DECISION ON THE ADMISSIBILITY

of

CASE No. CH/97/35

Mirjana MALIĆ

against

the Federation of Bosnia and Herzegovina

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 5 December 1997 with the following members present:

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

Olga KAPIĆ, Deputy Registrar

Having considered the Application by Mirjana MALIĆ against the Federation of Bosnia and Herzegovina submitted on 15 January 1997 by the Human Rights Ombudsperson for Bosnia and Herzegovina in accordance with the Rule 37 (b) of her Rules of Procedure, and at the request of the Ombudsmen of the Federation of Bosnia and Herzegovina, who represents the applicant, and **registered** under Case No. CH/97/35;

Takes the following decision on the admissibility of the Application under Article VIII paragraph 2 of Annex 6 to the Dayton Agreement.

I. THE FACTS

1. The facts of the case, as they appear from the Decision of the Ombudsmen of the Federation of Bosnia and Herzegovina referring the case to he Chamber and from the documents in the case file, may be summarised as follows:

2. The applicant is a citizen of Bosnia and Herzegovina, of Serbian descent. The applicant worked as an associate professor at the College of Dental Medicine in Sarajevo until 2 May 1992 when she stopped working due to the circumstances of war. On 23 May 1992, the College terminated the applicant's employment on the basis of absence without leave for more than 20 working days. On 20 July 1992, the applicant appealed this decision to the Dean of the College, but she did not receive a response.

3. On 23 February 1996, the applicant brought a claim to the Institution of the Ombudsmen of the Federation of Bosnia and Herzegovina (the "Ombudsmen"), who investigated the complaint and concluded that the case involved serious issues of discrimination based on national origin because the College had, since the end of the war, re-employed four professors of Bosniak descent but had not re-employed the applicant.

II. COMPLAINTS

4. The applicant, who is represented by the Ombudsmen in the proceedings before the Chamber, complains that she has been discriminated against in her right to work by the College's termination of her employment and failure to respond to her request for re-employment. The Ombudsmen found that the case raises issues under Article II, para. 2(b) of Annex 6 to the Dayton Agreement in conjunction with Article 6, para. 1 of the International Covenant on Economic, Social and Cultural Rights.

III. PROCEEDINGS BEFORE THE CHAMBER

5. The case was referred to the Chamber by the Human Rights Ombudsperson on 15 January 1997, in accordance with the Rule 37 (b) of her Rules of Procedure, at the request of the Ombudsmen. Subsequently the Ombudsman submitted a letter authorising them to represent the applicant in the proceedings before the Chamber. The case was registered on 7 March 1997.

6. On 6 June 1997, the Chamber considered the case and decided to request additional information from the Ombudsmen regarding the applicant's claim that she had been discriminated against in her right to work, in particular the details of this allegation, in particular to identify fore professors employed and to state their qualifications, position they filled before the war and the position they were appointed after the war.

7. The Ombudsmen responded with additional information by letter on 1 July 1997 stating that the request of Ms Malić to be included in the teaching process was refused and gave names of professors of Bosniak descent allegedly employed after the war.

8. On 8 August 1997 the Chamber considered the case and decided in accordance with Rule 49 (3) (a) of its Rules of Procedure, to request certain further information from the applicant and also to give notice of the application to the Government of the respondent Party in accordance with the Rule 49 (3) (b) of its Rules of Procedure and invite them to submit written observations on the admissibility and merits of the application. The Chamber fixed a time limit expiring on 26 August 1997 for the applicant and 9 September 1997 for the respondent Party. Additional information received from the applicant was transmitted to the respondent Party on 29 August 1997. On 13 November 1997, the applicant and the respondent Party were advised that the Chamber intended to decide on the admissibility of the case at its next session on the basis of the documents in the file if

no observations had been received by that time. No response has been received from the respondent Party to any of the communications sent.

IV. THE LAW

9. Before examining the merits of the case the Chamber must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII paragraph 2 of the Human Rights Agreement (hereinafter "the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina

10. It first notes that it can only deal with the applicant's complaints in so far as it is alleged that her human rights have been violated after 14 December 1995, the date on which the Agreement came into force. (see Case No. CH/96/1, Matanović v. Republika Srpska, Decision on Admissibility of 13 September 1996)

11. The Chamber next notes that the respondent Party has not put forward any objection to the admissibility of the case. It has not, in particular, suggested that any alternative "effective remedy" was available to the applicant for the purposes of Article VIII paragraph 2 (a) of the Agreement. In this respect the Chamber refers to the principles applied by the European Court of Human Rights in relation to the rule as to exhaustion of domestic remedies under Article 26 of the European Convention on Human Rights, which the Chamber has itself applied in previous decisions, (see Eur. Court HR, Akdivar v. Turkey, Judgement of the Grand Chamber of 16 September 1996; *Case No. CH/96/9*, Marković v. State and Federation of Bosnia and Herzegovina, Decision of 4 February 1997). In particular the Chamber recalls that in the *Akdivar* case the Court stated:

> "Under Article 26 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness" (ibid. para. 66).

12. As regards the burden of proof the Court also stated:

> "In the case of exhaustion of remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy…was in fact exhausted or for some reason inadequate or ineffective in the particular circumstances…or that there existed special circumstances absolving him or her from the requirement…" (ibid., para. 68).

13. In para. 69 of the Judgement the Court further emphasised that the application of the domestic remedies rule "must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up." Accordingly, the Court said, it must be applied "with some degree of flexibility and without excessive formalism" and it is necessary to "take realistic account not only of the existence of formal remedies in the legal system…but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants".

14. In the present case, as the Chamber has pointed out, the respondent Party has not suggested that any effective alternative remedy was available. On the information available to it the Chamber finds that it is not established that any such remedy was available.

15. On the basis of the facts as they appear from the file the Chamber finds that issues arise under Article II paragraph 2 (b) of the Agreement (which empowers it to consider alleged or apparent discrimination in relation to the enjoyment of certain rights) in conjunction with Article 6 of the

International Covenant on Economic, Social and Cultural Rights (which concerns the right to work), Article 25 of the International Covenant on Civil and Political Rights (which concerns the right of access, on general terms of equality, to the public service) and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (which concerns *inter alia* discrimination in the employment field). The facts of the case may also raise issues under Article 6 (1) and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantee respectively the right to a fair hearing within a reasonable time in civil proceedings and the right to an effective remedy for violations of Convention rights.

16. In these circumstances the Chamber finds that the application should be declared admissible and should be examined on the merits in so far as it relates to alleged or apparent violations of the applicant's rights since 14 December 1995.

17. For these reasons the Chamber, without prejudging the merits, unanimously

DECLARES THIS APPLICATION ADMISSIBLE

in so far as it relates to alleged violations of the applicant's rights since 14 December 1995.

(signed) Olga KAPIĆ
Deputy Registrar of the Chamber

(signed) Michèle PICARD
President of the Chamber