HUMAN RIGHTS CHAMBER
FOR BOSNIA AND HERZEGOVINA

DOM ZA LJUDSKA PRAVA
ZA BOSNU I HERCEGOVINU

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 12 April 2002)

Case no. CH/00/6558

Edin GARAPLIJA

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 9 April 2002 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, 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:

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

I. INTRODUCTION

1. This case concerns the applicant's complaint of an alleged violation of his right to a fair hearing in appellate proceedings before the Supreme Court of the Federation of Bosnia and Herzegovina (hereinafter "the Supreme Court"). These proceedings were renewed pursuant to the Chamber's decision on admissibility and merits of 6 July 2000 in case no. CH/98/934.

2. The applicant alleges that the Supreme Court refused to accept evidence presented by him in his defence during the renewed appellate proceedings. He also complains of the panel's composition which was the same as in the previous appellate proceedings and alleges that one of the judges of the Supreme Court received instructions from the secret service to deviate from justice in his case.

3. The case raises issues under Article 6 of the European Convention on Human Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was introduced on 4 December 2000. The applicant is represented by Mr. Faruk Balijagić, a lawyer practising in Brčko and Tuzla.

5. The applicant requested that the Chamber order a provisional measure to suspend his detention. On 8 December 2000 the Chamber decided not to order the provisional measure requested.

6. The Second Panel of the Chamber considered the case on 8 December 2000 and 6 March 2001. On the latter date the Second Panel decided to relinquish jurisdiction in favour of the Plenary Chamber.

7. On 5 April 2001 the Chamber decided to request further information from the applicant.

8. On 26 April 2001 the applicant submitted additional observations in reply to the Chamber's request. On 7 May the Chamber decided to transmit the case to the Federation of Bosnia and Herzegovina (hereinafter "the respondent Party" or "the Federation") for its observations.

9. On 12 December 2001 the Chamber invited Amnesty International to participate as *amicus curiae* in the proceedings. As a result, on 31 January 2002 Amnesty International submitted a report on the case. This report was transmitted to the parties on 15 February 2002.

10. The applicant submitted further observations on 27 August, 11 September and 26 November 2001 and 25 March 2002. The respondent Party submitted observations on 14 and 31 August and 22 November 2001 and 11 March 2002.

11. The Chamber continued its deliberations on 5 March and 8 and 9 April 2002 and adopted the present decision on the latter date.

12. Pursuant to Rule 22 of the Chamber's Rules of Procedure judge Mato Tadić did not participate in the deliberations on the admissibility and merits of the case and adoption of the present decision.

III. FACTS

A. The particular facts of the case

13. On 13 June 1997 the Cantonal Court of Sarajevo convicted the applicant for abduction and attempted murder and sentenced him to 13 years of imprisonment. On 26 May 1998 the Supreme Court rejected the applicant's appeal against the first-instance judgment as manifestly ill-founded.

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

Thereafter, on 10 September 1998, the applicant filed his first application to the Chamber essentially alleging that his trial before the Supreme Court was unfair.

14. On 6 July 2000, the Chamber delivered its decision, CH/98/934 Edin Garaplija against the Federation of Bosnia and Herzegovina, in which it decided that "the applicant's right to a fair hearing as guaranteed by Article 6 paragraph 1 in conjunction with paragraph 3 (c) of the Convention [had] been violated in that he [had not been] present during the proceedings before the appellate court, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement". The Federation of Bosnia and Herzegovina was ordered "to take all necessary steps to grant the applicant renewed appellate proceedings, should the applicant lodge a petition to this effect" (paragraph 66 items 3 and 5).

15. On 18 July 2000 the applicant submitted a request for renewal of the appellate proceedings before the Supreme Court.

16. On the basis of the Chamber's decision, the Supreme Court allowed the requested renewal of the appellate proceedings and held two sessions on 5 and 24 October 2000 in the presence of the parties and their representatives. The sessions were held before the same panel of the Supreme Court which had rejected the applicant's appeal on 26 May 1998. During the public sessions the applicant applied to the Supreme Court to refer the case back to the first-instance court for retrial before an entirely different panel.

17. On 5 October 2000 the applicant also challenged judge Malik Hadžiomeragić on the grounds of partiality due to the allegation that he was in contact with the secret service AID *(Agencija za istraživanje i dokumentaciju).* The applicant explained before the Supreme Court panel that persons from the AID told him during the first set of the proceedings that the dispute would be solved positively due to the collaboration of the mentioned judge with the AID. He complained that, contrary to the promise, the result was not positive. On the same day, 5 October 2000, the President of the Supreme Court decided to reject the applicant's challenge *propter affectum* as ill-founded due to the lack of evidence in support of the motion and any other indication of partiality.

