DECISION ON ADMISSIBILITY AND MERITS

Case no. CH/02/9999

Safija DURAN

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 1 November 2004 with the following members present:

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

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

Having considered the aforementioned application introduced to the Human Rights Chamber for Bosnia and Herzegovina pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

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

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

I. INTRODUCTION

1. The applicant is a citizen of Bosnia and Herzegovina of Bosniak origin. Until the breakout of the Bosniak-Croat conflicts in the Herzeg-Bosnia Canton ("Canton 10") the applicant had worked in the Hotel “Dinara” in Livno for 28 years. Since 21 July 1993 she has been unsuccessfully trying to be reinstated to her work. The applicant complains that she has been denied rights under her working relations due to discrimination on the basis of her national origin.

2. The case raises issues with regard to discrimination in enjoyment of the right to work and related rights protected under Articles 6 and 7 of the International Covenant on Economic, Social and Cultural rights (“the ICESCR”). The application also raises issues under Article 6 of the European Convention on Human Rights (hereinafter: “the Convention”).

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

3. The application was introduced on 22 April 2002.

4. On 17 March 2004 the Commission transmitted the application to the respondent Party under Article 6 of the Convention and in relation to the issue of discrimination in the enjoyment of the right to work under Articles 6(1) and 7 of the ICESCR.

5. On 20 April 2004 the respondent Party submitted its written observations on admissibility and merits. On 10 May 2004 the applicant sent her response to the written observations of the respondent Party. The applicant’s response was transmitted to the respondent Party for its information and possible comments on 11 May 2004.

6. On 22 July 2004 the applicant submitted additional observations that were transmitted to the respondent Party on 28 July 2004.

7. On 10 March 2004, 8 September 2004 and 1 November 2004 the Commission considered the admissibility and merits of the case. On the latter date, the Commission adopted the present decision.

III. FACTS

8. The applicant worked in the Hotel-Catering Tourist Enterprise (HUTP) “Dinara” ("HUTP Dinara" or "the company") from 7 April 1965 until 21 July 1993, when she was told not to come to work any more. According to the documentation submitted by the applicant, it appears that the applicant’s employment was terminated by an oral decision of the Director of the Enterprise. The applicant stated that she never received a written procedural decision on the termination of her employment.

9. On 25 February 1998 the applicant filed a court action against HUTP Dinara before the Municipal Court in Livno. The applicant requested that the Court issue a judgment establishing:

> "that the employment of the plaintiff Safija Duran has not been terminated and that therefore the defendant must enable her to exercise her rights under her working relations, enable her to perform tasks and duties that she used to perform until 1993, and to compensate her for the expenses of the civil proceedings”.

10. It appears from the respondent Party’s observations that in March 1998 the company “Dinara Livno” split into two companies in mixed ownership (Hotel “Park” d.o.o. Livno and UTD “Dinara” d.o.o. Livno). In May 2000 both mixed ownership companies were privatized and the

state capital was purchased by natural persons. In the privatization program of both newly-created companies there were no employees registered on the waiting list.

11. On 3 February 2000 the applicant addressed HUTP “Dinara” in writing, requesting establishment of her working-legal status in accordance with Article 143 of the Law on Labour.

12. On 1 December 2000 the applicant filed an appeal for establishment of her working-legal status before the Commission for Implementation of Article 143 of the Law on Labour of the Federation of Bosnia and Herzegovina in Tomislavgrad ("the Cantonal Commission"). She stressed in the appeal that she had never received any response to her request for establishment of her working-legal status that she submitted to HUTP Dinara on 3 February 2000.

13. The Municipal Court in Livno did not schedule any hearings in relation to the applicant’s court action of 25 February 1998. Instead, three years later, on 12 February 2001, the court issued a procedural decision suspending the proceedings in the applicant’s case and referring the case to the Cantonal Commission.

14. On 10 February 2004 the Cantonal Commission in Tomislavgrad invited the applicant to submit additional documents. On 31 March 2004 the Commission issued a conclusion according to which the applicant’s appeal was considered as not having been filed because the applicant did not timely submit the requested additional documents.

15. On 26 April 2004 the applicant filed an appeal before the Federal Commission for Implementation of Article 143 of the Law on Labour ("the Federal Commission") against the Cantonal Commission's conclusion of 31 March 2004, explaining the reasons for the delay and submitting the requested documents in attachment to her appeal. These proceedings are pending before the Federal Commission.

