



DECISION ON ADMISSIBILITY AND MERITS
(delivered on 7 March 2003)

Case no. CH/00/3476

M.M.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 3 March 2003 with the following members present:

Mr. Mato TADIĆ, President
Mr. Jakob MÖLLER
Mr. Giovanni GRASSO
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI

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 is a citizen of Bosnia and Herzegovina of Serb origin, married to a citizen of Bosnia and Herzegovina of Croat origin. Before the armed conflict in Bosnia and Herzegovina she worked as a teacher at the "Podhum" primary school, which belongs to the central school "Fra Lovro Karaula" in Livno, now Canton 10 of the Federation of Bosnia and Herzegovina. During the war she was told by members of a paramilitary force that she could not work at school any more because of her origin. After the cessation of the war the applicant requested to resume her work but was not successful. She alleges that this is due to discrimination on the ground of her ethnic origin.
2. The case primarily raises the issue of discrimination in the enjoyment of the right to work and related rights protected by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR") and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 5 January 2000 and registered on the same day.
4. On 13 May 2000 the Chamber decided to transmit the case to the respondent Party for observations on the admissibility and merits.
5. The respondent Party submitted its observations on 24 July and 6 December 2000, 12 March and 9 December 2002 and 30 January and 27 February 2003. The applicant submitted observations in reply on 19 October 2000, 11 January and 14 March 2001, 9 July 2002 and 14 and 20 January 2003.
6. The Chamber considered the admissibility and merits of the case on 13 May 2000, 10 January, 4 February and 3 March 2003. The Chamber adopted the present decision on the latter date.

III. FACTS

7. The facts of this case are not in dispute among the parties. In particular the facts summarised in paragraphs 8 and 9 are based on the applicant's allegations, which have remained undisputed.
8. The applicant has been a teacher since 1968 and employed by the "Podhum" primary school, which belongs to the central school "Fra Lovro Karaula" in Livno (the employer), since 1990. She worked as a teacher until 11 November 1992, when four Croat paramilitary men came to school and, after having threatened and humiliated her, told her that she could not work at the school any more because of her Serb origin. After that she was not allowed to come to work any more. The applicant received 30% of her salary until January 1994, when all payments stopped. She has never received any decision on her working status by the employer. The applicant remained in Livno during the war in Bosnia and Herzegovina.
9. The applicant requested the employer to enable her to resume work both during the war and after the war, but the employer has not allowed her to do so. In the meantime, the employer, which lacked qualified employees, hired at least 12 persons to work as teachers. The great majority of the new employees had insufficient or inappropriate qualifications. They were of Croat origin.
10. In 1998 the applicant filed a civil action before Municipal Court in Livno requesting the Court to establish that she is in a labour relation with the employer and requesting to resume her work with the employer. On 22 March 1999 the Municipal Court in Livno (Općinski sud u Livnu) issued a decision in her favour. The Public Attorney, who represents the school, appealed against this decision to the Cantonal Court in Livno (Županijski sud u Livnu). On 8 July 1999 the Cantonal Court in Livno annulled the first instance decisions and decided to send the case back to the Municipal Court.

11. On 17 December 1999 the Municipal Court issued a new decision in applicant's favour. In its judgement the Court stated:

“VERDICT

It is established that the plaintiff is employed with the defendant and the defendant is obliged to enable her to return to work and to acknowledge all the rights on the basis of her employment within 15 days after the verdict becomes valid...

R e a s o n i n g

The plaintiff claims the following: that she has been employed with the defendant since 1968, that she was removed from her position on 10 November 1992 by four armed soldiers, and on the basis of a war time decision regulating labour relations, the director orally informed her that she was placed on the waiting list.

The plaintiff claims that she requested the defendant, both during the war and after the war, to return her job to her, requests that the defendant ignored.

In response to the allegations, the defendant [the director of the school] claims the following: that the plaintiff was placed on the waiting list due to the war conditions and that her labor relation was not terminated, nor has any procedural decision terminating her labor relation been issued.

The Cantonal Public Attorney claims the following: that the plaintiff's labor relation was terminated on 10 November 1992 because she was removed from her position by the soldiers and was not placed on the waiting list, and after she was removed from her position she neither complained to the school, nor filed a lawsuit within the legally prescribed time limit. Despite that, the plaintiff received compensation for her salary until 1 January 1994, after which she stopped receiving that compensation and again did not complain to the school or file a lawsuit...

On the basis of the evidence, the following facts are indisputable:

The plaintiff was employed with the defendant since 1968. The plaintiff did not, of her own will, leave or resign from her place of employment.

The plaintiff was completely illegally removed from her position by four soldiers and without any decision of the competent organ. The defendant party does not provide adequate protection to the plaintiff but rather placed the plaintiff on the waiting list in accordance with the war time decision regulating labour relations. The plaintiff accepted this solution and, therefore, her labor relation was suspended, as is prescribed by the above-mentioned legal act.

In accordance with that, the Cantonal Public Attorney, objects that the plaintiff has not complained of the violation of her rights, nor filed any lawsuit, because she accepted the director's decision based on the war time decision regulating labour relations. The director had sufficient grounds to take the decision to place her on the waiting list, he only failed to put the decision in writing...

