder, the competent court may decide that the marital spouse who because of the divorce keeps the occupancy right holder’s capacity over the apartment in question, shall move to another apartment offered by the allocation right holder, if that apartment satisfies the needs of the occupancy right holder who stays in the apartment and if it secures premises for emergency accommodation of the other marital spouse.”

B. The Law on Civil Proceedings

33. Article 353 of the Law on Civil Proceedings (OG SFRY, nos. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, and 35/91; OG RS, nos. 17/93, 14/94, and 32/94) provides, in relevant part as follows:

> "A judgment may be refuted for:
>
> 1. a substantial breach of the provisions of the Law on Civil Proceedings;
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> 2. wrong or incomplete establishment of the facts;
>
> 3. misapplication of the substantial law.
>
> "A judgment in default may not be refuted on the ground of wrongly or incompletely established facts.
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> "A judgment on the ground of admission and a judgment on the ground of renouncement may be refuted on the ground of a substantial breach of provisions of the civil procedures or because the admission or renouncement has been given on the ground of misinterpretation, under coercion, or because of fraud."

34. Article 354 provides as follows:

> "A substantial breach of the civil proceedings exists if the court, while conducting the proceedings, has not applied, or has wrongly applied, any provision of this law, and that was, or might have been, an influence in reaching a lawful and fair judgment.
>
> "A substantial breach of civil proceedings exists in the following cases:
>
> 1. If the court has been improperly composed, or if a judge, or a juror judge, who was not present at the main trial, has participated in reaching the judgment.
>
> 2. If a judge or juror judge who, according to the provisions of this law should have been exempted (Article 71, paragraph 1, points 1 through 5) or was exempted by the decision of the court, participated in reaching the judgment;

3. If a decision has been made on a claim in a dispute that is not within the jurisdiction of that court (Article 16);

4. If a decision has been made on a claim in a lawsuit that was filed after expiration of the legally prescribed time limit;

5. If the court has decided on claims that are within the substantive competence of a higher court of same kind, another court (Article 16), or if it had wrongly decided upon objection of the parties in the decision that was entered in the judgment that it has territorial competence, and a party appeals because of that;

6. If, in contravention of the provisions of this Law, the court has based its decision on improper dispositions of the parties (Article 3 paragraph 3);

7. If, in contravention of the provisions of this Law, the court has made a judgment in default, a judgment on the ground of admission, or a judgment on the ground of renouncement;

8. If one of the parties has, by an illegal action, particularly by failing to provide documents, not been given an opportunity to speak before the court;

9. If, in contravention with provisions of this Law, the court has rejected the request of a party to use its own language and alphabet in the proceedings, and the party appeals against it;

10. If the court reached the judgment without holding the main trial, and was obliged to hold the main trial;

11. If a person who cannot act as a party in the proceedings has acted as the plaintiff or the defendant, or if a party who was a legal person was not represented by an authorized person, or if a person incapable of participating in legal proceedings was not represented by a legal representative, or if the legal representative or the agent of the party did not have proper authorization to conduct the dispute or specific actions thereof, and those actions haven not been approved afterwards;

12. If a decision has been made in a dispute already in process before another court, or validly ruled on by another court, or the dispute has been resolved by a settlement before the court;

13. If, in contravention of the Law, the trial was not held in public;

14. If the judgment contains errors due to which the judgment cannot be examined, especially if the substance of the judgment is not understandable, or if it contradicts itself or the reasons that have led to it, or if the judgment does not contain reasoning at all, or if those reasons are unclear or contradictory, or if there is a contradiction in critical facts between what is stated in the reasons for the judgment about the content of documents or the record on statements given during the proceedings and those documents or records themselves."

35. Article 368 provides as follows:

"The court of second instance shall pass a judgment dismissing an appeal as ill-founded and confirm the first instance judgment if it has found that that there are no reasons for refuting the judgment or reasons that it must pay attention to '*ex officio*'."

