DECISION ON THE MERITS

DELIVERED ON 6 APRIL 1998

in

CASE No. CH/96/21

Krstan ČEGAR

against

the Federation of Bosnia and Herzegovina

The Human Rights Chamber of Bosnia and Herzegovina, sitting on 20 February 1998, with the following members present:

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

Peter KEMPEES, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the merits of the Application by Krstan ČEGAR against the Federation of Bosnia and Herzegovina, registered under Case No. CH/96/21 and declared admissible by the Chamber on 11 April 1997 under Article VIII paragraph 2 of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopted the following Decision on the merits under Article XI of the Agreement and Rules 57 and 58 of its Rules of Procedure.

I. INTRODUCTION

1. This case arises from the arrest and detention of the applicant by Bosnian Croat police officers between 1 June and 16 July 1996 near Glamoč. It was referred to the Chamber by the Human Rights Ombudsperson (hereinafter "the Ombudsperson") by a Decision dated 23 October 1996. This Decision was issued under Article V paragraph 5 of the Agreement set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina. In her Decision the Ombudsperson expressed the opinion that the case raised issues under Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") and of Article 1 of Protocol No. 1 to the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

2. This case was referred to the Chamber by a Decision of the Ombudsperson dated 23 October 1996. It was received at the Registry of the Chamber on 29 October 1996 and registered on the same day. It originated in an application lodged with the Ombudsperson on 19 July 1996 by Mr Krstan Čegar (hereinafter "the applicant") against the Federation of Bosnia and Herzegovina (hereinafter "the Federation"). On 3 February 1997 the Chamber decided under Rule 49 (3) (b) of its Rules of Procedure to give notice of the application to the respondent Party and invite them to submit written observations on the admissibility and merits of the application. The Chamber fixed a time limit expiring on 26 March 1997 for the submission of these observations. Additional information received from the applicant was transmitted to the respondent Party on 27 February and 12 March 1997. No response has been received from the respondent Party to any of the communications sent.

3. On 11 April 1997 the Chamber decided to declare the application admissible.

4. On 5 November 1997 the Chamber decided that a single hearing should be held in the present case and in the cases of Hermas v. the Federation of Bosnia and Herzegovina (No.CH/97/45) and Marčeta v. the Federation of Bosnia and Herzegovina (No.CH/97/41).

5. The hearing, which concerned the merits of the present application, was held in Sarajevo on 3 December 1997.

The applicant appeared in person with his representative Ms. Vesna Rujević, lawyer practising in Banja Luka.

The respondent Party was represented by its Agent, Mr Džemaludin Mutapčić.

6. The Chamber heard addresses by Ms Rujević and Mr Mutapčić, and also replies from Ms Rujević and the applicant to its questions.

7. The Agent of the respondent Party left the hearing immediately after delivering his address, explaining that due to other professional commitments he was unable to remain. The Agent, in response to an enquiry from the President, indicated that he would like the opportunity to comment in writing on a claim for compensation from the applicant. After the departure of the Agent the Chamber heard answers to questions put individually by its members to the applicant and his representative. The Chamber notes with serious concern that it was deprived of the opportunity to put questions to the Agent and to hear the respondent Party's response to its questions.

8. By a letter dated 19 December 1997 the Agent of the respondent Party submitted comments on the applicant's compensation claim.

9. The applicant submitted additional compensation claims after the Chamber's hearing, which were received at the Chamber's registry on 26 January 1998.

III. ESTABLISHMENT OF THE FACTS

A. The facts of the Case

10. The facts as set out by the Ombudsperson in her decision on referral, and later in the Chamber's decision on admissibility, have not been disputed by the respondent Party. Nor has the Agent of the respondent Party disputed the additional facts stated by the applicant and his representative at the hearing. The Chamber will therefore base its decision in principle on the facts as set out in its decision on admissibility but will also take into account the submissions made by the applicant at the hearing.

11. The applicant is a citizen of the Republika Srpska. He was born in 1943 and resides in Mišin Han, a suburb of Banja Luka. Before the war he lived in the town of Glamoč, which now lies within the Federation.

12. On 1 June 1996, the applicant went in his car to visit his former home in Glamoč. Finding it destroyed, he left. Just outside Glamoč, he was stopped and arrested by Bosnian Croat police officers. The applicant's car, a trailer and a number of agricultural implements and other items were seized.

13. The applicant was subsequently detained in a prison near Glamoč. On 3 June, 1996 he was transferred to a prison in Livno. On 11 June 1996, he was transferred to the Radoč military prison near Mostar.

14. On 12 and 13 June 1996, the applicant received visits from the United Nations International Police Task Force (IPTF) and the International Committee of the Red Cross (ICRC) respectively.

15. While in detention in Livno the applicant was told that he was being held for the purpose of exchanging him against prisoners held by the authorities of the Republika Srpska and would not be released until such exchange was possible.

16. According to the decision of the Ombudsperson the applicant was released on 16 June. However, from information given by the applicant in his application form and during the public hearing it is established that he was released on 16 July 1996, following an intervention of the ICRC in Mostar. His car and trailer were returned to him following an intervention by the International Implementation Force (IFOR). The other items which had been seized were not.

17. The applicant has never been provided with any information about the reasons for his arrest and subsequent detention other than the intended prisoner exchange. Nor was he at any time brought before a judge or other officer during his detention.

18. The applicant stated at the hearing that he was in poor health. He has submitted documents from which it appears that he suffers from heart disease.

B. Relevant Legislation

19. According to the statement of the Agent of the respondent Party at the Chamber's hearing, Article 542, paragraph 2 of the Law on Criminal Procedure now provides for compensation of damage which is the result of unjustified deprivation of liberty. A person wishing to claim such compensation may address a request to the competent Ministry of Justice of the Canton concerned in order to reach an agreement on the existence of such damage and on the form and amount of compensation. However, provision is made only for compensation of pecuniary damage.

20. Article 13 of the Law on the Application of the Law on Criminal Procedure ("Official Gazette RBiH", no. 6/92, 9/92, 13/94 and 33/95) provided, *inter alia*:

> "1) Provisions of the Law on Criminal Procedure in regard to … procedures for the compensation of damage, rehabilitation and procedures for the achievement of other rights of persons unjustly convicted and unjustly deprived of liberty, shall not apply."

The Law on the Application of the Law on Criminal Procedure was in force from 2 June 1992 until 23 December 1996, i. e. from the day of its publication in the "Official Gazette RB&H" until the cessation of the imminent threat of war. Since the day it was repealed, the provisions of Articles 541 to 549, relating to the procedure for compensation for damage, rehabilitation and realisation of other rights of persons who had been unjustly sentenced and whose detention was ill-founded, have been fully applicable once more.

IV. FINAL SUBMISSIONS OF THE PARTIES

21. The applicant's representative, speaking at the Chamber's hearing, submitted that the applicant had been a victim of violations of Article 5 of the Convention and Article 1 of Protocol No. 1 to the Convention and asked the Chamber to award the applicant compensation as claimed.

22. The respondent Party accepted that the applicant had been unlawfully detained but submitted firstly that the application was premature in that the possibility of claiming compensation under the law of the Federation was open to the applicant and, secondly, that the compensation claimed by the applicant was in any event excessive.

V. OPINION OF THE CHAMBER

A. The Respondent Party's Preliminary Objection

23. The Agent of the respondent Party, speaking at the Chamber's hearing, stated that it would have been open to the applicant under Article 524 § 2 of the Law on Criminal Procedure to apply to the competent Minister of Justice for compensation for damage arising from his illegal detention and thereafter to apply to the competent court. The applicant's claim for damages was accordingly premature.

24. Article XI paragraph 1 of the Agreement provides as follows:

> "Following the conclusion of the proceedings, the Chamber shall promptly issue a decision, which shall address:
>
> (a) whether the facts found indicate a breach by the Party concerned of its obligations under this Agreement; and if so
>
> (b) what steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries) and provisional measures."