The established facts clearly show that the plaintiff's labor relation was suspended [in the meaning : put on stand by] based upon the legal act which was valid at the time of her suspension and, during the course of the proceedings, the defendant has not demonstrated that the plaintiff's labor relation was terminated in any legally prescribed way.

Under Article 144 of the Law on Labor of the Federation of BiH, the plaintiff is entitled to request from the defendant to be reinstated into her job, and under the same Article the defendant is obliged to do so and, therefore, the court decided as above..."

The Public Attorney appealed again against the second judgement of 17 December 1999, to the Cantonal Court.

12. On 4 July 2000 the Cantonal Court issued a new decision annulling the first instance judgement and sending the case back to the first instance court again. In its procedural decision the Cantonal Court stated:

“The appeal is granted, the contested judgement annulled and the case returned to the first instance court for reconsideration.

R e a s o n i n g

...The first instance court did not in any way establish the status of the plaintiff's labor relation with the defendant party, and the correct application of the substantive law depends directly on this fact. This court is responsible for the application of the substantive law *ex officio* by virtue of Article 347 of the Law on Civil Procedure. The first instance court failed to apply, in issuing the judgement, Article 143 of the Federal Labor Law (OG of F BiH no. 43/99) which should and must be applied based on the status of the case file and an Instruction of the Federal Minister of Social Policy, Displaced Persons and Refugees which was published in the Official Gazette of FBiH no. 17/00. Any earlier regulations can not be applied to regulate the plaintiff's legal labor status, thus the first instance court incorrectly applied Article 144 of the Federal Labor Law when neither the facts nor legal regulations support such a finding...”

13. On 27 December 1999, after the Law on Labour (see paragraph 22, below) entered into force, the applicant requested the employer to be reinstated into working and legal status. The employer has never responded to this request. On 29 November 2000 according to the amended Article 143a of the Law, the applicant complained to the Cantonal Commission for Implementation of the Article 143 of the Law on Labour (hereinafter: the Cantonal Commission).

14. On 8 May 2001, acting for the third time in the applicant's case, the Municipal Court in Livno issued a decision suspending proceedings and relinquishing its jurisdiction in favour of the Cantonal Commission. The applicant submitted an appeal against this decision. She argued that the court should have decided on her request for reinstatement into work. The Cantonal Court rejected the appeal and the case was transferred to the Commission.

15. On 27 November 2002 the Cantonal Commission issued a procedural decision establishing the following:

1.The appeal is accepted.

2.M. M. from Livno is recognized the status of an employee on the waiting list pursuant to Article 143 of the Law on Labour.

3.The employer, Primary School "Fra Lovro Karaula", is ordered to issue a decision on the complainant's working and legal status, within 15 days from the effective date of this procedural decision

16. On 18 December 2002 the employer filed an appeal against the mentioned decision to the Federal Commission. The proceedings are still pending.

17. On 14 January 2003, the employer issued a procedural decision reinstating the applicant into work, but only for the period while another employed teacher is absent due to her maternity leave.

IV. RELEVANT LEGAL PROVISIONS

A. The Law on Labour Relations

18. The Law on Labour Relations was published in the Official Gazette of the Republic of Bosnia and Herzegovina (hereinafter "OG RBiH") no. 21/92 of 23 November 1992. It was passed as a Decree with force of law, and was later confirmed by the Assembly of the Republic (OG RBiH, no. 13/94 of 9 June 1994).

19. The Law contained the following relevant provisions:

Article 7:

“An employee whose work becomes temporarily unnecessary due to a reduced amount of work during the state of war or in case of immediate danger of war may be put on the waiting list no longer than until the cessation of these circumstances.

An employee on the waiting list shall be entitled to monetary compensation in the amount defined by the director's or the employer's decision in accordance with material assets of the company or other legal person, i.e. the employer...

Article 10:

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

if he or she lives or if his or her working place is on occupied territory or on territory where fighting is taking place.

if taken prisoner...

if there is no information available of his/her whereabouts...

...

Unpaid leave can last until the termination of the circumstances mentioned above, if the employee demonstrates, within 15 days after the termination of these circumstances, that he or she was not able to come to work earlier. During the unpaid leave all rights and obligations of the employee under the employment are suspended.”

B. The Law on Fundamental Rights in Labour Relations

20. 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 (OG RBiH no. 2/92).

21. Article 23 paragraph 2 of the Law provides that:

“A written decision on the realisation of a worker's individual rights, obligations and responsibilities shall be delivered to the worker obligatorily.”

C. The Law on Labour

22. The Law on Labour (OG FBiH no. 43/99) entered into force on 5 November 1999. The Law was amended by the Law on Amendments to the Law on Labour (OG FBiH no. 32/00), which entered into force on 7 September 2000, with the particular effect that certain new provisions, including Articles 143a, 143b and 143c, were inserted.

23. Article 5 of the Law on Labour provides that:

“(1) A person seeking employment, as well as a person who is employed, shall not be discriminated against on the basis of race, colour, sex, language, religion, political or other opinion, ethnic or social origin, financial situation, birth or any other circumstance, membership or non-membership in a political party, membership or non-membership in a trade union, and physical or mental impairment in respect of recruitment, training, promotion, terms and conditions of employment, cancellation of the labour contract or other issues arising out of labour relations.