18. On 24 October 2000 the Supreme Court rejected the applicant's request to refer the case to the first-instance court and gave its judgment on the applicant's appeal. The Supreme Court found it established that the applicant "hit the injured party with his fist, bound him to the pipe of a radiator, inserted a wooden club between his hands when he was already cuffed and hit him on different parts of his body". The Supreme Court further stated that "the injured party was subject to physical and psychical harm" and thereby assessed that "these actions fulfil the characteristics of maltreatment in discharge of duty". It overturned the first-instance judgment, replacing the applicant's conviction for abduction with a conviction for the crime of maltreatment in discharge of duty, as provided by Article 54 of the Criminal Law. The conviction for attempted murder (Article 36) was confirmed but assessed less severely. The Supreme Court accordingly reduced the sentence of imprisonment from 13 to 7 years as a compound punishment for both criminal acts.

19. On 5 December 2000 the President of the Federation issued a decision reducing the applicant's imprisonment by one year. On 13 March 2001 the Commission for Conditional Release rejected the applicant's request to be released on parole. However, on 25 August 2001 the Commission issued a decision releasing the applicant temporarily for the period from 2 August to 2 November 2001, *i.e.*, until the last day of his jail sentence.

20. For further explanation of the factual background, the Chamber refers to its decision delivered on 6 July 2000 in case no. CH/98/934 (Decisions July – December 2000).

B. The Amnesty International report of 24 January 2002

21. The report of Amnesty International, which acted as *amicus curiae*, provides a summary of the criminal proceedings against the applicant before the domestic authorities. Amnesty International expresses its concern that the applicant's right to a fair hearing was violated. The report also raises issues which are not relevant for the present application, such as the alleged failure of the

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

authorities of the respondent Party "to fully investigate human rights abuses committed by (para-) military units under their control during the war".

22. Amnesty International points out that the same panel of the Supreme Court, which had considered the applicant's earlier appeal, conducted the renewed appellate proceedings. The applicant's lawyer raised the allegation that AID officials had contacted one of the judges of the panel and had given him instructions on how to decide the appeal against the applicant. The report recalls that the president of the Supreme Court, who was not a member of the panel, rejected the motion to recuse the judge from the proceedings on the same day due to the applicant's failure to substantiate his allegations. Amnesty International states that "in view of the importance not only of actual, but also of perceived impartiality of the appeal court" a new panel should have been appointed to consider the applicant's appeal.

23. In particular, Amnesty International states the following:

> "The Supreme Court judgment stated … that, in giving effect to the Human Rights Chamber's order to repeat appeal proceedings, it had decided not to hold a "hearing" (*petres*) – at which new evidence could be presented and examined. Instead the Supreme Court chose to conduct a "session" (*sjednica*), at which the accused could present in a summary fashion the information that they sought have examined in a court. …
>
> The Supreme Court's decision on this issue is not consistent with the arguments presented by the lawyers for the accused, who explicitly challenged the factual findings of the court of first instance. They also sought to present and have examined new evidence by either the Cantonal Court or the Supreme Court.
>
> In this regard, Amnesty International is concerned that the summary of the new evidence presented by Edin Garaplija and his co-defendants was not given due consideration by the appeal court, which refused to either hold a hearing in order to fully consider the new evidence or to remit the case to the court of first instance to reestablish the factual situation, taking into consideration the new evidence. …
>
> Amnesty International further notes that the Supreme Court judgment implicitly acquits the accused of the charge of abduction, substituting this charge with other offences. However, the judgment omits to provide an explicit explanation for this decision."

24. The *amicus curiae* expresses its concern that the renewed proceedings may have violated the applicant's right to a fair hearing due to the applicant's sentence to a term of imprisonment after proceedings that it considers failed to allow for a full and fair examination of available evidence before an independent and impartial court.

IV. RELEVANT LEGAL PROVISIONS

A. The Criminal Code

25. At the relevant time, the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of the SFRY nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90); taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – nos. 2/92, 8/92, 10/92, 16/92 and 13/94) provided in Article 19 for the attempt of a criminal offence which reads as follows:

> "Whoever intentionally commences execution of a criminal offence but does not complete his/her doing, shall be punished for the attempted crime only when the criminal offences in question in punishable by imprisonment of five years or more, and for other crimes only where the law expressly prescribes punishment for the attempt alone.
>
> An attempted criminal offence shall be punished within the limits of the punishment prescribed for the same criminal offence committed but may be punished less severely."