IV. RELEVANT LEGISLATION

A. The Law on Labour Relations

16. The Law on Labour Relations was published in the Official Gazette of the Republic of Bosnia and Herzegovina (“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).

17. 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

18. 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).

19. Article 23, paragraph 2 of the Law provides that:

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

C. The Law on Labour

20. 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.

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

"(1) A person seeking employment, as well as a person who becomes employed, shall not be discriminated against based on race, color, 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 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 discriminatory grounds;

3. If the court finds the complaint to be well-founded, it shall make such order as it deems necessary to ensure compliance with this article, including an order for employment, reinstatement, or the provision or restoration of any right arising from the contract of employment."

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

> "(1) An employee who is on the waiting list on the effective date of this law shall retain that status no longer than six months from the effective date of this law (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 (5 February 2000), addressed in written form or directly the employer for the purpose of establishing the legal and working status – and had 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 a waiting list employee referred to in paragraphs 1 and 2 of this Article is not requested to return to 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 entry of this Law into force, 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 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."

23. 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 favorable for the employees."

D. The Law on Amendments to the Law on Labour

24. In the Law on Amendments to the Law on Labour, a new Article 143a was added to the Law on Labour 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 the case when the Cantonal Commission is not performing tasks for which it is established, the Federal Commission shall overtake the jurisdiction of the Cantonal Commission.

"(4) If a procedure pertaining to the rights of the employee under paragraph 1 and 2 of the 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 procedure."

25. In the Law on Amendments to the Law on Labour, a new Article 143b was added to the Law on Labour as follows:

"(1) Members of the Federal/Cantonal Commission shall be appointed by the Federal/ Cantonal Minister on the basis of their professional experience and demonstrated ability for performance of their function.

"(2) Members of the Commission have to be independent and objective and may not be elected officials or have any political mandate.

"(3) The Federal Ministry or competent organ of the Canton shall bear the expenses of the Federal/Cantonal Commission."

26. In the Law on Amendments to the Law on Labour, a new Article 143c was added to the Law on Labour 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 Labour Law further added 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 (7 September 2000) in the application of Article 143 of the Law on Labour.

Article 54

> "Procedures of realization 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 (7 September 2000), if it is more favourable to the employee, with the exception of Article 143 of the Law on Labour."

28. The Supreme Court of the Federation of Bosnia and Herzegovina, in its decision no. U-388/01 of 12 December 2001, held that the decisions of the Cantonal Commission and Federal Commission do not have the legal nature of administrative acts. In its opinion, the Supreme Court stated that the Commissions are not organs that conduct proceedings under the laws regarding administrative proceedings, but they are *sui generis* bodies unique to the field of labour relations. Therefore, their final decisions are not subject to judicial review under regular administrative dispute procedures, which are limited to review of administrative acts. Extra-judicial remedies cannot be filed against the Commissions' decisions because they can only be filed against effective judicial decisions. Commission decisions should, however, be subject to review by competent regular courts subject to the Law on civil procedure.

E. The Law on Civil Proceedings

29. On 11 November 1998 the Law on Civil Procedure of the Federation of Bosnia and Herzegovina entered into force (OG FBiH no. 42/98 and 3/99). Article 426 of this Law stipulates that, in proceedings concerning labour relations, the court shall generally have regard to the urgency of such matters, especially in scheduling hearings and setting time limits. A new Law on Civil Procedure took effect on 5 November 2003 (OG FBiH 53/03).

V. COMPLAINTS

30. The applicant alleges that her right to work has been violated because her employment was terminated because of her national origin. She also alleges that, at the time, employees of HUTP Dinara prohibited her from entering the facility. She wrote in her application: "I was most stricken with the injustice I experienced from the present employees of the Catering Enterprise "Dinara" who prohibited me from entering the firm in which I worked sometimes for 16 hours a day, and after that, I did not have the right to enter." She further alleges that the Municipal Court in Livno never scheduled any hearing in her case. Instead, three years latter, it transferred the case to the Cantonal Commission.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to the admissibility

31. The respondent Party first objects to the Commission's competence *ratione temporis* in relation to the events that occurred before the Agreement entered into force.

32. The respondent Party also considers that domestic remedies have not been exhausted and that the application is therefore premature. The respondent Party alleges that, in this case, the Municipal Court in Livno issued a final and binding procedural decision to suspend the proceedings, after which the case was transferred to the Cantonal Commission, which issued a conclusion on 31 March 2004. This conclusion has not become effective yet because the proceedings remain on appeal before the Federal Commission.