36. Article 369 provides as follows:

"The court of second instance shall pass a decree to cancel the judgment of a court of first instance should it find that there was a significant violation of the rules of the proceedings

and it shall return the case to the same court of first instance or send it the competent court of first instance to hold a new main trial. The court of second instance shall, in its decree, decide which particular actions, affected by the violation of the proceedings, are to be cancelled.

"If provisions under Article 354, paragraph 2, items 3, 4 and 12 of this law have been violated in the proceedings before the court of first instance, the court of second instance shall cancel the first instance judgment and dismiss the appeal.

"If provisions under Article 354, paragraph 2, item 11 of this law have been violated in the proceedings before the court of first instance, the court of second instance shall, considering the nature of the violation, cancel the first instance judgment and return the case to the competent court of first instance or it shall cancel the first instance judgment and dismiss the lawsuit."

37. Article 370 provides as follows:

"The court of second instance shall also cancel a judgment of the court of first instance if it believes that proper establishment of facts requires holding a new trial before the court of first instance, unless it has decided to hold a trial itself.

"The court of second instance shall act in the same way if the party has not refuted the judgment because of wrongly or incomplete establishment of the facts, if while deciding on the appeal a reasonable doubt has arisen as to whether the facts on which the judgment of the court of first instance was grounded were properly established.

"If the court of second instance in a session of the Panel or at the trial finds that the proper determination of facts requires determination of new facts or adduction of fresh evidence, it shall annul the first instance judgment and return the case to the court of first instance for retrial."

38. Article 373 provides as follows:

"The court of second instance shall alter the judgment of the first instance:

1. if, on the basis of a trial, the court has established the facts differently from the facts established by the first instance judgment;

2. if the court of first instance has wrongly assessed documents or indirectly presented evidence, and the decision of the court of first instance is based exclusively on such evidence;

3. if the court of first instance has drawn an incorrect conclusion on the existence of other facts and the judgment was based on such facts;

4. if it believes that the facts in the original judgment were properly established, but the court of first instance wrongly applied the substantive law."

39. Article 385 provides as follows:

"A revision may be filed in the case of:

1. a substantial violation of the provisions governing civil proceedings under Article 354, paragraph 2 of this law, unless the violation is related to territorial jurisdiction (Article 354, paragraph 2, item 5), if the court of first instance has passed a judgment without holding a main trial and it was obliged to hold a main trial (Article 354, paragraph 2, item 10), if a decision was made on a claim for which the proceedings are pending (Article 354, paragraph 2, item 12) or if, in contravention of the law, the public was excluded from the main trial (Article 354, paragraph 2, item 13).

2. a substantial violation of the provisions governing civil proceedings under Article 354, paragraph 1 of this law that was made during the proceedings before the court of second instance;

3. incorrect application of the substantive law."

"If the claim has been exceeded the revision may be filed only if the violation was made only in the proceedings before the court of second instance.

"A revision on the basis of wrongly or incompletely established facts may not be filed.

"A revision may be filed against a second instance judgment confirming a judgment based on an admission only for the reasons stated in paragraph 1, items 1 and 2 and paragraph 2 of this Article."

40. Article 393 provides as follows:

"The court of revision shall adjudicate the revision as ill-founded if it determines that the reasons for which the revision has been filed do not exist, or reasons that it must pay attention to “ex officio” do not exist.”

41. Article 394 provides as follows:

"If it determines that there is a substantial violation of the provisions of the procedural rules under Article 354, paragraphs 1 and 2 of this law because of which a revision may be filed, except for the violation set forth under paragraphs 2 and 3 of this Article, the court of revision shall pass a decree cancelling in whole or in part the judgments of the courts of first and second instance, and return the case for retrial to the same or other Panel of the court of first or second instance, or to some other competent court.

"If in the proceedings before the courts of first and second instance a violation has been made under Article 354, paragraph 2, items 3, 4 and 12 of this law, except if it has been decided on a dispute already tried before another court, the court shall pass a decree cancelling the decision and dismiss the lawsuit.