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

26. Article 36 of the Criminal Code of the Socialist Republic of Bosnia and Herzegovina (hereinafter "SRBiH"), which was applicable at the relevant time in accordance with the provision on the continuation of laws as contained in Article 2 of Annex II to the Constitution of Bosnia and Herzegovina (Annex 4 to the Agreement) (Official Gazette of the Socialist Republic of Bosnia and Herzegovina nos. 16/77, 19/77, 32/84, 19/86, 40/87, 41/87, 33/89, 2/90 and 24/91; OG RBiH nos. 16/92, 21/92, 13/94, 28/94 and 33/94), provides for the offence of murder as follows:

> "Whoever deprives another person of his/her life shall be punished by imprisonment for not less than five years.
> …"

27. Article 50 of the applicable Criminal Code of the SRBiH prescribes the offence of abduction as follows:

> "Whoever commits abduction of a person in order to force him/her or someone else to do something, not to do something, or to suffer,
> shall be punished by imprisonment for a term between one year and ten years.
> …"

28. Article 54 of the applicable Criminal Code of the SRBiH prescribes the offence of maltreatment in discharge of duty as follows:

> "An officer, who in discharge of duty maltreats another person, inflicts grave physical or mental suffering on him/her, frightens him/her, insults him/her,
> shall be punished with imprisonment for a term between three months and three years."

B. Provisions on Criminal Procedure

29. The Law on Criminal Procedure of the Federation of BiH (Official Gazette of the Federation of BiH no. 43/98) entered into force on 28 November 1998.

1. Relevant provisions relating to the disqualification of judges

30. The relevant provisions on disqualification of judges provide as follows:

> Article 35:
>
> "A judge or lay judge may not perform his judicial duties in the following cases:
> …
> (5) if in the same case he has participated in rendering a decision of a lower court, or if in the same court he has participated in rendering a decision completed by an appeal.
> (6) if circumstances exist which engender doubt as to his disinterestedness."
>
> Article 36:
>
> "(1) As soon as a judge or lay judge learns that any of the grounds for disqualification referred to in Article 35 paragraph 1 through 5 exist he must interrupt all work on the case and inform the president of the court, who shall appoint his replacement. …
> (2) If a judge feels that there are other circumstances which justify his disqualification (Article 35 paragraph 6), he shall inform the president of the court."
>
> Article 37:
>
> "(1) The parties may also seek disqualification.
> (2) The parties may petition for disqualification before the main trial commences; but if they have learned of the reason for disqualification as referred to in Article 35, paragraph 1 through 5, of this law after the main trial has began, they shall file the motion immediately after learning of it.
> (3) The parties may include a petition for disqualification of a judge of a higher court in an appeal or in an answer to an appeal.
> (4) A party may seek disqualification of a particular judge or lay judge referred to by name who was involved in the case or of a judge of a higher court.

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

(5) The party must cite in the petition the circumstances which he deems to represent legal grounds for disqualification. Reasons presented in a previous petition for disqualification which has been rejected may be cited again in a petition."

Article 38:

"(1) The president of the court shall rule on the petition for disqualification referred to in Article 37 of this law.

…

(3) Before the decision on disqualification is taken, a statement shall be taken from the judge, lay judge or president of the court, and other inquiries shall be conducted as needed.

(4) No appeal is permitted against a decision granting a petition for disqualification. A decision rejecting a petition for disqualification may be contested with a specific appeal; but if this decision was made after the indictment was brought, then it can be contested only by an appeal of the verdict.

(5) If the petition for disqualification referred to in Article 35, paragraph 6 of this law is filed after commencement of the main trial or if it does not conform to the provisions of Articles 37, paragraphs 4 and 5 of this law, the petition shall be rejected in its entirety or in part. No appeal is permitted against a decision rejecting a petition. The president of the court shall issue the decision rejecting the petition, and if the motion is made during the trial, it shall be made by the entire panel. The judge whose disqualification is being sought may participate in rendering this decision."

2. Relevant provisions on appeal proceedings

31. Article 365 provides as follows:

"(1) Notice of the session of the panel shall be given to the accused and his defence counsel…, who within the period allowed for an appeal … are requested to be notified of the session or can propose that a hearing be held before the court of second-instance. The presiding judge of the panel or the panel itself may decide to give notice of the session of the panel to the parties even if they have not requested so, or to give notice of the session to a party who did not request so if their presence would be helpful to clarify the matter."

32. Article 366 provides as follows:

"(1) The second-instance court shall render a decision in a session of a panel or on the basis of a hearing.

(2) The second-instance court shall decide in a session of a panel whether to hold a hearing."

33. Article 367 provides as follows:

"(1) A hearing shall be held before the second-instance court only if it is necessary for presentation of new evidence or repetition of evidence already presented because the state of the facts was erroneously or incompletely established and if there are legitimate reasons for not returning the case for retrial to the court of first-instance."