2. As to the merits

33. With regard to Article 6 of the Convention, the respondent Party asserts that the Court of the respondent Party, having acted in accordance with valid legal regulations, decided upon the applicant's request within a reasonable time; that the applicant's request before the Cantonal Commission had been decided within a reasonable time; and that the applicant had contributed to any delay by her own conduct. Specifically, the applicant failed to act upon the invitation of the Commission to submit the required documentation, causing the conclusion of 31 March 2004 to be issued. The respondent Party also asserts that the applicant was not denied the opportunity to use regular and extraordinary remedies. The respondent Party states that there has been no violation of Article 6 of the Convention in any aspect of this case.

34. In relation to Article II(2)(b) of the Agreement, the respondent Party maintains that the applicant does not prove what acts constituted possible discrimination, nor does she offer any argument in support of her allegations. Her statement of discrimination alone cannot be a ground for a finding of discrimination, without further support. The respondent Party asserts that the applicant's employment was lawfully terminated on 21 July 1993.

35. In relation to the ICESCR, the respondent Party claims that the rights under Articles 6(1) and 7 of that Covenant have been fully ensured to all persons under equal conditions by passing the Law on Working Relations and the Law on Labour, which do not contain discrimination on any grounds.

3. As to the Compensation Claim

36. With regard to the compensation claim, the respondent Party states that a decision on the working-legal status of the applicant in accordance with the Law on Labour is pending, that the right to compensation under the applicant's working relations may be exercised before the courts of the respondent Party, and that the compensation claim in the application will be resolved by that. The respondent Party also adds that the applicant has set her request for income payment arbitrarily and in too high an amount, especially considering the fact that employees could not have received a monthly income of 500 KM during the relevant period. The respondent Party proposes that the Commission reject the compensation claim as ill-founded.

B. The Applicant

37. The applicant points out that she lost her job on 21 July 1993 after 28 years of hard work as a waitress with HUTP Dinara. She asserts that she has been discriminated against because her work post has not been abolished, a need for it did not cease to exist, and a person of Croat origin has been employed in it. The applicant asserts that, during that period, all of the employees of Bosniak origin (50% of the employees) lost their jobs, and new employees of Croat origin were employed in their posts as waiters. In her letter of 22 July 2004 the applicant stated names of persons of Croat origin that were employed in her post and the posts of her colleagues. She mentioned the following persons: M.D., K.N., V.T., M.D., M.I., M.L. and others. The applicant did not receive any procedural decision on her working status from her employer. She has been monitoring the situation in the company since 1994 to see whether any of the Bosniak employees was called back to work, but it did not happen. She sued the company in 1998 before the court. The applicant points out that it took three years for the court to issue a procedural decision on suspension of the proceedings, and it took more than three years for the Cantonal Commission to call her to submit further documentation. (She filed her appeal on 1 December 2000, and the invitation to submit further documentation was sent on 10 February 2004.) She further argues that the Cantonal and Federal Commissions have no power to decide on her original lawsuit filed before the Court, and therefore her access to Court has been denied. According to her letter of 10 May 2004, the applicant no longer seeks reinstatement into work because of her aggravated health condition. She maintains her compensation claim, however.

VII. OPINION OF THE COMMISSION

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

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

A. Admissibility

1. Competence *ratione temporis*

40. The Commission will first address the question of to what extent it is competent *ratione temporis* to consider this case, taking into account that the respondent Party argues that the issues raised in the application do not fall within the Commission's competence *ratione temporis*.

41. The Commission 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 out of the competence of the Commission *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).

42. 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 Commission'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).

43. The Commission observes that the applicant had been denied the right to work in the company before the Agreement entered into force on 14 December 1995, and this denial has continued to date. Because the applicant has never received a procedural decision on termination of her employment, the Commission finds that her working relation with the company has never been validly terminated. Accordingly, the applicant's complaint with regard to her inability to be reinstated to work concern a situation that has continued after 14 December 1995. To this extent, the situation falls within the competence of the Commission *ratione temporis*.

44. The Commission is also competent to examine the fact that the applicant's salaries and contributions were not paid after 14 December 1995.

45. Since the applicant's appeal concerns the failure of her employer to reinstate her to work and the failure of the courts to decide her case in a timely manner, the Commission concludes that it is competent *ratione temporis* to examine the application insofar as it relates to events after 14 December 1995.