25. The Chamber considers that the rule, contained in Article VIII paragraph 2 (a) of Annex 6, that available remedies should be exhausted does not apply to claims for monetary relief under Article XI paragraph 1 (b). That rule defines one of the conditions relating to the Chamber's jurisdiction to consider allegations of violations of human rights as referred to in the first two Articles of the Agreement; in other words, it relates to the institution of proceedings before the Chamber. A claim for monetary compensation or other relief, which the Chamber may consider if a violation is found, does not constitute a new application under Article VIII paragraph 1; it is an element of the case which the Chamber must consider in reaching its decision, as follows from the clear wording of Article XI.

The preliminary objection must therefore be rejected.

B. Scope of the Case before the Chamber

26. The applicant's representative, speaking at the Chamber's hearing, alleged a violation of Article 8 of the Convention in addition to the other Articles invoked in that the applicant had been deprived of contacts with his family.

The applicant himself also stated at the hearing that he had been maltreated while in custody and had been forced to work. These are statements which, if the Chamber were to consider them, would lead to consideration of the case under Articles 3 and 4 of the Convention respectively.

27. Mindful of its duty, firstly, to assist the Parties in securing to all persons within their jurisdiction the highest possible level of internationally recognised human rights and fundamental freedoms (Article I of Annex 6), and secondly, to develop fair and effective procedures for the adjudication of applications (Article X paragraph 1 of Annex 6), the Chamber takes the view that its procedures must be such as to place the applicant and the respondent Party on an equal footing as far as possible. This means that the applicant should not be at an unfair disadvantage vis-à-vis the respondent Party and vice versa. It also means that the applicant and the respondent Party should both have a reasonable opportunity to present their factual allegations and legal arguments to the Chamber and to comment on each other's allegations and arguments.

28. In the present case the Chamber cannot but note that these additional allegations were brought before it at a very late stage of the proceedings. Yet there was nothing to prevent their being stated to the Ombudsperson and the Chamber at the outset. The respondent Party would then have been in a position to comment on these allegations during the proceedings before the Ombudsperson and the Chamber until the date of the admissibility decision, and either to provide argument or evidence to the contrary or to admit and clarify the facts.

29. The Chamber will accordingly refrain from considering these additional allegations as such (see the Matanovic v. the Republika Srpska (Merits) Decision of 11 July 1997, paragraph 60).

C. Merits

1. Article 5 of the Convention

30. Article 5 of the Convention provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

31. The applicant claimed to have been a victim of violations of Article 5 paragraphs 1, 2, 3 and 4.

The Agent of the respondent Party, speaking at the Chamber's hearing, admitted that the applicant had been detained without just cause.

32. The Chamber notes at the outset that it is not open to doubt that the applicant was deprived of his liberty.

(a) Article 5 paragraph 1 of the Convention

33. The applicant argued that his detention was illegal and that it was not ordered by a court, as required by the law of the Federation.

34. The Agent of the respondent Party offered no argument to the contrary.

35. On the facts of the case, the Chamber has come to the conclusion that the applicant was arrested and detained by agents of the respondent Party for the sole purpose of exchanging him against prisoners held by others.

It is to be recalled that Article 5 paragraph 1 intended to guarantee freedom from arbitrary detention. The enumeration therein given of grounds which may justify deprivation of liberty is exhaustive (see the judgment of the European Court of Human Rights in the Ireland v. the United Kingdom of 18 January 1978, Series A No. 25, paragraph 194) and arrest or detention for the purpose of exchange is not to be found there. That is sufficient for the Chamber to find that the applicant's detention was contrary to Article 5 paragraph 1 of the Convention.

36. In conclusion, there has been a violation of Article 5 paragraph 1 of the Convention.

(b) Article 5 paragraph 2 of the Convention

37. The applicant was of the opinion that the failure to inform him of the reasons of his arrest or of any charges against him constituted a violation of the applicant's right, guaranteed by Article 5 paragraph 2 of the Convention, to be given such information "promptly".

38. The Agent of the respondent Party offered no argument to the contrary.

39. As the European Court of Human Rights stated in its Fox, Campbell and Hartley judgment of 30 August 1990 (Series A, No. 182), Article 5 paragraph 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral

part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 the person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (loc. cit., paragraph 40).

40. The applicant was kept in detention for forty-six days. He was not informed of the reasons for his arrest and detention until he was told, more than two days later, that he was being held for the purpose of exchanging him against prisoners held in the Republika Srpska. Furthermore, no legal grounds for his detention were given to him. Such behaviour by an authority cannot in any circumstances be considered compatible with Article 5 paragraph 2 of the Convention.

41. In conclusion, Article 5 paragraph 2 has been violated.

(c) Article 5 paragraph 3 of the Convention

42. The applicant was of the opinion that he had been the victim of a violation of Article 5 paragraph 3 of the Convention in that he had not been brought promptly before a judge, brought to trial within a reasonable time or released pending trial.

43. The Agent of the respondent Party did not offer any arguments to the contrary.

44. The Chamber recalls that Article 5 paragraph 3 applies only to persons arrested or detained in accordance with Article 5 paragraph 1 (c). That, provision not being applicable Article 5 paragraph 3 is not applicable either.

(d) Article 5 paragraph 4 of the Convention

45. The applicant was of the opinion that he had been the victim of a violation of Article 5 paragraph 4 in that he had not been able to take proceedings by which the lawfulness of his detention would be decided speedily by a court and his release ordered if the detention was not lawful.

46. The Agent of the respondent Party did not offer any arguments to the contrary.

47. The finding of a violation of Article 5 paragraph 1 in the present case does not dispense the Chamber from proceeding to inquire whether there was a failure to comply with Article 5 paragraph 4, as the two provisions are distinct (see the European Court of Human Right's Bouamar v. Belgium judgment of 29 February 1988, Series A No. 129, paragraph 55).

48. The Chamber recalls that, as was held by the European Court of Human Rights in its Chahal v. the United Kingdom judgment of 15 November 1996 (*Reports of Judgments and Decisions* 1996, § 126), Article 5 paragraph 4 provides a *lex specialis* in relation to the more general requirements of Article 13.

49. As was held by the European Court of Human Rights in its Brogan and Others v. the United Kingdom judgment of 29 November 1988 (Series A No. 145-B), the notion of "lawfulness" under Article 5 paragraph 4 has the same meaning as in Article 5 paragraph 1; and whether an "arrest or "detention" can be regarded as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 paragraph 1. By virtue of Article 5 paragraph 4, arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty (loc. cit., paragraph 65).

50. This means that, in the instant case, the applicant should have had available to him a remedy allowing the competent court to examine not only compliance with the procedural requirements laid

down by domestic law but also the reasonableness of any suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention (compare the Brogan judgment, loc. cit.).

Furthermore, as appears from the wording of Article 5 paragraph 4 itself, the remedy in question must be such as to allow the lawfulness of the arrest or detention to be decided "speedily" by a body possessing the attributes of a "court".

51. The Chamber accepts that no remedy at all was available to the applicant until he was released six weeks later following an intervention by the ICRC and indeed the Agent of the respondent Party has not suggested otherwise. This is in itself sufficient to find that there has been a violation of Article 5 paragraph 4.

52. In conclusion, Article 5 paragraph 4 has been violated.

2. Article 1 of Protocol No. 1 to the Convention

53. Article 1 of Protocol No. 1 to the Convention provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general provisions of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

54. The applicant's car, a trailer and a number of agricultural implements and other items were seized when he was arrested. His car and trailer were eventually returned to him following an intervention by IFOR. The other items which had been seized were not. As regards these other items, he claimed to have been "deprived of his possessions", contrary to Article 1 of Protocol No. 1.

55. The Agent of the respondent Party did not offer any arguments to the contrary.

56. It is not in dispute that the items seized and not returned to the applicant were his property. Nor can there be any doubt that the applicant was deprived of them. Such an interference by the authorities with a person's right to the "peaceful enjoyment of his possessions" will constitute a violation of Article 1 of Protocol No. 1 unless it is "in the public interest" and "subject to the conditions provided for by law and by the general provisions of international law".

In the present case the Agent of the respondent Party has not sought to justify the action of the authorities concerned in the public interest, nor has he given any legal grounds on which it might have been based. The Chamber, for its part, sees no justification whatsoever.

57. In conclusion, there has been a violation of Article 1 of Protocol No. 1.

VI. REMEDIES

58. The applicant submitted claims for compensation at the hearing on 3 December 1997. On 26 January 1998 he submitted additional claims in writing (see paragraph 9 above).

59. The Chamber finds that the additional claims for compensation are out of time. The claims submitted at the hearing were set out in a detailed statement, on which the Agent of the respondent Party was able to comment if he wished. There is no reason why the additional claims the applicant now wishes to make should not have been contained in the same document, or at least submitted at the same time, so that they too might have been the object of adversarial argument.

60. The applicant claimed compensation for the goods which had been taken from him and not returned. He further claimed to have suffered non-pecuniary damage for which monetary compensation was in order.

a) Pecuniary damage

61. The applicant's claims were the following:

(a) for various tools: 1,500 German Marks (DEM);

(b) for a plough: DEM 1,000;

(c) for two spare tyres: DEM 200;

(d) for a manometer: DEM 100;

(e) for 50 kilograms of laundry soap: DEM 130;

(f) for 70 kilograms of wool: DEM 70;

(g) for various small tools for field work: DEM 150;

(h) for car tools and a jack: DEM 150;

(i) for a car cassette player: DEM 200.

His claims under this head thus totalled DEM 3,500.

62. The Agent of the respondent Party, speaking at the Chamber's hearing, stated that the applicant's monetary claims were too high.

63. The Chamber notes that the allegation that the applicant's goods were unlawfully taken from him appears already in the Ombudsperson's decision on referral to the Chamber. It would therefore have been possible for the respondent Party to undertake investigations to ascertain for itself the accuracy of any claims which the applicant might make under this head. Having established as a fact that goods were in fact taken from the applicant, which the Agent of the respondent Party did not deny, and being of the opinion that the applicant's claims are not unreasonable or excessive, the Chamber will accept the applicant's claims. It therefore awards the applicant the sum claimed in respect of pecuniary damage.

b) Non-pecuniary damage

64. The applicant claimed to have suffered non-pecuniary damage. He had been kept in illegal detention and separated from his family. The situation had been aggravated by his poor health. He claimed to have suffered injury to his feelings. An award of DEM 20,000 would, in his opinion, constitute appropriate compensation in this regard.

65. In the opinion of the Agent of the respondent Party, this claim was too high.

66. The Chamber accepts that the applicant suffered non-pecuniary damage for which monetary compensation is the appropriate remedy. Not only was the applicant kept in illegal detention for six weeks, but it was apparently motivated solely by the desire to exchange him against prisoners held by another authority. That is a fact of which the Chamber takes a very serious view (see its decision of 18 February 1998 in the case of Hermas v. the Federation of Bosnia and Herzegovina).

Moreover, the applicant was kept in complete uncertainty as to the date of his eventual release and deprived of every possibility to regain the freedom to which he was entitled.

67. Nevertheless, a sum of DEM 20,000 seems very high.

In the circumstances, the Chamber considers it reasonable to award the applicant DEM 5,000 in respect of non-pecuniary damage.

VII. CONCLUSIONS

68. For the above reasons the Chamber decides, unanimously,

1. that there has been a violation of Article 5 paragraph 1 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

2. that there has been a violation of Article 5 paragraph 2 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

3. that there has been a violation of Article 5 paragraph 4 of the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

4. that there has been a violation of Article 1 of Protocol No. 1 to the Convention and that the respondent Party is thereby in breach of its obligations under Article 1 of the Agreement;

5. a) to order the respondent Party to pay to the applicant, within three months, the sum of DEM 8,500 (eight thousand five hundred German Marks);

b) that simple interest at an annual rate of 4 % will be payable over this sum or any unpaid portion thereof from the day of expiry of the above-mentioned three-month period until the date of settlement;

6. to dismiss the remainder of the applicant's claims for remedies;

7. to order the respondent Party to inform the Chamber before 06/07/98 on the steps taken by it to comply with the above orders.

(signed) Peter KEMPEES
Registrar of the Chamber

(signed) Michèle PICARD
President of the Chamber