34. Article 374 provides as follows:

"(1) The second-instance court may, on the basis of a panel session or of a hearing, reject an appeal as being submitted out of time or as being inadmissible, or it may refuse the appeal as ill-founded and confirm the judgment of the first-instance court, or it may revoke the judgment of the first-instance court and return the case to the court for reconsideration, or it may modify the verdict of the first-instance court."

35. Article 378 provides as follows:

"(1) The second-instance court shall … render a decision revoking the first-instance judgment and return the case for retrial if it finds that there has been an essential violation of the provisions of criminal procedure or if it considers that erroneously or incompletely established facts justify a new trial before the original court.

(2) The court in the second instance may order that the new trial be held before the court in the first-instance before an entirely different panel."

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

3. Relevant provisions on review proceedings

36. Article 398 of the Law on Criminal Procedure, providing for a petition to reopen criminal proceedings, reads as follows:

> "(1) A petition to reopen criminal proceedings shall be decided by the panel of the court which tried the cause in the first-instance in the previous proceedings.
>
> …
>
> (3) If possible, no judge who participated in rendering the verdict in the prior proceeding shall participate in deciding on the petition in the panel."

V. COMPLAINTS

37. The applicant complains that he was denied the right to a fair trial during the renewed appellate proceedings before the Supreme Court. He states that the Supreme Court refused to accept evidence presented by him in his defence, which he alleges would have led to his acquittal. He also complains of the composition of the panel of the Supreme Court, which was the same as in the previous appellate proceedings. He therefore requested the Chamber to annul the judgment of the Supreme Court in his case, dated 24 October 2000, and to order the respondent Party to renew the proceedings before the domestic courts.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the admissibility criteria

38. The respondent Party opines that the applicant abuses his right of petition. The Federation alleges that the applicant's application was motivated by his wish for publicity. The application is offensive and not substantiated by any facts.

39. The Federation also asserts that the allegations and requests of the application are the same as already examined by the Chamber in case no. CH/98/934.

2. As to the merits

40. The respondent Party contends that the renewed appellate proceedings were held before an independent and impartial court established by law and that none of the further enumerated procedural guarantees set out in Article 6 of the Convention has been violated.

41. In particular, the Federation points out that according to the domestic law the renewed appellate proceedings could be held before the same judges. The respondent Party calls it "absurd" that the applicant bases his application on the Supreme Court's rejection of his motion to exclude judge Malik Hadžiomeragić from his case, considering that this judge was allegedly collaborating with the applicant's colleagues from the secret service AID and supposed to influence the proceedings in the applicant's favour.

42. The Federation further denies that any document was submitted by Amnesty International to the Supreme Court or the Government of the Federation. However, even if Amnesty International submitted requests, it would not be relevant for the case.

43. As to the allegation that the Supreme Court did not allow motions of the applicant to take evidence and rejected to hear witnesses, the Federation states that the Supreme Court denied the motions as ill-founded. The Federation opines that the Supreme Court justifiably established that the means of evidence presented by the applicant could not support his protestation of innocence. Moreover, the respondent Party also claims that the applicant conceded his crimes before the panel of the Supreme Court. Particularly, he admitted that by acting in the line of duty he had participated

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

in depriving the victim of his liberty. Therefore, the Court properly established that the motions lodged by the applicant's defence lawyer were irrelevant.

44. The respondent Party points out that besides the rejection of certain motions the Supreme Court accepted new evidence presented during the session and altered the assessment of the applicant's acts under the criminal law. The Supreme Court sentenced the applicant to seven years in prison. By the issuance of the new sentence the previous punishment was considerably reduced. The imprisonment was again reduced by decisions of the President of the Federation and the Commission for conditional release.

B. The applicant

45. In reply to the Chamber's query as to whether the applicant had objected to the renewed proceedings being held before the same judges of the Supreme Court, the applicant's representative submitted information to the effect that he challenged one of the judges due to a new allegation that this person collaborated with the AID. Further he stated that he had "reliable information" about the collaboration of one of the judges but did not make further information known to the Chamber. He presented a decision of the Commission for Probation of the Federal Government which refused to release the applicant on probation on 13 March 2001 as evidence that the Government was attempting to "cover up" the applicant's case.

46. The applicant submits that the Supreme Court primarily examines crimes committed by Muslims, and to a much lesser extent crimes committed by Serbs and Croats.

47. The applicant's lawyer claims that it is a fact that judge Malik Hadžiomeragić is a collaborator of the secret service AID. He states that "the AID would have obtained through him a verdict of not-guilty if the director of the AID had not been blackmailed by the former director of the AID, Mr. Bakir Alispahić, and an agreement be reached that neither the AID's dirty jobs nor the affairs of the Muslim Intelligence Service be revealed". He further states that "it was arranged that everything would break Edin Garaplija's back by punishing him". Moreover, he contends that "when the new authorities, which are not of national-fascist character, were informed that a request for conditional release of a fighter against terrorism and crime was rejected, the government ordered within a very short period of time that the decision be changed".

VII. OPINION OF THE CHAMBER

A. Admissibility

48. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. According to Article VIII(2)(b), the Chamber "shall not address any application which is substantially the same as a matter which has already been examined by the Chamber". Under Article VIII(2)(c) the Chamber shall dismiss any application which it considers "manifestly ill-founded" or an "abuse of the right of petition".

1. As to the objection that the application is substantially the same as a case already submitted to the Chamber

49. The Chamber notes that the subject-matter of the application in case no. CH/98/934 was the fairness of the proceedings before the Supreme Court that led to that court's decision of 26 May 1998. Having found a violation of Article 6 of the Convention with regard to these proceedings, the Chamber ordered the respondent Party to hold renewed appellate proceedings. The case currently before the Chamber concerns the applicant's complaint that those renewed proceedings did not comply with the requirements of a fair trial. Accordingly, the Chamber will examine only the renewed appellate proceedings as to whether they reveal any violations of the applicant's rights guaranteed by Article 6 of the Convention.

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

50. The Chamber decides not to declare the application inadmissible pursuant to Article VIII(2)(b) of the Agreement, as the present case has not already been examined by the Chamber.

2. The motion to have a judge removed from participating in the adjudication of the case because he was allegedly collaborating with the secret service

51. The applicant's representative, in answer to the Chamber's request, stated that he had challenged one of the judges in the renewed appellate proceedings because he is allegedly a collaborator with the secret service. Further he claims that he has "reliable information" about his accusation. The applicant did not disclose this information and has failed to provide the Chamber with any evidence.

52. Accordingly, the Chamber will reject the applicant's complaint about the lack of impartiality of one of the judges who allegedly was in collaboration with the secret service as manifestly ill-founded pursuant to Article VIII(2)(c) of the Agreement due to the applicant's failure to supply any evidence in support of his motion.

3. As to the alleged abuse of the right to petition

53. The Chamber opines that for the remaining complaints the case raises serious issues and appears to be sufficiently substantiated for the purposes of admissibility. It is therefore not justified to reject the application as manifestly ill-founded or abusive. The fact that the case may contribute to the applicant's publicity does not make the complaints raised less serious.

4. Conclusion on admissibility

54. The Chamber finds the applicant's complaint about the lack of impartiality of one of the judges, who allegedly was in collaboration with the secret service, manifestly ill-founded. As there are no other grounds to declare the application inadmissible, the Chamber rejects the remaining objections of the respondent Party and declares the complaints that the renewed appellate proceedings were held before the same panel and regarding the denial of motions to present evidence admissible.

B. Merits

55. 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.

56. The applicant alleges violations of Article 6 of the Convention. In relevant part, Article 6 provides as follows:

> "1. In the determination … of any criminal charge against him, everyone is entitled to a fair … hearing … by an independent and impartial tribunal …
> 2. …
> 3. Everyone charged with a criminal offence has the following minimum rights:
> a …
> b to have adequate … facilities for the preparation of his defence;
> c to defend himself in person or through legal assistance;
> d … to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> …"

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

1. As to the complaint that the renewed appellate proceedings were not held before an entirely different panel

57. The applicant alleges that he was unlawfully denied the right to renewed proceedings before a differently composed court, which in his submission constitutes a violation of Article 6 of the Convention. This allegation calls into question the impartiality of the Supreme Court in its second set of proceedings.

58. The Chamber notes at the outset that pursuant to Article 378 paragraph 2 of the Law on Criminal Procedure the second-instance court may, but need not, order the first-instance court to hold a new trial before an entirely new panel. This provision, however, does not apply to renewed proceedings before a court of appeal or the Supreme Court. It follows that, as a matter of domestic law, the applicant had no right to expect the renewed proceedings to take place before a differently composed panel of the Supreme Court.

59. The European Court of Human Rights has stated that the existence of impartiality for the purposes of Article 6 (1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case; and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, *inter alia*, Eur. Court HR, *De Cubber v. Belgium* judgment of 26 October 1984, Series A no. 86, pp. 13-14, para. 24 and the decision of the Chamber, *Ivanović*, case no. CH/98/548, delivered on 6 July 2000, Decisions July – December 2000, paragraph 44 *et seq.*).

60. As regards the subjective test, the Chamber recalls that, except for the claim dealt with in paragraphs 51-52 above, which claim the Chamber has dismissed, the applicant did not suggest that the Supreme Court panel was biased against him. Moreover, the Chamber does not find any indication of prejudice or bias of the judges of the Supreme Court against the applicant. It will therefore only consider the objective aspect.

61. The European Court has stated that under the objective test, quite apart from a judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. Even appearances may be of some importance. The question arises when, in a given case, there is a legitimate reason to fear that a particular judge lacks impartiality. What is at stake is the confidence which the courts, in a democratic society, must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality should withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused may be important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, *inter alia*, Eur. Court HR, *Hauschildt v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 21, paragraphs 47-48).

62. The European Court held that "it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority" (Eur. Court HR, *Ringeisen v. Austria* judgment of 16 July 1971, Series A no. 13, p. 40, para. 97). It therefore held that in the proceedings in question there was no violation of Article 6, paragraph. 1.

63. In its *Diennet* judgment of 26 September 1995 the European Court of Human Rights reiterated the above-mentioned rule and held that the fact that three of the seven members who made up the disciplinary section of the National Council of the *ordre des medecins* had already taken part in the first decision before the case was referred back to it by the Court of Cassation could not be seen as evidence of bias. The Court did not consider that a similarity between the wording of the two decisions, the one prior and the other subsequent to the decision of the Court of Cassation, provided any evidence of bias on the part of the members of the body handing them down (see Eur. Court HR, *Diennet v. France* judgment of 26 September 1995, Series A no. 325, p. 25 – 26, paragraphs 49 – 52). With reference to the *Ringeisen* case, it held that the fact that three of the

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

seven members who made up the disciplinary section had already taken part in the first decision could not in itself suffice to make the proceedings unfair.

64. Moreover, unlike the first set of proceedings before the Supreme Court where the applicant was not present, the applicant had the possibility to raise all issues in the renewed appellate proceedings thereby enabling the judges to have a fresh approach. In the case of *Thomann* the European Court of Human Rights held on 10 June 1996 that "if a court had to alter its composition each time that it accepted an application for a retrial from a person who had been convicted in his absence, such persons would be placed at an advantage in relation to defendants who appeared at the opening of their trial. This is because this would enable the former to obtain a second hearing of their case by different judges at the same level of jurisdiction. In addition, it would contribute to slowing down the work of the courts as it would force a larger number of judges to examine the same file, and that would scarcely be compatible with conducting proceedings within a 'reasonable time'" (see Eur. Court HR, *Thomann v. Switzerland* judgment of 10 June 1996, Reports 1996-III No. 11 p. 816, paragraph 36).

65. In conclusion, the European Court of Human Rights in its case-law takes the position that, as a general rule, no ground for legitimate suspicion can be discerned in the fact that judges who have taken part in the first decision also participate in a second decision after the case is referred back to them by a higher court.

66. Similarly, the Chamber finds that the fact that the renewed appellate proceedings took place before the same Supreme Court panel as in the first set of the appellate proceedings does not constitute a violation of the applicant's right to a fair hearing before an impartial tribunal. It follows that there has been no violation of Article 6 of the Convention in this respect.

2. As to the complaint about the Supreme Court's denial of the applicant's motions to present evidence

67. The applicant alleges that the Supreme Court refused to accept evidence presented by him in his defence. In particular, he complains that persons able to supply relevant evidence were not heard as witnesses in the renewed appellate proceedings.

68. The Chamber notes that, while it may well be so that the applicant disagrees with the decisions made by the Supreme Court in respect to each item of evidence, it should be recalled that Article 6 of the Convention does not guarantee a right to have motions sustained in criminal proceedings. The right to a fair hearing does not require that any particular rules of evidence are followed in criminal courts. It is for the domestic courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce (see*, inter alia*, Eur. Court HR, *Barbèra, Messegué and Jabardo v. Spain* judgment of 6 December 1988, Series A no. 146, paragraph 68). Accordingly, the Convention does not provide an accused person an unlimited right to obtain the attendance of witnesses in court. The Convention institutions have taken the approach that the domestic courts enjoy the discretionary power to satisfy themselves that the hearing of a witness is likely to assist them in ascertaining the truth. Article 6(3) only requires that a court must give the reasons for which it decides not to summon those witnesses whose examination has been expressly requested (see Eur. Court HR, *Vidal v. Belgium* judgment of 22 April 1992, Series A no. 235, paragraph 34).

69. However, the Chamber is nevertheless competent, in exercising its powers entrusted to it in the Agreement, to verify whether or not the appreciation made by the Supreme Court complies with the condition laid down in Article 6(3)(d) of the Convention. The Chamber, having examined the record of the hearing and the Supreme Court's second decision, observes that the Supreme Court indicated to a sufficient extent the grounds on which it based its decision not to hear new witnesses or to hear again witnesses already heard by the Cantonal Court. Accordingly, no violation of Article 6 of the Convention has been established regarding this complaint.

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

3. The conviction with the offence of maltreatment in discharge of duty

70. The Supreme Court in the renewed appellate proceedings acquitted the accused of the charge of abduction, substituting this charge with the offence of maltreatment in discharge of duty. The *amicus curiae* asserts that no sufficient explanation was given by the Supreme Court for this decision.

71. The Chamber recalls that the Supreme Court established that the applicant "hit the injured party with his fist, bound him to the pipe of a radiator, inserted a wooden club between his hands when he was already cuffed and hit him on different parts of his body". The Supreme Court further stated that "the injured party was subject to physical and psychical harm" and thereby assessed that "these actions fulfil the characteristics of maltreatment in discharge of duty". The Chamber agrees that the reasoning given by the Supreme Court may be short. Nonetheless, the Supreme Court sufficiently described the acts constituting the offence. The conviction with maltreatment in discharge of duty moreover improves the applicant's position since it constitutes a less severe crime (see paragraphs 27 and 28 above). The Chamber therefore concludes that the change in the offence the accused was found guilty of does not reveal a violation of Article 6 of the Convention.

4. Conclusion on the merits

72. Consequently, the Chamber does not find sufficient elements that would support the applicant's complaints of an unfair trial.

73. The Chamber recalls, in addition, that after the second set of proceedings the Supreme Court overruled the first-instance judgment and replaced the applicant's conviction for abduction with a conviction for the crime of maltreatment in discharge of duty, assessed the conviction for attempted murder less severely and, therefore, reduced the sentence of imprisonment from 13 to 7 years. This substantive reduction in sentence suggests that the judges of the Supreme Court were not biased against the applicant during the renewed appellate proceedings and did not overlook exonerating evidence. In fact, it suggests that the applicant's arguments were seriously considered. In view of these facts, no legitimate reason to fear a lack of impartiality of the Supreme Court's judges during the renewed appellate proceedings could be found.

74. In conclusion, the Chamber finds that the facts do not support the applicant's complaint of an unfair trial before a court. No violation of the procedural guarantees provided in Article 6 paragraph 1 of the Convention has been established.

VIII. CONCLUSION

75. For these reasons, the Chamber decides,

1. unanimously, to declare admissible the complaint of a violation of Article 6 of the European Convention on Human Rights in that the renewed appellate proceedings were held before the same Supreme Court panel and motions to present evidence were denied;

2. unanimously, to declare the complaint of a lack of impartiality of one of the Supreme Court judges inadmissible as manifestly ill-founded;

3. by 12 votes to 1, that the respondent Party did not violate the applicant's rights as guaranteed under Article 6 of the European Convention on Human Rights.

(signed) Ulrich GARMS Registrar of the Chamber	(signed) Michèle PICARD President of the Chamber

Annex Dissenting Opinion of Mr. Giovanni Grasso

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

ANNEX

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Giovanni Grasso.

DISSENTING OPINION OF MR. GIOVANNI GRASSO

Preliminary remarks

1. I cannot agree with the decision of the Chamber. In my opinion the case discloses a clear and serious breach of Article 6 paragraph 1 of the European Convention on Human Rights as regards the requirements of "impartiality" and "establishment by law" of the Panel of the Supreme Court which decided upon the renewed appellate proceedings against the applicant. In fact the decision of the Chamber can exclude such violation of Article 6, paragraph 1 only on the basis of a misinterpretation both of the provisions of the Law on Criminal Procedure of the Federation of Bosnia and Herzegovina and of the general principles which arise from the case-law of the European Court as to the requirements of impartiality of the tribunal.

The requirements of impartiality according to Article 6 paragraph 1
of the European Convention on Human Rights.

2.1 As the Chamber has correctly stated, the existence of impartiality for the purposes of Article 6 paragraph 1 must be determined according to a subjective test, that is on the basis of the personal conviction and behaviour of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

In the present case it is necessary, in my opinion, to consider only the second test. Under this objective test, as the European Court has stated on numerous occasions, "it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts, which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence, which the courts in a democratic society must inspire in the public. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held objectively justified" (see Eur. Court HR, *Ferrantelli and Santangelo v. Italy*, judgement of 7 August 1996, Recueil 1996-III paragraph 58, p. 951-952; see also Eur. Court HR, *Hauschildt v. Denmark*, judgement of 24 May 1989, Series A-154, p. 21, par 48).

On the basis of these general principles the European Court has found repeatedly a violation of Article 6 paragraph 1 in cases in which a judge, who had already judged the co-perpetrators of a crime – making some specific references to the particular position of the applicant, who was accused of being one of the persons responsible for that crime - takes part in new proceedings concerning the criminal responsibility of the applicant. According to the European Court this situation can cast justified doubts on the impartiality of this judge or, in other words, "it is sufficient to hold the applicant's fears as to the lack of impartiality ... to be objectively justified" (*Ferrantelli and Santangelo*, paras 59 – 60; Eur. Court HR, *Rojas Morales v. Italy*, judgement of 16 November 2000, paras 30–33).

If the general principles of the European Court of Human Rights as to the requirements of impartiality according to Article 6 paragraph 1 of the European Convention are very clear, the case law on the specific issue at stake is less consistent. On a few occasions the European Court held that "it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority" (Eur. Court HR, *Ringeisen v. Austria*, judgement of 11 July 1971, Series A-13, para 40; see also Eur. Court HR, *Diennet v. France*, judgement of 26 September 1995, Series A-325, paras 25 – 26). But on another occasion, in a case very similar to the present case, the European Court found a violation of Article 6, paragraph 1 of the European Convention in the fact that the Court of Appeal, which decided upon the appeal against a first instance decision, was composed of the same judges who had decided upon a previous appeal in the same proceedings. The European Court noted that the provision of the

Downloaded from WorldCourts | International Case Law Database | worldcourts.com

national legal system in question "which lays down that the Court of Appeal shall not comprise, in a case like this, any judge who has previously dealt with it in the first set of proceedings, manifests the national legislature's concern to remove all reasonable doubts as to the impartiality of that court. Accordingly, the failure to abide by this rule means that the applicant's appeal was heard by a tribunal whose impartiality was recognised by national law to be open to doubt" (Eur. Court HR, *Oberschlick v. Austria*, judgement of 23 May 1991, Series A-204, paras 48–52).

2.2 In the present case the fear of the applicant as to the impartiality of the Court appears to be fully reasonable and justified because not only some but all the judges who decided upon the renewed appeal had already decided upon the previous appeal, taking a clear position on his criminal responsibility after an evaluation of all the circumstances of the case. The subject matter of the renewed appeal proceedings and of the original proceedings was exactly the same, so that the impartiality of the judges who had already taken a decision in the case is clearly open to doubts.

The violation of the Law on Criminal Procedure
of the Federation of Bosnia and Herzegovina

3.1 Furthermore it should be underlined that the decision of the Chamber misinterpreted the Law on Criminal Procedure of the Federation of Bosnia and Herzegovina.
In this case, as it is correctly stated in paras. 14 – 16 of the decision, the renewal of the appellate proceedings was granted by the Supreme Court of the Federation on the basis of the decision of the Human Rights Chamber which found a violation of the right of the applicant to a fair hearing and ordered the Federation of Bosnia and Herzegovina "to take all necessary steps to grant the applicant renewed appellate proceedings, should the applicant lodge a petition to this effect".
It is clear that in the Law on Criminal Procedure of the Federation there is no specific regulation of this particular situation (the renewal of the appellate proceedings on the basis of a decision of the Human Rights Chamber).
In relation to this specific issue the Chamber recalls the provisions of Article 378 paragraph 2 of the Law on Criminal Procedure, according to which the second instance court may order the first instance court to hold a new trial before an entirely new panel, but notes that "this provision, however, does not apply to renewed proceedings before … the Supreme Court" (para. 58 of the decision).
In my opinion this conclusion is not fully correct, because in relation to this renewed appellate proceedings it seems to be appropriate to apply by analogy the provisions of the review proceedings, according to which the case should be decided upon by a completely new panel "if possible" (Article 398 paragraph 3 of the Law on Criminal Procedure).
The reference to the regulation of the review proceedings is fully justified by the fact that in the case at issue the renewal of the proceedings has taken place on the basis of the order of the Chamber after the exhaustion of the ordinary remedies, as it occurs in the review proceedings when the court accepts the petition of the applicant and orders the repetition of the trial.

3.2 In the present case, the Federation in its observations has given no explanation of the reasons why the renewed appellate proceedings were decided upon by a panel of the Supreme Court composed of the same judges who had decided upon the first appeal. Therefore the circumstances of the case reveal a clear violation of Article 398 paragraph 3 of the Law on Criminal Procedure of the Federation.

Conclusion

4. In conclusion, I believe that the circumstances of the present case disclose a serious violation of Article 6 paragraph 1 of the European Convention in relation to the composition of the panel of the Supreme Court which decided upon the renewed appeal on the basis of the order of the Human Rights Chamber and which was neither "impartial" nor "established by law".

(signed)
Giovanni Grasso

Downloaded from WorldCourts | International Case Law Database | worldcourts.com