"If, in the proceedings before the courts of first and second instance, a violation has been made under Article 354, paragraph 2, item 11 of this law, the court shall, considering the nature of the violation, act under the provisions of paragraph 1 or 2 of this Article."

42. Article 395 provides as follows:

"If the court of first instance established an incorrect application of substantive law, it shall accept the revision by its judgment and alter the refuted judgment."

43. Article 397 provides as follows:

"If there is a reasonable doubt during deciding upon the revision filed in the dispute under Article 382 paragraph 4 item 6 of this law that the facts, on which the refuted decision was based, have been properly established, the court of revision shall pass a decree cancelling the refuted decision, and if needed, cancel the decisions of the courts of lower instance and return the case for a new trial before the same or other Panel of the court of first or second instance, or another competent court."

44. Article 400 provides as follows:

"The parties may also file a revision against the decree of a court of second instance by which the proceedings have been finally concluded.

"The revision against a decree under paragraph 1 of this Article is not allowed in disputes in which the revision of a final judgment would not be allowed (Article 382, paragraphs 2 and 3).

> "A revision is always allowed against a decision of a court of second instance by which the appeal is being dismissed, or by which a decree of the court of first instance dismissing the appeal is being confirmed.
>
> "In the actions of the revision against the decree, provisions of this law related to the revision against a judgment shall be accordingly applied."

45. A new Law on Civil Procedure entered into the force on 1 August 2003 (OG RS, nos. 58/03 and 85/03). Article 456 of the new Law provides as follows:

> "If a first instance decision concluding the proceedings before the first instance court has been issued prior to the date of the beginning of the application of this Law, further proceedings shall be conducted in accordance with regulations that were then in force."

V. COMPLAINTS

46. The applicant alleges that her rights have been violated because she has not been able to live in the apartment with her two underage children, but has lived in an uninhabitable apartment with her aunt. She alleges that the proceedings before the domestic courts have taken too long, and the health of her family has been impaired because the dispute with her ex-husband has been going on for so long. She complains that when the proceedings were finally completed, the court had wrongly assessed the facts pertaining to her case.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the admissibility

47. In its observations on the admissibility and merits dated 4 November 2002 the respondent Party asserts that the application does not meet the admissibility requirements under Article VIII(2)(a) in relation to the exhaustion of domestic remedies, and it proposes that the Chamber reject the application as inadmissible. The respondent Party does not state specifically why it considers the application inadmissible for non-exhaustion of domestic remedies.

2. As to the facts

48. In its written observations, the respondent Party considers that the facts are as stated by the applicant, i.e. that the "domestic courts have neither solved the issue of the apartment nor of alimony." The respondent Party points out, however, that by the judgment on divorce and the payment of alimony the amount of 20 percent of I.M.'s salary was ordered, and the procedural decision of 29 March 2001 ordered payment of 30 percent of the salary.

3. As to the merits

49. The respondent Party considers that, on the merits of the application, with respect to the alleged violation of Article 6 paragraph 1 of the Convention, this Article cannot be applied in this case because the same Article provides "in the determination of his civil rights and obligations … within a reasonable time...." The respondent Party points out that Article 6 relates to a violation of civil rights and not private rights, and it cites the European Court's view in the case of *Ringeisen against Austria* (Eur. Court HR, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13).

50. The respondent Party asserts that the European Court held that Article 6 paragraph 1 is limited to the right to a fair trial in pending proceedings or the right of access to a court. The

respondent Party considers that it is obvious that the applicant's access to court has been secured, as well as the right to a fair trial. This is confirmed, the respondent Party argues, by the numerous court proceedings and by the quashing of lower instance decisions by higher courts.

51. In relation to the notion of a "reasonable time", the respondent Party considers that a definition of this notion cannot be formed abstractly, but must be assessed in light of the circumstances of each case. It invokes the European Court's stance that the interests of a person concerned with the fastest possible decision must be weighed in relation to the requirements of thoroughly conducted proceedings. In the assessment of the reasonableness of a period of time, three criteria are applied: the complexity of the case, the conduct of the applicant, and the conduct of the authorities. The respondent Party points out that the court decisions in the present case were issued in 1992, during the period of the armed conflict. The respondent Party cites the case of *Ciricosta and Viola* (Eur. Court HR, *Ciricosta and Viola v. Italy*, judgment of 4 December 1995, Series A no. 337-A), where the European Court established that a period of 15 years fulfilled the reasonable time requirement under Article 6 paragraph 1 of the Convention. The respondent Party also proposes that the Chamber reject the application as ill-founded on the merits.

4. As to the compensation claim

52. With respect to the applicant's compensation claim, the respondent Party considers the claim to be absolutely ill-founded.

B. The applicant

53. In her reply to the respondent Party's written observations, the applicant states that no fair trial has been conducted in the proceedings before the domestic courts because all the evidence presented was in her favour but the decisions were issued in favour of the opposite party. She points out that the First Instance Court's procedural decision in Lopare of 30 December 1993 was issued at the first hearing without hearing any evidence.

54. Regarding the "reasonable time" requirement, the applicant points out that between the issuance of the procedural decisions in the court proceedings of the first instance court and the second instance court a period of eight or more months elapsed, which in no case can be considered a reasonable time. She also complains that after the Supreme Court of the Republika Srpska granted review on 31 December 1994, the renewal of proceedings started only in 1996, two years later.

55. The applicant generally points to the bad condition of the Republika Srpska judiciary and to judges who fail to respect fundamental principles of fairness, while domestic organs do nothing to remove them from duty.

56. The applicant points out that the respondent Party's stand with respect to her compensation claim is entirely in contradiction with the real factual state in the case. She considers her compensation claim justified due to the length of the proceedings and the legal costs and expenses incurred, and because of the physical and mental trouble that she suffered for 11 years due to the duration of the proceedings.

57. After the final decision was issued, the applicant complains that the Supreme Court of the Republika Srpska misapplied the law and issued its decision on the basis of updated facts that had changed in the meantime.

VII. OPINION OF THE COMMISSION

A. Admissibility

58. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided the application by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the application. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant's case, from those of the Chamber, except for the composition of the Commission.

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

1. As to the length of the court proceedings

60. The Commission will first address the question of whether it is competent *ratione temporis*. In accordance with generally accepted principles of law, the Agreement cannot be applied retroactively. Accordingly, the Commission is not competent to consider events that took place prior to 14 December 1995. The Commission may, however, consider relevant evidence of prior events as background information to events occurring after 14 December 1995 (*see* case no. CH/97/67, *Sakib Zahirović v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, decision on admissibility and merits of 10 June 1999, paragraphs 104-06, Decisions January–July 1999).

61. The court proceedings were initiated in 1991. In 1992 the First Instance Court issued its first procedural decision. In 1993 the Higher Court issued a judgment confirming the First Instance Court decision. The Supreme Court, deciding upon the request for review, issued a decision annulling both decisions and ordering a retrial. The First Instance Court, in accordance with the instructions given by the Supreme Court, issued a decision in 1997.

62. The court proceedings started prior to 14 December 1995, before the Agreement entered in to force. However, the proceedings have continued for over eight years after that date. Thus, insofar as the applicant's claims relate to conduct by the respondent Party that continued after 14 December 1995, they fall within the Commission competence *ratione temporis*.

63. The respondent Party also argues that the applicants' complaints under Article 6 of the Convention are not applicable. According to the respondent Party's allegations, this case does not concern the "civil rights" of the applicant, but rather it is a private dispute between private parties. Noting, however, that the pending proceedings concern the applicant's attempt to obtain an occupancy right over the apartment in Lopari, based on the Law on Housing Relations, the Commission finds that these proceedings do in fact relate to the determination of her "civil rights and obligations", within the meaning of Article 6, paragraph 1 of the Convention. Accordingly, that provision is applicable to the proceedings in the present case. In these circumstances, Commission finds that Article 6 of the Convention is applicable and that the respondent Party's objection to admissibility on this ground cannot be upheld.

2. As to the applicant's other claims

64. The applicant complains that "the courts in Republika Srpska have not decided about alimony". The Commission notes, however, that the First Instance Court in Brčko, in a divorce proceeding, issued a decision ordering the applicant's ex-husband to pay alimony of 20 percent of his monthly salary for their underage son so long as legal conditions for paying alimony existed. Subsequently, deciding upon the request of the applicant, the First Instance court in Bijeljina issued a decision increasing the amount from 20 percent to 30 percent, which the applicant's ex-husband is obliged to pay. Furthermore, in all court decisions deciding about the occupancy right,

the court analysed the financial situation of the applicant and I.M. as one important fact for issuing a decision, and it found that alimony had been paid by the applicant's ex-husband. In the proceedings before the domestic courts, the applicant has never denied the fact that alimony has been paid. Therefore, the Commission finds that the application does not disclose any appearance of a violation of the rights and freedoms guaranteed under the Agreement in this respect. It follows that the application, in this part, is manifestly ill-founded within the meaning of Article VIII(2)(c) of the Agreement. The Commission therefore decides to declare this part of the application inadmissible.

65. The Commission notes that the applicant further complains that during the proceedings, the First Instance Court, District Court, and the Supreme Court violated her rights under Article 6 of the Convention. The applicant requests the Commission to review all the court decisions and to issue a decision ordering the respondent Party to grant the apartment to her. The applicant complains that the court issued a decision on the basis of facts that appeared 12 years after the proceedings started. According to the applicant, the court wrongly assessed the facts pertaining to her case and misapplied the law. Article 6 guarantees the right to a fair hearing. The Chamber stated on several occasions, however, that it had no general competence to substitute its own assessment of the facts for that of the national courts (*see, e.g.*, case no. CH/99/2565, *Banović*, decision on admissibility of 8 December 1999, paragraph 11, Decisions August-December 1999, and case no. CH/00/4128, *DD "Trgosirovina" Sarajevo (DDT)*, decision on admissibility of 6 September 2000, paragraph 13, Decisions July-December 2000). The same applies to the Commission. There is no evidence that the court failed to act fairly as required by Article 6 of the Convention. It follows that the application is manifestly ill-founded within the meaning of Article VIII(2)(c) of the Agreement in this respect. The Commission therefore decides to declare this part of the application inadmissible.

3. Conclusion as to admissibility

66. The Commission finds that no other grounds exist for declaring the case inadmissible. Accordingly, the Commission concludes that the application is admissible in respect of the applicant's claim regarding the length of the judicial proceedings, and inadmissible in all other respects.

B. Merits

67. Under Article XI of the Agreement, the Commission 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 and the other international agreements listed in the Appendix to the Agreement.

1. Article 6 of the Convention

68. The applicant complains about the length of the proceedings before the domestic courts in the Republika Srpska.

69. 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...."

70. The first step in establishing the length of the proceedings is to determine the period of time to be considered. In November 1991, the applicant initiated proceedings before the First Instance Court in Brčko, requesting the court to determine that she was the occupancy right holder over the apartment. On 9 January 1992 the First Instance court issued a decision. The final decision in the

lower domestic courts was issued by the District Court in Bijeljina on 15 November 2002, i.e. 11 years later. Thereafter, the Supreme Court of the Republika Srpska rejected the applicant's request for review No. 17 February 2004, more that 12 years after the proceedings started. Thus, the regular court proceedings lasted for nearly nine years after the Agreement entered into force on 14 December 1995.

71. The reasonableness of the length of proceedings is to be assessed having regard to the criteria laid down by the Commission, 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, with reference to the corresponding case law of the European Court of Human Rights).

72. The Commission notes that the issue in the underlying case is the establishment of the occupancy right over an apartment between former spouses. The case does not appear to the Commission to be so complex as to require more than eleven years of regular court proceedings, including nearly seven years after the Agreement entered into force.

73. The courts in this case issued eighteen decisions. Six of seven decisions issued by the first instance court were annulled by decisions of the second instance court. The second instance court issued eight decisions, and in five decisions ordered renewal of the proceedings. Two decisions of the second instance court were annulled by decisions of the Supreme Court. Finally, the Supreme Court, as the highest court deciding upon an extraordinary remedy, request for review of the proceedings, issued three decisions. In two of them the Supreme Court ordered renewal of the proceedings.

74. The Commission considers that the conduct of the courts in Republika Srpska, in what appears to be an uncomplicated dispute about an occupancy right, were primarily responsible for the fact that the proceedings in the applicant's case lasted for so long. As to the conduct of the applicant, the Commission cannot find any evidence that her actions served to prolong the proceedings for such a long time period. The Commission concludes that the length of proceedings has been unreasonably long and that the Republika Srpska and its courts are responsible for this.

75. In view of the above, the Commission finds that the respondent Party violated Article 6, paragraph 1 of the Convention because the proceedings in the applicant's case were not concluded within a reasonable time.

2. Conclusion as to the merits

76. In summary, the Commission finds that the respondent Party has violated the human rights of the applicant protected by Article 6 paragraph 1 of the Convention.

VIII. REMEDIES

77. Under Article XI(1)(b) of the Agreement, the Commission must next 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 Commission shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

78. The Chamber notes that it has found a violation of the applicant's rights protected by Article 6, paragraph 1 of the Convention with regard to the length of proceedings.

79. The applicant has requested that the Commission order the respondent Party to pay compensation for court cost and expenses and living expenses she incurred in the amount of 35,000 Convertible Marks ("KM", *konvertibilnih Maraka*). The applicant also requests compensation for mental suffering and medical treatment in the amount of 15,000 KM.

80. The Commission considers it appropriate to award a sum to the applicant in recognition of the sense of injustice she has suffered as a result of the respondent Party's failure to have her case decided within a reasonable time.

81. Accordingly, the Commission will order the Republika Srpska to pay to the applicant the sum of 3,000 (three thousand) Convertible Marks (*Konvertibilnih Maraka*, “KM”) in non-pecuniary damages in recognition of her suffering as a result of her inability to have her case decided within a reasonable time.

82. Additionally, the Commission will award simple interest at an annual rate of 10% (ten percent) on the sum awarded to be paid to the applicant in the preceding paragraph. The interest shall be paid as of one month from the date on which this decision is received on the sum awarded or any unpaid portion thereof until the date of settlement in full.

IX. CONCLUSIONS

83. For the above reasons, the Commission decides:

1. unanimously, that the application is admissible under Article 6 of the European Convention on Human Rights in respect of the length of the judicial proceedings insofar as it relates to events occurring after 14 December 1995;

2. unanimously, to declare the remainder of the application inadmissible;

3. unanimously, that the Republika Srpska has violated the rights of the applicant as guaranteed by Article 6, paragraph 1 of the Convention because the proceedings in her case were not concluded within a reasonable time, the Republika Srpska thereby being in breach of Article I of the Agreement;

4. unanimously, to order the Republika Srpska to pay the applicant, no later than one month after the date of receipt of this decision, the total sum of 3,000 (three thousand) Convertible Marks (*Konvertibilnih Maraka*, “KM”) as compensation for non-pecuniary damages;

5. unanimously, to dismiss the remainder of the applicant’s compensation claims;

6. unanimously, to order the Republika Srpska to pay simple interest at the rate of 10% (ten percent) per annum over the sum awarded in conclusion No. 4 above or any unpaid portion thereof from the due date for such payment until the date of settlement in full; and,

7. unanimously, to order the Republika Srspka to report to the Commission, or its successor institution, no later than two months from its receipt of this decision, on the steps taken by it to comply with the above orders.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission