DECISION ON REQUEST FOR REVIEW

Case no. CH/00/3476

M.M.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 May 2003 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, Deputy Registrar

Having considered the respondent Party's request for a review of the decision of the Second Panel of the Chamber on the admissibility and merits of the aforementioned case;

Having considered the First Panel's recommendation;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina as well as Rules 63 to 66 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 applicant has sought reinstatement into her employment before the courts in Livno. After two judgments of the Municipal Court, both quashed by the Cantonal Court, her case was transmitted to the Cantonal Commission for Implementation of the Article 143 of the Law on Labour. The Cantonal Commission determined that the applicant is "an employee on the waiting list" and ordered the employer to issue a decision on the complainant's working and legal status. The employer appealed against that decision. Before the appeal was decided by the Federal Commission for Implementation of the Article 143 of the Law on Labour, on 14 January 2003 the employer issued a procedural decision temporarily reinstating the applicant into work as replacement for an employee on maternity leave.

II. PROCEEDINGS BEFORE THE CHAMBER

3. In its decision on admissibility and merits adopted on 3 March 2003, the Second Panel concluded that the applicant had been discriminated against in the enjoyment of her right to work as guaranteed by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural rights and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. The Chamber ordered 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. Also, the Chamber ordered the Federation to pay the applicant the amount of 42,000 Convertible Marks (forty two thousand *Konvertibilnih Maraka*) by way of compensation for pecuniary damages.

4. On 7 March 2003, the Second Panel's decision was delivered pursuant to Rule 60 of the Chamber's Rules of Procedure. On 7 April 2003, the respondent Party submitted a request for review of the decision.

5. In accordance with Rule 64(1) the request for review was considered by the First Panel on 5 May 2003. In accordance with Rule 64(2), on 8 May 2003 the Plenary Chamber considered the request for review and recommendation of the First Panel.

III. THE REQUEST FOR REVIEW

6. In the request for review, the respondent Party complains that the Chamber neglected the fact that the applicant's employer allegedly complied with the decision of the Cantonal Commission for the Implementation of Article 143 of the Law on Labour of 27 November 2002. According to the respondent Party, in that way the Federation corrected possible discriminatory treatment against the applicant. Taking into account that the applicant did not appeal against the employer's decision of 14 January 2003, temporarily reinstating her into her job until the absent teacher returns from maternity leave, the respondent Party considers the applicant is satisfied with her present working status. The Federation adds that the Chamber's "fear" that the applicant's labour relation could be terminated once the teacher on leave returns is ill-founded, because the applicant could have appealed on that basis. The applicant, however, according to the respondent Party is satisfied with the recent conduct of her employer.

7. The Federation further argues that in ordering the reinstatement of the applicant into her pre-war employment the Chamber exceeded its competencies under the Agreement and infringed upon the competencies of the domestic courts. The Federation submits that according to its own practice, the Chamber should have either declined to substitute itself to the domestic courts or, in case it established that the proceedings were substantially inadequate and unfair, ordered a re-trial.

8. The Federation also challenges the award of compensation to the applicant for lost income, on the ground that such compensation should have been assessed by the competent domestic organs on the basis of the applicant's status as an employee on the waiting list.

9. Finally, the Federation submits that all the circumstances justifying review under Rule 64 have been made out.

IV. OPINION OF THE FIRST PANEL

10. The First Panel notes that the request for review has been lodged within the time limit prescribed by Rule 63(3)(a).

11. The First Panel recalls that under Rule 64(2) the Chamber "shall not accept the request unless it considers (a) that the case raises a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance and (b) that the whole circumstances justify reviewing the decision".

12. As to the respondent Party's arguments summarised in paragraph 6 above, the First Panel is of the opinion that the respondent Party is misrepresenting the facts of the case. Firstly, the assignment of a temporary position to the applicant as replacement of a colleague on leave in no way represents compliance with the decision of the Cantonal Commission. Secondly, as the Second Panel has correctly established "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" (paragraph 58 of the decision on admissibility and merits). As a consequence, even if the employer had complied with the Cantonal Commission's decision, this would not remove the ongoing violation of the applicant's human rights as established by the Second Panel. The First Panel therefore considers that in this respect the request for review does not raise "a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" as required by Rule 64(2)(a).

13. As to the respondent Party's arguments summarised in paragraph 7 above, the First Panel is of the opinion that the respondent Party is misconstruing the Agreement and the Chamber's jurisprudence. The requirement that applicants exhaust domestic remedies, set forth in Article VIII(2)(a) of the Agreement, gives the domestic authorities (both administrative and judicial) the opportunity to correct an alleged violation of human rights. As established by the Second Panel, the applicant's employer and the judiciary of Canton 10 have failed to do so for more than seven years. Thereafter, it is the Chamber's jurisdiction, attributed to it by the Parties to the Agreement, to establish the facts of the case, and to order appropriate remedies if it finds those facts to constitute a violation of the applicant's rights under the Agreement.

14. It is true that the Chamber has repeatedly stated that "it has no general competence to substitute its own assessment of the facts and application of the law 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). However, the Chamber has made this statement in two contexts: firstly, where the applicant complains under Article 6 of the Convention, protecting the right to a fair trial, that the courts wrongly assessed the facts pertaining to his or her case and misapplied the law. In the present case, the Second Panel has not considered the application under Article 6 of the Convention.

15. Secondly, it is generally the Chamber's practice to rely on the findings of the domestic courts where, in a dispute of essentially private nature, the courts find that the applicant does not enjoy a certain right (see, e.g., case no. CH/02/8820, *Tomanić*, decision on admissibility of 5 September

2002, paragraph 23). The Chamber has also declined to review the findings of the domestic courts in cases where the courts assessed that the applicant does not have the right to obtain an occupancy right, e.g. because he was not a member of the previous occupancy right holder's household. In such cases, having found that the applicant has not proved that the court proceedings were unfair, the Chamber will generally rely on the findings of the domestic courts also for the question of whether an apartment is the applicant's home for the purposes of Article 8 of the Convention, or whether the applicant's claim constitutes a protected possession for the purposes of Article 1 of Protocol No. 1 to the Convention. In the present applicant's case, however, the dispute was not between two private parties, and the courts failed to decide on the applicant's claim. The Second Panel was therefore fully justified in establishing the facts and the legal situation on its own.

16. As a consequence, also with regard to the arguments summarised in paragraph 7 above, the First Panel considers that the request for review does not raise "a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" as required by Rule 64(2)(a).

17. As to the respondent Party's challenge to the compensation award, the First Panel considers that the Chamber's decision regarding compensation in *Čuturić* (case no. CH/98/1171, decision on admissibility and merits of 8 October 1999, Decisions August-December 1999), cited by the respondent Party, has no bearing on the issues in this case. In the *Čuturić* case the applicant's dismissal was outside the Chamber's competence *ratione temporis* and the Chamber accordingly found no discrimination in the enjoyment of the right to work, but only a violation of Article 6 of the Convention for the unreasonable length of the proceedings initiated by the applicant against her termination. In the present case, on the contrary, the Second Panel has found that the applicant was never validly dismissed, and that she was discriminated against in the enjoyment of her right to work. The Second Panel has accordingly awarded compensation to remedy this violation. Moreover, the argument that compensation should have been assessed by the competent domestic organs on the basis of the applicant's status as an employee on the waiting list is ill-founded for the reasons set forth in paragraphs 12 and 13 above. The First Panel therefore considers that also in respect of the compensation awarded the request for review does not raise "a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance" as required by Rule 64(2)(a).

18. Being of the opinion that the request for review does not meet the conditions set forth in Rule 64(2), the First Panel, unanimously, recommends that the request be rejected.

V. OPINION OF THE PLENARY CHAMBER

19. The plenary Chamber agrees with the First Panel that the request for review does not meet the two conditions required for the Chamber to accept such a request pursuant to Rule 64(2).

VI. CONCLUSION

20. For these reasons, the Chamber, unanimously,

DECIDES TO REJECT THE REQUEST FOR REVIEW.

(Signed)
Ulrich GARMS
Registrar of the Chamber

(Signed)
Michèle PICARD
President of the Chamber