(2) Paragraph 1 of this Article shall not exclude the following differences:

1. which are made in good faith based upon requirements of particular a job;
2. which are made in good faith based on incapability of a person to perform tasks required for a particular job or to undertake training required, provided that the employer or person securing professional training has made reasonable efforts to adjust the job or the training which such person is on, or to provide suitable alternative employment or training, if possible;
3. activities that have as an objective the improvement of the position of persons who are in unfavourable economic, social, educational or physical position.

(3) In the case of a breach of paragraphs 1 and 2 of this Article:

1. Persons whose rights are violated may submit a complaint before the competent court in relation to the infringement of their rights;

2. If the complainant presents obvious evidence of discrimination prohibited by this Article, the defendant is obliged to present evidence that such differential treatment was not made on the discriminatory grounds;

3. If the court finds that the allegations of the plaintiff are well-founded, it shall order the application of the provisions of this Article, including employment, reinstatement to a previous position or restoration of all rights arising out of the labour contract.”

24. Article 143 of the Law on Labour provides that:

“(1) An employee who has been on the waiting list as of the effective date of this law shall retain that status no longer than six months of this date [5 May 2000], unless the employer invites the employee to work before the expiry of this deadline.

(2) An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law, addressed in written form or directly the employer for the purpose of establishing the legal and working status, and has not accepted employment from another employer during this period, shall also be considered an employee on the waiting list.

(3) While on the waiting list, the employee shall be entitled to compensation in the amount specified by the employer.

(4) If an employee on the waiting list referred to in paragraphs 1 and 2 of this Article is not requested to resume work within the deadline referred to in paragraph 1 of this Article, his or her employment shall be terminated with a right to severance pay which shall be established according to the average monthly salary paid at the level of the Federation on the date of the entry into force of this Law, as published by the Federal Statistics Institute.

(5) The severance pay referred to in paragraph 4 of this Article shall be paid to the employee for the total length of service (experience) and shall be established on the basis of the average salary referred to in paragraph 4 of this Article multiplied with the following coefficients:

Experience	Coefficient
- up to 5 years	1.33
- 5 to 10 years	2.00
- 10 to 20 years	2.66
- more than 20 years	3.00.

...

(8) If the employee's employment is terminated in terms of paragraph 4 of this Article, the employer may not employ another employee with the same qualifications or educational background within one year, except the person referred to in paragraphs 1 and 2 of this Article, if that person is unemployed.”

Article 145 of the Law on Labour provides that:

“Proceedings to exercise and protect the rights of employees, which were instituted before this law has come into effect, shall be completed according to the regulations applicable on the territory of the Federation before the effective date of this law, if this is more favourable for the employees.”

25. In the Law on Labour, a new Article 143a was added that reads as follows:

“(1) An employee believing that his employer violated a right of his arising from paragraph 1 and 2 of Article 143, may within 90 days from the entry into force of the Law on Amendments to Labour Law, introduce a claim to the Cantonal Commission for Implementation of Article 143 of the Law on Labour (hereinafter the “Cantonal Commission”), established by the Cantonal Minister competent for Labour Affairs (hereinafter the “Cantonal Minister”).

(2) The Federal Commission for Implementation of Article 143 (hereinafter the 'Federal Commission'), which is established by the Federal Minister, shall decide on the complaints against the procedural decisions of the Cantonal Commission.

(3) In case the Cantonal Commission is not performing the tasks for which it is established, the Federal Commission shall take over the jurisdiction of the Cantonal Commission.

(4) If a procedure pertaining to the rights of the employee under paragraphs 1 and 2 of Article 143 has been instituted before a Court, this Court shall refer the case to the Cantonal Commission, and issue a decision on suspension of the procedure.”

26. The new Article 143c provides as follows:

“The Federal/Cantonal Commission may:

1. hear the employee, employer and their representatives;
2. summon witnesses and experts;

3. request appropriate authority organs and employers to submit all relevant information.

Decisions of the Federal/Cantonal Commission shall be:

1. final and subject to the court's review in accordance with the law;
2. legally based;
3. transmitted to the applicant within 7 days."

27. The Law on Amendments to the Law on Labour furthermore introduced the following Articles 52, 53 and 54:

"Article 52

This Law shall not affect contracts and payments done between an employer and his employee in the application of Article 143 of the Law on Labour prior to the date of entry into force of this Law.

Article 53

This Law shall not affect final decisions issued by the Court in the period prior to the entry into force of this Law in application of Article 143 of the Law on Labour.

Article 54

Procedures of realisation and protection of employees' rights initiated prior to the entry into force of this Law shall be completed according to the regulations applicable on the territory of the Federation prior to the entry into force of this Law, if it is more favourable to the employee, with the exception of Article 143 of the Law on Labour."

D. The Law on Civil Proceedings

28. Article 426 of the Law on Civil Proceedings (OG FBiH no. 42/98) states that in disputes concerning employment, the Court shall have particular regard to the need to resolve such disputes as a matter of urgency.

E. The Law on Primary Education of Canton 10

29. The Law on Primary Education of Canton 10 (Official Gazette of Canton 10, no.4/98 and 6/98) provides as follows:

Article 10

(1) A primary school can be founded by the assembly of the Canton and by the municipalities...

(3) Under the conditions established in Article 13....a primary school can be established by physical persons or religious communities, but with previous consent of the Ministry [competent for Education].

Article 13

(3) A primary school can commence working when the Ministry establishes that all the conditions... have been met.

Article 77

(1) A primary school is ruled by a director and a school board.

(2) ...director...

- organizes the work of the school and...is responsible for the legality of the school's work;...
- issues final decisions on hiring and terminating the labour relations of the employees of the school...

Article 78

(1) Director of primary school... is appointed by the school board, with [previous] consent of the founder and Minister [for education]

(3) ...Minister will appoint the director of the school if he/she does not grant the consent to the proposal [of the school board]

Article 79

(3) The founder elects more than half of members of the School Board...

(4) ...decisions are being made by the votes of majority of members of the school board

V. COMPLAINTS

30. The applicant alleges a violation of her right to a fair hearing under Article 6 of the European Convention on Human Rights (hereinafter: the Convention), of the right to respect for private and family life as guaranteed by Article 8 of the Convention, as well as the violation of her right to peaceful enjoyment of her possessions under Article 1 of Protocol No. 1 to the Convention due to the loss of salaries and contributions for the Pension and Social Fund. She further complains about discrimination in the enjoyment of her right to work due to her ethnic origin and refers to Article II(2)(b) of the Agreement in conjunction with the Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 5 of the International Convention on Elimination of All Forms of Racial Discrimination (CERD). She requests reinstatement into her former working position.

31. The applicant further alleges that administrative and judicial proceedings are ineffective in that no final decision was rendered in the dispute.

VI. SUBMISSIONS OF THE PARTIES

A. The Respondent Party

1. As to the facts

32. The respondent Party points out that the applicant's labour relation was not terminated on 10 November 1992, but she was orally put on the waiting list. She received the compensation for the salary until 1 January 1994. It also states that the applicant filed the requests to the Courts and to the Cantonal Commission and that the First Instance Court has issued two decisions in the applicant's favour which were annulled by the Cantonal Court in Livno (Županijski sud u Livnu). The respondent Party, basically admits the fact that the school hired new employees with insufficient or inappropriate qualifications, whose names were listed by the applicant. All but two of them are of Croat origin, while the respondent Party submits that it has no information as to the origin of the remaining two.

2. As to the admissibility

33. The respondent Party argues that the applicant did not exhaust domestic remedies as the procedures are still pending before the competent domestic organs (i.e. the Federal Commission).

34. In its additional observations of 6 December 2000, the respondent Party also argues that the application should be declared inadmissible *ratione personae* because, as it alleges, the employer, "the Primary School "Fra Lovro Karaula" in Livno, where the applicant worked, is not a Party to Annex 6 nor an official or organ of the respondent Party, nor Canton, Municipality, nor any individual acting on the authority of such official or organ." However, in the additional information of 27 February 2003 the respondent Party concedes that the founder of the mentioned school is Livno Municipality.

35. The respondent Party also considers the application inadmissible *ratione temporis*, and points out that the Chamber is not competent to grant compensation in regard to the pecuniary damage arisen from the events before the Agreement entered into force.

3. As to the merits

36. With respect to Article II(2)(b) of the Agreement, the respondent Party contests the allegations, because, to its opinion, there is no evidence of discriminatory treatment of the applicant. As a proof of that allegation the respondent Party notes that the applicant as an employee on the waiting list was provided with compensation until 1 January 1994. The respondent Party states that, the applicant's allegations which are not supported by any further arguments, can not be considered as evidence of discrimination. But, in its latest observations the respondent Party confirmed that the applicant's allegations on hiring new employees of Croat origin, instead of her, were true.

37. As to Articles 6 and 7 of the ICESCR the respondent Party asserts that the war circumstances, and, eventually, the different system of financing the schools which was enacted later on, influenced the conditions of the work of the applicant. It points out that the respondent Party could not be blamed for these reasons.

38. With respect to Article 6 of the Convention, the respondent Party also points out that the Municipal Court in Livno issued a decision in favour of the applicant. It disputes the allegation of a violation of the right to a fair hearing before the court as provided by the Article 6 of the Convention, considering that the proceedings have been conducted in reasonable time.

b) The applicant

39. The applicant states that she has worked as a teacher in Livno district for 24 years, including two years between 1990 and 1992 in the "Podhum" primary school, which belongs to the central school "Fra Lovro Karaula" in Livno, until she was told that she could not teach the children any more because of her Serb origin. The applicant claims she was not allowed to work although she never received any decision on her status with the employer.

40. The applicant states she has never been invited to resume work and contends that she has been discriminated against on national ground, because she was denied to work only because of her Serb origin. She claims that her employer lacked qualified personnel, but it still did not allow her to work. Instead of the applicant, during the war and after the war other persons have been employed in the school, although they did not possess the appropriate qualifications. The applicant specifically quotes the names of the persons who have been employed. Some of the teachers employed have come from other parts of Bosnia and Herzegovina, some did not have appropriate qualifications and some of them had not even graduated at the time they were employed. Besides, some people were called by the employer to come and work, although they had already been retired at that time. All of them are of Croat origin.

41. The applicant claims that she repeatedly tried to persuade her employer to reinstate her into work, but with no success. She maintains that, when there was a free post of a teacher in the school in 1999, she asked the director to allow her to come back to work. Allegedly, the director told her that he did not mind employing her, but the politics of HDZ did not allow him. She tried to intervene with a member of the Assembly of Canton 10, and he promised her to help her, but he did not succeed. At this time, the school employed the person who had not graduated yet.

42. The applicant further claims that she approached the Deputy Ombudsperson of the Federation of Bosnia and Herzegovina in Livno who has intervened several times without any success. After that she asked the Deputy – Minister of the Health Care in Canton 10 to help her, and allegedly he talked to the Minister of Education of Canton 10, but was told that the applicant's case will be solved when the Croats are reinstated into work in Republika Srpska.

43. The applicant complains that the Federation failed to organise both the court and the administrative proceedings in a way that would ensure the protection of her rights. She states that, after the court had issued two decisions in her favour, by the appeal of the employer, the case was transferred to the Commission, which issued a decision which did not enable her reinstatement into work. She has now for many years been unsuccessfully trying to be reinstated into her working position.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Competence *ratione personae*

44. The Chamber has jurisdiction for applications directed against the Parties of the Agreement, namely Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska. This jurisdiction, as contained in Article II of the Agreement, extends to violations of the rights and freedoms provided for in the relevant international agreements, where such a violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities or any individual acting under authority of such an official or organ.

45. The Chamber also recalls the undertaking of the Parties to the Agreement to secure the rights and freedoms mentioned in the Agreement to all persons within their jurisdiction. This undertaking not only obliges a Party to refrain from violating those rights and freedoms, but also imposes on that Party a positive obligation to ensure and protect those rights (see *Matanović v. The Republika Srpska*, Case No. CH/96/1, decision on the merits of 6 August 1997, Decisions 1996-1997, paragraph 56, and *Marčeta v. The Federation of Bosnia and Herzegovina*, Case No. CH/97/41, decision of 3 April 1998, Decisions and Reports 1998, paragraph 65).

46. Although the respondent Party alleges that it cannot be held responsible for the acts of the school, the Chamber notes that the applicant's employer is a primary school founded by the Livno Municipality. According to the Law on Primary Education of Canton 10 the school is ruled by the director and a school board. The director is, *inter alia*, responsible for staffing decisions. Also, more than half of members of the school board are appointed by the founder i.e. the Livno Municipality, and the school board is entitled to appoint the director with previous consent of the founder and Minister. Furthermore, the Cantonal Minister competent for education is entitled not to grant the consent to the proposal of the school board for appointment of the director. In that case Minister is entitled to appoint the director of the school. From these facts it is clear to the Chamber that public bodies for which the Federation is responsible have a direct influence on any acts and omissions of the school, which is a public institution, and not a private school (see *Brkić v. the Federation of Bosnia and Herzegovina*, Case no. CH/99/2696, decision of 8 October 2001, Decisions July-December 2001). Therefore, the impugned acts and omissions are attributable to the Federation for the purposes of the Agreement.

47. Additionally, the Chamber recalls the Parties' positive obligation under Article I of the Agreement to secure the rights guaranteed therein. Such protection through the executive and judicial branch falls within the responsibilities of the Federation as one of the Entities of Bosnia and Herzegovina (see Article III(3) of the Constitution of Bosnia and Herzegovina, paragraph 79 above).

48. For the above reasons, the Chamber rejects the Federation's argument that it cannot be held responsible for the impugned acts in question.

2. Competence *ratione temporis*

49. The Chamber will next address the question to what extent it is competent *ratione temporis* to consider this case, bearing in mind that the respondent Party objects, as to the admissibility, that the issues raised in the application are outside the competence *ratione temporis* of the Chamber.

50. The Chamber notes that some of the alleged violations 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., *Matanović v. The Republika Srpska*, case no. CH/96/1, decision on the admissibility of 13 September 1996, Decisions 1996-1997).

51. Evidence relating to such events may, however, be relevant as a background to events

occurring after the Agreement entered into force (see, e.g., *Eraković v. The Federation of Bosnia and Herzegovina*, case no. CH/97/42, decision of 15 January 1999, paragraph 37). Moreover, in so far as an applicant alleges a continuing violation of her rights after 14 December 1995, the case will fall within the Chamber's competence *ratione temporis* (see *Bastijanović v. Bosnia and Herzegovina and The Federation of Bosnia and Herzegovina*, case no. CH/96/8, decision of 4 February 1997, Decisions 1996-97).

52. The Chamber notes that the applicant was denied the right to work at the school prior to the entry into force of the Agreement on 14 December 1995. This denial continued until 14 January 2003. As the applicant has never received a procedural decision to this effect, the Chamber finds it established that her working relationship with the school was never validly terminated. Therefore, the applicant's grievances in respect of her inability to go back to work relate to a situation which has continued after 14 December 1995. To this extent, the situation therefore falls within the Chamber's competence *ratione temporis*.

53. Analogously, the Chamber is competent to examine the fact that the applicant's salary and related contributions have not been paid after 14 December 1995.

54. The Chamber is also competent *ratione temporis* to examine any omission on the part of authorities for which the Federation is responsible under the Agreement, in so far as such omission has occurred or continued after 14 December 1995.

3. Requirement to exhaust effective domestic remedies

55. 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 her complaints and, if so, whether she 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 her application based on the Agreement and to satisfy the Chamber that the remedy was an effective one.

56. The respondent Party alleges that the applicant did not exhaust all the domestic remedies since the case is still pending before the Federal Commission.

57. The Chamber recalls first of all that the applicant has never received any decision concerning her employment status, neither a decision terminating her employment, nor a decision placing her on the waiting list.

58. The Chamber further recalls that the applicant filed a civil action before the Municipal Court in Livno in 1998 seeking recognition of the fact that she still is an employee of the primary school. This Court has since then twice decided in the applicant's favour, and twice its judgement has been quashed by the Cantonal Court. In the third set of proceedings, the Municipal Court referred the applicant's case to the Cantonal Commission. The Cantonal Court confirmed this decision, although the applicant's labour relation was neither terminated, nor she was placed on the waiting list, and therefore manifestly is not within the scope of Article 143 and following of the Law on Labour.

59. The Federal Commission before which the applicant's case is now pending cannot grant the applicant the one relief relevant to her case, i.e. order the employer to allow the applicant to come back to work. Whatever the decision of the Federal Commission, the applicant would have to turn to the Municipal Court in Livno again, for the fourth time. 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 Commissions and Courts of the respondent Party.

4. Conclusion on admissibility

60. The Chamber concludes that the application is admissible insofar as the applicant complains about discrimination in the enjoyment of her right to work, and violations of her rights to fair hearing, to respect for private and family life and to peaceful enjoyment of her possessions, 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 rejects this application as being inadmissible in so far as to acts and omissions that occurred prior to 14 December 1995.

B. Merits

61. Under Article XI of the Agreement the Chamber must next address the question whether the facts found disclose a breach by the Federation of its obligations under the Agreement. Under Article I of the Agreement, the Parties are obliged to “secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms”, including the rights and freedoms provided for by the Convention and the other international agreements listed in the Appendix to the Agreement.

1. Discrimination in the enjoyment of the right to work as well as to just and favourable remuneration and protection against unemployment, as guaranteed by the ICESCR and the CERD

62. The Chamber has repeatedly held that the prohibition of discrimination is a central objective of the Dayton Peace Agreement to which the Chamber must attach particular importance. Article II(2)(b) of Anex 6 affords the Chamber jurisdiction to consider alleged or apparent discrimination on a wide range of grounds in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to the Agreement, amongst others the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (see *Zahirović*, case no. CH/97/67, decision on admissibility and merits, delivered on 8 July 1999, paragraph 59 with further references, Decisions January – July 1999, *Kraljević*, case no. CH/01/7351, decision on admissibility and merits, delivered on 12 April 2002, paragraph 61).

63. The Chamber further notes that the basis of discrimination in Bosnia and Herzegovina often rests upon the perceived ethnic or national differences expressed in terms such as Bosniak, Croat and Serb. Therefore, the Chamber uses this terminology in discrimination cases without endorsing it (see *Brkić*, case no. CH/99/2696, decision on the admissibility and merits, delivered on 12 October 2001, paragraph 64).

64. The Chamber will consider the allegation of discrimination under Article II(2)(b) of the Agreement in relation to Articles 6(1) and 7(a)(i)(ii) of the ICESCR and Article 5(e)(i) of the CERD which, in relevant part, read as follows:

Article 6(1) of the ICESCR:

“The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”

Article 7 of the ICESCR:

“The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) fair wages and equal remuneration for work of equal value without distinction of any kind, ...
 - (ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant; ...”

Article 5 of the CERD:

“... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.

...”

(a) Impugned acts and omissions

65. Acts and omissions possibly implicating the responsibility of the Federation under the Agreement include the failure to re-employ the applicant after the end of the armed conflict and hiring of other teachers by the school for a position which the applicant held before and during the war, until she was denied the right to work.

66. These acts affect the applicant's enjoyment of the rights enshrined in Articles 6(1) and 7(a)(i) and (ii) of the ICESCR and Article 5(e)(i) of the CERD. The Chamber is accordingly called upon to examine whether the Federation has failed to secure protection of these rights without discrimination.

(b) Differential treatment and possible justification thereof

67. The Chamber considers it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

68. There is a particular onus on the respondent Party to justify otherwise prohibited differential treatment which is based on any of the grounds explicitly enumerated in Article II(2)(b) of the Agreement (see the *Brkić* decision, *loc. cit.*, paragraphs 71 *et seq.* with further references).

69. The applicant argues that she was not allowed to work solely because of her Serb origin. The respondent Party does not dispute that the applicant was employed by the school. Further, the Federation admits the fact that other employees were hired after the applicant was forbidden to work. It asserts that the applicant's employment was not terminated but she was put on the waiting list.

70. Article 23 of the Law on Fundamental Rights in Labour Relations required that “a written decision on the realisation of a worker's individual rights, obligations and responsibilities shall be delivered to the worker obligatorily“. The Chamber notes that the employer has never identified or explained the reasons for which the applicant's work was eventually not needed, nor has a decision placing the applicant on the waiting list ever been issued and delivered to the applicant. The respondent Party, in its observations does not dispute that the school has not issued a written decision on the applicant's working status and not given any explanation of this treatment of the applicant. The Federation explains that the applicant was orally put on the waiting list, but, according to the Law, the written decision should have been issued and delivered to the applicant. Because of that, her legal and working status was undefined and has remained such up to this day, apart from the short term contract of 14 January 2003, to replace another employee on maternity leave.

71. Furthermore, Article 7 of the Law on Labour Relations provided that “an employee whose work becomes temporarily unnecessary due to a reduced scope of work during the state of war or in case of immediate danger of war may be put on the waiting list no longer than until the cessation of these circumstances“. The Chamber notes that the mentioned circumstances ceased on 22 December 1995 when the Presidency of the Republic of Bosnia and Herzegovina issued a Decision on Revoking the State of War. Also, on 19 December 1996 the Parliament of Federation of BiH issued a Decision on Cessation of application of the Decision on Declaring the Imminent Threat of War on the Territory

of the Federation of Bosnia and Herzegovina. The Chamber, further notes that, despite the unusual circumstances had ceased, the unlawful behaviour of the school continued and the applicant was not allowed to continue to work up to 14 January 2003, when she was given, it appears, a short term contract to replace another employee on maternity leave. Accordingly, the behaviour of the employer constitutes acts and omissions that violate the Federation law, and for which the respondent Party is responsible.

72. The Chamber, further, notes that the applicant's employer is not a company whose business could be influenced by the conditions on the market but an educational institution. If there was a real necessity of putting the applicant on the waiting list because of reduced amount of work, or any other reason, that fact should have been explained and identified by the school. Also, the school lacked personnel with the applicant's qualifications, but it still did not allow her to work. Instead of that, the school hired employees with insufficient qualifications or undergraduates to perform the duties of the applicant's job. After the war the school continued to deny the applicant's right to work, while, at the same time hiring teachers of Croat origin. Hence, the school administration was willing to exclude an experienced teacher on the grounds of her origin and to hire inexperienced and unqualified teachers instead. The Chamber considers this kind of differential treatment of the applicant unjustified and directed to preserve the "ethnic purity" of the school. This behaviour constitutes sufficient ground for arriving at the conclusion that the applicant has been discriminated on the ground of her national or ethnic origin.

73. The Chamber considers the respondent Party responsible for this discrimination. Firstly, the applicant's employer is a regular primary school founded by the municipality of Livno, which means that the school is a public institution and the respondent Party has influence on the activities of the school and could have prevented such discrimination.

74. Secondly, the Chamber notes that the Municipal Court in Livno issued two judgements in favour of the applicant, but both were quashed by the Cantonal Court. After that the Municipal Court, acting for the third time in the case, pursuant to the reasoning of the Cantonal Court's decision, suspended the proceedings and transferred the case to the Cantonal Commission. Hence, the courts of the Federation for more than three years denied the applicant's claim, putting her in a procedural circle, and finally treated her as an employee on the waiting list in manifest violation of the law, and thus perpetuated the denial of her right to work.

75. In the light of all these considerations the Chamber finds it established that the applicant has been subjected to differential treatment in comparison with colleagues of Croat origin. No legitimate aims have been put forward to justify this differential treatment. There is no evidence showing that the applicant's treatment has been objectively justified in pursuance of any legal provisions during and after the armed conflict. The respondent Party has failed to show that its authorities provided opportunities for a further investigation of the matter in order to remedy possible discriminatory treatment. The Chamber, therefore, finds that the Federation authorities have actively discriminated against the applicant through the administrative bodies of the school due to her Serb descent.

76. The Chamber concludes that the applicant has been discriminated against, on the ground of her national or ethnic origin, in the enjoyment of her right to work, and to just and favourable conditions of work, as defined in Articles 6 and 7 of the ICESCR, the Federation thereby being in violation of its obligations under Article 1 of the Agreement to secure to all persons within its jurisdiction, without discrimination on any ground, the rights guaranteed by the instrument in question. The applicant has been discriminated against also in the enjoyment of her rights as guaranteed by Article 5(e)(i) of the CERD, in particular her right to protection against unemployment.

2. Complaint under Article 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention

77. The Chamber finds that in light of its finding of a discrimination in relation to Articles 6(1) and 7(a)(i)(ii) of the ICESCR and Article 5(e)(i) CERD, there is no need to examine the applicant's complaint of a violation of her right to a fair hearing under Article 6 of the Convention, the right to respect for private and family life under Article 8 of the Convention and to peaceful enjoyment of possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention.

3. Conclusion on the Merits

78. The Chamber concludes that the applicant has suffered discrimination on the ground of her national or ethnic origin in the enjoyment of her right to work and related rights as guaranteed under Articles 6(1) and 7(a)(i) and (ii) of the International Covenant on Economic, Social and Cultural Rights and Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination.

VIII. REMEDIES

79. Under Article XI(1)(b) of the Agreement the Chamber must next address the question of which steps shall be taken by the Federation of Bosnia and Herzegovina to remedy breaches of the Agreement which it has found, including orders to cease and desist, and monetary relief.

80. In her application the applicant seeks reinstatement into her position. The applicant further requests that the Federation be ordered to compensate her for lost income and related contributions. She requests compensation in the amount of DEM 41,800 for the period from 1 January 1994 until 19 October 2000, when the claim was submitted. The applicant has not subsequently updated her compensation claim.

81. The Federation objects to the claim and submits that the claim is unjustified and ill-founded, particularly as far as it relates to the period before 15 December 1995, as the date of entry into force of the Agreement.

82. The Chamber has found the Federation to be in breach of its obligations under the Agreement by having discriminated against the applicant on the basis of her national or ethnic origin in the enjoyment of her rights under Article 6(1) and 7(a)(i) and (ii) ICESCR and Article 5(e)(i) CERD. Therefore, the Chamber finds it appropriate to order remedies, including the payment of pecuniary compensation.

83. The Chamber welcomes the fact that the applicant was temporarily reinstated into work on 14 January 2003, by a short-term contract for replacement of an employee on maternity leave. However, the Chamber notes that the duration of her reinstatement could depend on the length of the other employee's maternity leave, i.e. could be terminated the day the absent employee returns to work. Because of that fact the applicant now has not the possibility to work on terms equal to those enjoyed by the other employees. Therefore, the Chamber will order the Federation to undertake immediate steps to ensure that the applicant is no longer discriminated against in her right to work and to just and favourable conditions of work, and that she be offered the possibility of fully returning to her labour relationship, resuming her work on terms appropriate to her former position and equal to those enjoyed by other employees. These steps shall be taken swiftly and in any event not later than the date when the absent employee, who is now replaced by the applicant, returns to work.

84. Furthermore, the Chamber finds it appropriate to award the applicant pecuniary compensation for lost income. The applicant requested that the Federation be ordered to pay her compensation for lost income, including the contributions to the Pension and Disability Fund, in the amount of 41,800 KM, covering the period from 1 January 1994 until 19 October 2000, when the compensation claim was submitted. This figure amounts to approximately 500 KM for each month of unemployment. The Federation objects to the claim and submits that the claim is unjustified and ill-founded, particularly as far as it relates to the period before 15 December 1995, as the date of entry into force of the Agreement.

85. The Chamber has already stated that it is not competent to order compensation for the damage that occurred before the Agreement entered into force. Therefore the Chamber will order the Federation to pay the compensation only for the period upon the Agreement's entry into force i.e. from 14 December 1995 on.

86. According to the Official Gazette of the Federation of Bosnia and Herzegovina (nos. 5/97, 4/98, 5/99, 50/99 and 51/2000), the average net salary in “non-economic employment relationships” (including school teachers) amounted to KM 239 in 1996, to KM 348 in 1997, to KM 406 in 1998, to 435.80 KM 1999, and to 412.72 KM in 2000¹. Having regard to the general depreciation due to inflation and the fact that the net average salary does not include contributions to pension funds, the Chamber considers that the applicant’s claim of approximately 500 KM for each month of unemployment is, as a whole, reasonable (see case no. CH/97/90, *Rajić*, delivered on 7 April 2000 Decisions and Reports January-August 2000 and case no. CH/98/1018, *Pogarcic*, delivered on 6 April 2001 Decisions and reports January-June 2001). From January 1996 until January 2003 the total amount of lost salary amounts to 42,000 KM. Therefore, the Chamber awards the applicant 42,000 KM in pecuniary compensation for lost income and unpaid contributions from January 1996, the first month upon the Agreement entry into force, up to January 2003.

87. In case the applicant is not fully reinstated into work by the date when the absent teacher, who is now replaced by the applicant, returns to work, the applicant shall also receive at the end of each month 20 KM for each day until she is offered to fully resume her work on terms compatible with her former position and equally enjoyed by others. Additionally, the Chamber will award 10 per cent interest per annum on the sum referred to in the preceding paragraph. The interest shall be paid as of the date of the expiry of a one-month time period set for the implementation of the present decision until the date of settlement in full.

IX. CONCLUSION

88. For these reasons, the Chamber decides,

1. unanimously, to declare the application admissible insofar as it relates to alleged violations of human rights after 15 December 1995.
2. unanimously, to dismiss the remainder of the application as inadmissible;
3. unanimously, that the applicant has been discriminated against in the enjoyment of her right to work and related rights, as guaranteed by Articles 6(1) and 7(a)(i) and (ii) of the International Covenant on Economic, Social and Cultural Rights, as well as in the enjoyment of her rights to work, to free choice of employment and to protection against unemployment under Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;
4. unanimously, that it is not necessary to examine the applicant’s complaint also under Article 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention;
5. unanimously, to order the Federation to take all necessary steps to ensure that the applicant is swiftly offered the possibility of fully returning to her labour relationship, resuming her work on terms appropriate to her former position and equal to those enjoyed by other employees, and in any event not later than the date when the absent employee, who is now replaced by the applicant, returns to work;
6. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant, not later than one month after the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber’s Rules of Procedure, the amount of 42,000 Convertible Marks (forty two thousand *Konvertibilnih Maraka*) by way of compensation for pecuniary damages;
7. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant simple interest at a rate of 10 (ten) per cent per annum over the sum stated in conclusion no. 6 or any unpaid portion thereof starting one month after the date when this decision becomes final and

¹ It should be noted that all employment categories were calculated together for the year 2000. There is no information on average annual net-salaries in non-economic employment relationships after 2000.

binding in accordance with Rule 66 of the Chamber's Rules of Procedure until the date of settlement in full;

8. unanimously, to order the Federation of Bosnia and Herzegovina to pay to the applicant at the end of each month KM 20 for each day, not including Saturdays and Sundays, until the applicant is offered to resume her work on terms compatible with her former position and equally enjoyed by others; the sums shall be paid from the date stated in conclusion no. 5; and

9. unanimously, to order the Federation of Bosnia and Herzegovina to report to it within two months from the date when this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedures on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Mato TADIĆ
President of the Second Panel