2. Requirement to exhaust effective domestic remedies

46. The Commission 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 Commission that the remedy was an effective one.

47. The respondent Party asserts that the applicant has not exhausted all domestic remedies, since the proceedings on resolution of the applicant's working-legal status by the Federal Commission remain pending. The respondent Party alleges that the applicant will have access to court protection before a competent court should her requests not be resolved in a way satisfactory to her.

48. The Commission observes in the case at hand that the Municipal Court in Livno decided not to deliberate on the merits of the case because it considered that the case fell under Article 143 of the Law on Labour. Therefore, it transferred the case to the Federal Commission. On the other hand, the stated Commission concluded that the appeal was not filed because the requested documents were not submitted. The case is pending before the Federal Commission, which will decide whether the applicant has met the formal requirements for application of Article 143 in her case. The applicant, in her lawsuit, requested the domestic organs to establish that her employment had not been terminated and to enable her to exercise her rights under her working relations. Application of Article 143 of the Law on Labour would not meet these requests because the Federal Commission is only competent to order a statutorily-set level of severance compensation. Indeed, only the regular courts are competent to decide these issues.

49. The applicant has tried to resolve her working-legal status before the domestic judicial system. After three years of inaction, however, the Municipal Court in Livno issued the procedural decision suspending the court proceedings and referring the case to the Commission for Implementation of Article 143, although the applicant's employment was never formally legally terminated and she was not placed on the waiting list. Therefore, her case does not appear to fall within the domain of Article 143 or other relevant articles of the Law on Labour.

50. Having regard to the above, the Commission concludes that the applicant cannot be required to exhaust any additional effective domestic remedies, because such do not exist. The Commission therefore declines to declare the application inadmissible for failure to exhaust domestic remedies.

3. Conclusion as to the admissibility

51. The Commission concludes that the application is admissible insofar as the applicant complains against discrimination in enjoyment of her rights to work and violations of the right to a fair hearing with regard to any actions or failures to act that either occurred or have continued after the Agreement entered into force on 14 December 1995. The Commission rejects as inadmissible those part of the application concerning actions or failures to act that occurred before 14 December 1995.

B. Merits

52. Under Article XI of the Agreement the Commission must next address the question whether the facts found disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement, the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognized 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. Article 6 of the Convention

53. Article 6 paragraph 1 of the Convention provides, as far as relevant, as follows:

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

a. Access to court

54. The Commission notes that the applicant initiated court proceedings on 25 February 1998. On 12 February 2001, however, the Municipal Court in Livno issued a procedural decision suspending the proceedings and referring the case to the Cantonal Commission for proceedings in accordance with Article 143 of the Law on Labour. On 10 February 2004 the Cantonal Commission invited the applicant to submit further documents, after which the Commission issued a conclusion on 31 March 2004, according to which the applicant's appeal was to be considered as not filed at all. On 26 April 2004 the applicant filed an appeal before the Federal Commission, and these proceedings are still pending.

55. The Commission finds that the procedural decision of the Municipal Court in Livno suspending the proceedings leaves the applicant without access to the court. The proceedings before the Cantonal and Federal Commission are *sui generis* proceedings, according to the opinion of the Supreme Court of the Federation of Bosnia and Herzegovina (see paragraph 28 above). The applicant's main complaints may not be resolved by a procedural decision that the Cantonal and Federal Commission might issue, and these may be decided only before courts, because these Commissions are limited to the application of Article 143.

56. The Cantonal Commission can apparently only order a statutorily prescribed level of compensation and is not competent to order the applicant's reinstatement or decide his discrimination claims. The same is true of the Federal Commission, the venue for direct appeal of the Cantonal Commission's decision.

57. Further, it is not clear what judicial review by the Cantonal or Federal Commission's decision, if any, would be available. The Supreme Court of the Federation of Bosnia and Herzegovina has made it clear that the Commission's decision is not subject to judicial review under regular administrative dispute procedures. While the Supreme Court stated that the Commission's decisions should be subject to a review by competent courts under the laws on civil procedure, it is not apparent that such review would be of any value to the present applicant. At best, the applicant could bring her claims anew in competent Municipal Court. It appears, however, that the court, following the law, could only uphold or repeat the referral of her case to the Cantonal Commission, and the applicant would have no prospect of reinstatement or determination of her discrimination claims. The existing system appears to place the applicant in an endless procedural loop, with no prospect of having her substantive claims heard by a court.

58. Under these circumstances, the Commission concludes that the respondent Party has violated the applicant's right to access to court guaranteed by Article 6, paragraph 1 of the Convention.

b. Conclusion

59. For the foregoing reasons, the Commission concludes that there has been a violation of the applicant's rights under Article 6, paragraph 1 of the Convention, for which the respondent Party, the Federation of Bosnia and Herzegovina, is responsible.

2. Discrimination in the enjoyment of the right to work and to just and favourable conditions of work, as guaranteed by the ICESCR

60. Under Article II of the Agreement, the Commission has jurisdiction to consider (a) alleged or apparent violations of human rights as provided in the Convention and its Protocols and (b) alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the sixteen international agreements listed in the Appendix to the Agreement on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

61. The Chamber repeatedly held that the prohibition of discrimination is a central objective of the Dayton Peace Agreement to which the Chamber (and now the Commission) must attach particular importance. Article II(2)(b) of the Agreement affords the Commission 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, including the ICESCR and the International Convention on the Elimination of All Forms of Racial Discrimination (*see* case no. CH/01/7351, *Kraljević*, decision on admissibility and merits, delivered on 12 April 2002, para. 62).

62. The Commission 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).

63. The Commission will consider the applicant's allegations of discrimination under Article II(2)(b) of the Agreement in relation to Articles 6(1) and 7(a)(i)(ii) of the ICESCR, which provide, in relevant part, as follows:

> Article 6(1)
>
> "The States Parties to the present Covenant recognize 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
>
> "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable 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; …"

a. Impugned acts and omissions

64. Acts and omissions possibly implicating the responsibility of the respondent Party under the Agreement include the failure to re-employ the applicant after the end of the armed conflict and hiring of a person of different national origin into a position that the applicant held before and during the war, until she was denied the right to work.

65. These acts affect the applicants' enjoyment of the rights guaranteed under Articles 6(1) and 7(a)(i) and (ii) of the ICESCR. The Commission will therefore examine whether the Federation of Bosnia and Herzegovina has secured protection of these rights without discrimination.

b. Differential treatment and possible justification therefor

66. The Commission must first determine whether the applicant was treated differently from others in the same or 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 or proportionality between the means employed and the aim sought to be realized. The burden is on the respondent Party to justify otherwise prohibited differential treatment based on grounds explicitly enumerated in Article II(2)(b) of the Agreement (*see* the above mentioned *Brkić*, *loc.cit*., paragraphs 71 *et seq.* with further references).

67. The applicant claims that she was not reinstated to work only because of her Bosniak origin. The respondent Party does not contest that the applicant was employed with the employer. Nor does the respondent Party contest the applicant's allegations that workers of Croat origin were employed as waiters after the applicant and all other employees of Bosniak origin were denied the right to work. There is also no dispute that the applicant is qualified for her work post and that she has substantial work experience. Except for a general refutation, the respondent Party has failed to contest the applicant's arguments or to offer arguments proving that the applicant was not subject to differential treatment.

68. The respondent Party asserts that the applicant's employment was terminated on 21 July 1993, but it has submitted no evidence to support this. It merely contests the applicant's statement that she was orally instructed not to come to work. Although Article 23 of the Law on Fundamental Rights in Labour Relations requires that "A written decision on the realization of a worker's individual rights, obligations and responsibilities shall be delivered to the worker obligatorily", the respondent Party does not contest in its observations that the employer has not issued a written decision on the applicant's working status and has not given any explanation for its treatment of the applicant. The Commission observes that the employer has never established or explained why, for example, the applicant's services were no longer required.

69. At the same time, according to the applicant's uncontested allegations, HUTP Dinara hired persons of Croat origin to replace nearly half its pre-war employees of Bosniak origin. After the war, the company continued denying the right to work to Bosniak employees, including the applicant. Indeed, the applicant was prevented from entering the business premises. In the light of these considerations, the Commission finds that the applicant was subjected to differential treatment compared to persons of different ethnic origin.

70. Having found that the applicant was treated differently in comparison with her colleagues of Croat origin, the Commission will consider whether there is any possible justification for such treatment. In this regard, the Commission notes that the company, at the same time it chose to employ new persons, failed to reinstate the applicant, an employee of 28 years' experience, to her work. The respondent Party provides no substantive argument as to why the applicant could not have been reinstated into her pre-war position or why the company hired replacement personnel instead of rehiring the applicant.

71. Having regard to the totality of these circumstances, the Commission is unable to find any reasonable or objective justification in law for the applicant's differential treatment, either during or after the armed conflict. Nor can the Commission discern any legitimate aim served by the company's failure to reinstate the applicant into her work. In the circumstances, sufficient grounds exist for a conclusion that the applicant has been discriminated against on the basis of her nationality or ethnic origin.

72. The Commission observes that the applicant's employer was an enterprise containing state capital that was privatized in May 2000. The applicant was not allowed to work from 21 July 1993 through the privatization date (or indeed afterward). Having regard to the public nature of the company prior to its privatisation and the absence of any effective means of pursuing the case

against the company after privatisation, the Commission finds the respondent Party responsible for the discriminatory conduct.

c. Conclusion

73. The Commission concludes, therefore, that the respondent Party, through the company HUTP Dinara, discriminated against the applicant 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 of Bosnia and Herzegovina thereby being in violation of its obligations under Article I of the Agreement to secure to all persons within its jurisdiction, without discrimination on any ground, the rights guaranteed by the ICESCR.

3. Conclusion on the merits

74. The Commission concludes that the applicant's rights guaranteed by Article 6(1) of the Convention have been violated and that she has been discriminated against in the enjoyment of her rights under Article 6(1) and Article 7(a) of the ICESCR.

VIII. REMEDIES

75. Under Article XI(1)(b) of the Agreement, the Commission must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Commission shall consider issuing orders to cease and desist, monetary relief (including pecuniary and non-pecuniary damages), as well as provisional measures.

76. In her application, the applicant complains that she has been denied the right to work. The applicant requests that the respondent Party be ordered to compensate her for lost income in the amount of 500 KM monthly, plus work-related contributions, from the date she stopped working through the date on which she introduced the application. According to her letter of 10 May 2004, the applicant no longer seeks reinstatement into work because of her aggravated health condition. She maintains her compensation claim, however.

77. The respondent Party argues that the applicant's claims are unjustified and ill-founded, and that the amount of compensation sought for lost income is arbitrarily and too high.

78. The Commission has found the Federation to be in breach of its obligations under the Agreement. In the circumstances, the Commission finds it appropriate to award the applicant, by way of compensation, within one month of the date of receipt of this decision, a lump sum of fifteen thousand (15,000) Convertible Marks ("Konvertibilnih Maraka") covering pecuniary and non-pecuniary damages suffered during the period from 14 December 1995 through 30 April 2004 .

79. The Commission shall also order the respondent Party to calculate and pay all contributions into the appropriate social insurance funds for the applicant, including all unpaid contributions for pension and health insurance from 1 January 1996 through 30 April 2004, and within one month of the date of receipt of this decision.

80. Additionally, the Commission will award 10% (ten percent) interest per annum on the sums referred to in the preceding paragraphs. The interest shall be paid from the due date of each payment until the date of settlement in full.

IX. CONCLUSION

81. For these reasons, the Commission decides,

1. unanimously, to declare the application admissible insofar as it relates to violations of human rights alleged to have occurred or continued after 14 December 1995;

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

3. unanimously, that the applicant's right to access to court under Article 6, paragraph 1 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. unanimously, that the applicant has been discriminated against in the enjoyment of the right to work and related rights guaranteed by Articles 6(1) and 7(a)(i) and (ii) of the International Covenant on Economic, Social and Cultural Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

5. unanimously, to order the Federation of Bosnia and Herzegovina to calculate and pay all contributions into the appropriate social insurance funds for the applicant, including unpaid contributions for pension and health insurance, for the period from 1 January 1996 through 30 April 2004, within one month from the date of receipt of this decision;

6. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant by way of compensation for pecuniary and non-pecuniary damages during the period from 14 December 1995 through 30 April 2004, the amount of fifteen thousand (15,000) Convertible Marks ("Konvertibilnih Maraka"), within one month from the date of receipt of this decision;

7. unanimously, to order the Federation of Bosnia and Herzegovina to pay the applicant simple interest at a rate of 10% (ten percent) per annum over the sum stated in conclusion no. 6 or any unpaid portion thereof from the due date until the date of settlement in full; and

8. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Commission, or its successor institution, within three months of the date of receipt of this decision, on the steps taken by it to comply with the above orders.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission