HUMAN RIGHTS CHAMBER
FOR BOSNIA AND HERZEGOVINA

DOM ZA LJUDSKA PRAVA
ZA BOSNU I HERCEGOVINU

DECISION ON ADMISSIBILITY AND MERITS

(delivered on 22 December 2003)

Case no. CH/98/565

M.K.

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in Plenary session on 4 December 2003 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, 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. The applicant is a citizen of Bosnia and Herzegovina of Serb origin. He was employed by the Sarajevo City Development Institute (now the Sarajevo Canton Development Institute) in Sarajevo before the outbreak of the armed conflict.

2. The case raises issues with regard to the discrimination in the enjoyment of the right to work and related rights as guaranteed by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). The application also raises issues under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 22 April 1998.

4. On 23 September 1998, the Chamber sent a letter to the applicant regarding his allegation that he did not initiate any proceedings before the courts because he was afraid of the consequences, given that Mr. Bakir Izetbegović, the son of Mr. Alija Izetbegović, was the Director of the Institute he was working for. He was asked to provide the Chamber with further information why this could have serious consequences for him or with information that consequences had occurred to others in similar circumstances. He was further requested to substantiate his allegation that he has been discriminated against because of his Serb origin in his working relations with the Institute. On 2 February 1999, the Chamber again sent the same letter because the applicant did not respond.

5. The applicant responded on 8 March 1999.

6. On 12 April 2000, the Chamber transmitted the case to the respondent Party for its observations on the admissibility and merits under Article II(2)(b) of the Agreement in conjunction with Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, as well as under Article 6 of the Convention. On 12 June 2000 the respondent Party sent its observations on admissibility and merits.

7. The respondent Party sent additional information on 13 October 2000, 7 November 2001, 8 February 2002, 30 December 2002, 13 March 2003, 21 April 2003, 22 July 2003, 16 August 2003, 17 September 2003, and 21 October 2003.

8. The applicant sent additional observations on 8 March 1999, 20 July 2000, 29 November 2000, 16 January 2002, 18 December 2002, 26 August 2003, and 16 September 2003.

9. The Chamber, sitting as the First Panel, deliberated on the admissibility and merits of the case on 10 September 1998, 6 April 2000, 5 September 2000, 2 April 2003, 7 October 2003, and 5 November 2003. On the latter date, the First Panel transferred the case to the Plenary Chamber. On 4 December 2003, the Plenary Chamber considered the admissibility and merits of the case and adopted the present decision.

III. FACTS

10. The applicant is a citizen of Bosnia and Herzegovina of Serb origin. Since 1974 he has worked as a mechanical engineer for the Sarajevo City Development Institute ("the Institute"). On 30 April 1992, the applicant left for Bar, in Montenegro, to accompany his spouse for medical treatment, after the director of the institute, Mr. Bakir Izetbegović, orally approved his use of 20 days of his prior year's holidays for that purpose.

11. Due to the hostilities during the armed conflict and the siege of Sarajevo, the applicant could not return to work after his trip to Montenegro. He spoke by phone with the director, who confirmed

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

that it was not possible to enter the town and told the applicant that he should wait until the situation changed.

12. In Bar, the applicant was registered as a refugee by the Red Cross, and, after the Dayton Agreement was signed, he returned to his apartment in Grbavica in Sarajevo.

13. On 7 July 1992, the Institute issued a procedural decision terminating the applicant's labour relations on 6 July 1992. The reasoning of that decision states that all employees of the Institute were requested to report to work on 6 July 1992 in accordance with the Decree of the Government of the Republic of Bosnia and Herzegovina on Entry into Force of Compulsory Work Order. Because the applicant did not report to work on or before 6 July 1992 and did not justify his absence, the Institute issued the procedural decision. The procedural decision was placed on the bulletin board of the Institute and was not delivered to the applicant.

14. On 23 March 1996, the applicant applied in writing to the Institute to be re-instated to his former position. When he did not obtain an answer, he submitted a second request on 15 June 1998. On 3 July 1998, his request for re-instatement was refused by the Institute on the grounds that "there was no need for workers of his profession".

15. He discovered, however, that another mechanical engineer, a trainee of Bosniak origin, had been employed to replace him. He also learned that his working relations were terminated on 6 July 1992, although he never received a formal termination notice. The applicant claims that, according to his experience in his field, he should have been employed instead of the trainee. The applicant further states that other employees were hired after he had submitted his request for reinstatement, and that he was told that the Institute would employ him when Bosniaks were employed in the Republika Srpska.

16. In his application of 22 April 1998, the applicant states that he did not initiate proceedings before the domestic courts because he was afraid for his and his family's safety, because the director of the Institute is the son of Mr. Alija Izetbegović and because he believed that any court proceedings against the Institute would therefore not be successful. He further added that his wife, who was also dismissed from her pre-war position, initiated court proceedings against her former employer, UPI Holding Sarajevo, and that these court proceedings were still pending.

17. The applicant engaged a lawyer to obtain the procedural decision terminating his labour relations. On 14 April 1999, the applicant's representative was given the requested procedural decision, and on 19 April 1999 the applicant's representative submitted an objection against that decision. When the director of the Institute did not respond within the 30-day time limit, the applicant submitted an action before the court on 27 May 1999, within the additional 15-day time limit allowed by the law.

18. On 12 June 2000, the Institute refused the applicant's request to establish his legal and working status with the Institute.

19. In his action filed 27 May 1999 before the Municipal Court I in Sarajevo, the applicant requested the Court to annul the 7 July 1992 procedural decision terminating his labour relations and to reinstate him into a position commensurate with his educational background and work experience. A hearing scheduled for 11 September 2000 was postponed for an indefinite period to decide on a proposal of the Institute's representative to suspend the proceedings and to transmit the case to the Cantonal Commission for labour relations to be established under the Law Amending the Law on Labour.

20. On 7 November 2000, the Municipal Court I issued a procedural decision on suspending the proceedings. The court established, however, that the original court action had been filed within the lime limit prescribed by law. In his 29 November 2000 submission to the Chamber, the applicant stated that his complaint before the Court had nothing to do with being an employee on the waiting list because his civil action sought annulment of the Institute's procedural decision terminating his labour relations. The applicant contends that the Court acted incorrectly when it issued the procedural decision to suspend the proceedings in his case. He cites Article 54 of the Law

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

Amending the Law on Labour, which provides that, proceedings for protection of employees that were initiated before the entry into force of the Law shall be finalised under regulations applied on the territory of the Federation of Bosnia and Herzegovina before the entry into force of the Law, if those regulations are more favourable for the employee.

21. On 4 December 2000, the applicant appealed to the Cantonal Court in Sarajevo against the 7 November 2000 procedural decision. On 8 November 2001, the Cantonal Court refused the appeal and confirmed the first instance procedural decision.

22. On 26 October 2002, the Cantonal Commission for Implementation of Article 143 of the Law on Labour issued a procedural decision rejecting as ill-founded the applicant's request to establish his legal and working status. The reasoning of this procedural decision states that, for more than one year, the applicant did not provide additional relevant documents and therefore the Commission could not, based on partial documentation, establish without dispute whether the applicant fulfilled the conditions for realisation of his rights under Article 143 of the Law on Labour. The decision also established that the applicant initiated court proceedings against his employer for reinstatement or annulment of the decision on termination of his labour relations in 1992, before the issuance of the Law on Labour. Therefore, the Cantonal Commission decided to return the case to the Municipal Court I in Sarajevo for finalisation of the labour dispute.

23. On 25 February 2003, the Cantonal Commission for Implementation of Article 143 of the Law on Labour returned the applicant's case file to the Municipal Court I in Sarajevo for continuation of the proceedings that had been initiated there. On 13 March 2003, the respondent Party submitted additional information regarding this fact, stating that the Court fully complied with Article 426 of the Law on Civil Procedure. This Article provides 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". In keeping with this law in the applicant's case, the court scheduled a new hearing for 7 April 2003.

24 . On 21 April 2003, the respondent Party responded to the Chamber's request for information on "whether someone has replaced the applicant in his former position". The respondent Party stated that "before the war Mr. M.K. was assigned to the position of technical supervision for mechanical installations and devices; the 1 October 2002 book of Internal Organisation of the Development Bureau of Canton Sarajevo prescribes two positions for mechanical engineers – professional assistant for supervision of reconstruction and construction of heating systems and facilities running on gas. These positions are full, and M.S. and E.T., mechanical engineers, are employed in them; these employees did not replace the applicant in his pre-war position, since that position has not been prescribed by the Book on Internal Organisation of the Development Bureau of Canton Sarajevo".

25. On 16 September 2003, the applicant submitted observations stating that "from the information of the respondent Party of 21 April 2003 it can be seen that the Rules of Internal Organisation of the Institute were issued on 1 October 2002, and he submitted his request for reinstatement on 23 March 1996, six years before the new Rules on Internal Organisation were adopted. He further stated that he was employed on 14 July 1975 as a Main Mechanical Engineer for heating of the City of Sarajevo, where he performed the tasks of the Professional Supervisor for Conversion of Boiler Plants into Gas Plants. He further stated that he is capable of performing all the tasks a mechanical engineer is required to do".

26. On 16 September 2003, the Municipal Court I issued a judgement by which the applicant's action was rejected as untimely. The court reasoned that the applicant submitted his first request for reinstatement on 23 March 1996, and that this should be considered as the applicant's objection against the procedural decision of 7 July 1992. Relying on Articles 81 and 83 of the Law on Fundamental Rights in Labour Relations, the court established that the applicant did not initiate court proceedings within the time limit prescribed by the Law, and for this reason it rejected the applicant's action. Having rejected the case on procedural grounds, the Court did not consider the applicant's requests for compensation. On 16 October 2003, the applicant appealed against the first instance judgement.

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

IV. RELEVANT LEGAL PROVISIONS

A. The Law on Fundamental Rights in Labour Relations

27. The Law on Fundamental Rights in Labour Relations of the Socialist Federal Republic of Yugoslavia ("SFRY") (Official Gazette of SFRY, nos. 60/89 and 42/90) was taken over as a law of the Republic of Bosnia and Herzegovina (Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RbiH" - no. 2/92). Article 23 paragraph 2 of the Law provides that:

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

Article 75 of the Law provides for the termination of a working relationship. Paragraph 2(3) of that Article reads as follows:

> "The working relationship ends without the consent of the employee, … if he or she stayed away from work for five consecutive days without good cause."

Article 78 of the Law requires that notice of termination of the working relationship be delivered in writing:

> "A decision on termination of labor relations and the reasons for its issuance shall be delivered to the employee in writing with instructions on the employee's right to file an appeal against the decision."

Paragraph 1 of Article 81 of the Law gives the employer 30 days to respond to an appeal by the employee:

> "Upon the appeal of the employee, the competent body within the organization, i.e. the employer, is obliged to issue a decision within 30 days from the date of submission of the appeal."

Article 83 of the Law sets out the procedures by which a worker can seek protection before the courts:

> "(1) A worker who is not satisfied with the final decision of the competent body in the organization, or if that organ fails to issue a decision within 30 days from the day the request or appeal is lodged, has the right to seek protection of his right before competent court within the next 15 days."

B. The Law on Labour Relations

28. The Decree with Force of Law on Labour Relations during the State of War or Immediate Threat of War (OG RBiH no. 21/92 of 23 November 1992) entered into force on the day of its publication. It was later confirmed by the Assembly of the Republic (OG RBiH no. 13/94 of 9 June 1994) and applied as the Law on Labour Relations. It remained in force until 5 November 1999. The Law contained the following relevant provisions:

> 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.
>
> …
>
> 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

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

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."

Article 15

"The employment is terminated, if, while under a compulsory work order, the employee stayed away from work for more than 20 consecutive working days without good cause, or if he or she took the side of the aggressor against the Republic of Bosnia and Herzegovina."

C. The Law on Labour

29. The Law on Labour (OG FBiH 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 32/00) with the particular effect that certain new provisions, including Articles 143a, 143b, and 143c, were added and entered into force on 7 September 2000.

30. 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, colour, 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."

31. 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

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

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."

32. 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 favourable for the employees."

D. The Law on Amendments to the Law on Labour

33. 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."

34. 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."

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

35. 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."

36. 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 (i.e. 7 September 2000).
>
> "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 realisation 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."

37. The Supreme Court of the Federation of Bosnia and Herzegovina, in its decision no. U-388/01, delivered on 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 laws on civil procedure.

E. The Law on Civil Procedure

38. 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).

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

V. COMPLAINTS

39. The applicant alleges a violation of his right to a fair hearing under Article 6 of the Convention. He further alleges that he has been discriminated against in the enjoyment of the right to work on the basis of his Serb origin and place of residence.

40. The applicant requests the Chamber to order the respondent Party to reinstate him to his pre-war employment and to compensate him for lost salary, along with contributions for pension and health insurance. He also requests moral damages for suffering in the amount of KM 10,000.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

1. As to admissibility

41. The Federation argues that the Chamber is not competent *ratione temporis* to consider the application because the labour relations of the applicant were terminated on 6 July 1992, before the entry into force of the Agreement.

42. The Federation also argues that the applicant has failed to exhaust effective domestic remedies including, *inter alia*, appeal against a first instance judgement. The Federation further argues that the application runs afoul of the six months rule because the applicant has not received a final decision.

2. As to the merits

43. The Federation argues that the application is ill-founded on the merits. With regard to Articles 6 and 7 of the ICESCR, the Federation asserts that the applicant lost his position solely due to his own behaviour, i.e. failing to report to work on time or to justify his absence.

B. The applicant

44. The applicant asserts: (1) that the court proceedings initiated on 25 May 1999 have been delayed to the end of his life; (2) that his case does not involve Article 143 of the Labour Law; (3) that the Institute needed employees with his work experience; and (4) that the exclusive reason for his dismissal was discrimination.

45. The applicant wrote on 8 March 1999 that, "As the Institute performs expert supervision of many facilities that were devastated during the course of the war and for which reconstruction funds have been granted from international donations, it is not true that there is no need for the Institute to employ people with my background."

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Competence *ratione temporis*

46. The respondent Party contends that the Chamber lacks competence *ratione temporis* to consider the application because the applicant's employment was terminated before the entry into force of the Agreement. The procedural decision terminating the applicant's labour relations was only delivered to him in writing, as required by Article 78 of the Law on Fundamental Rights in Labour Relations, on 14 April 1999. And it appears that the situation the applicant complains of — his employer's failure to hire him back — is of an ongoing nature. Further, the applicant's request for reinstatement was refused on 3 July 1998. The applicant's grievances relate to a situation that took

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

place after the Agreement entered into force, and the Chamber concludes that it is competent *ratione temporis* to consider the application insofar as it relates to events after 14 December 1995.

2. Requirement to exhaust effective domestic remedies

47. The Federation argues that the applicant has not exhausted effective domestic remedies including, *inter alia*, appeal to a second instance court. The Chamber must consider whether, for the purpose of Article VIII(2)(a) of the Agreement, any "effective remedy" was available to the applicant in respect of his complaints and, if so, whether he has demonstrated that it has been exhausted. It is incumbent on the respondent Party arguing non-exhaustion to show that there was a remedy available to the applicant other than his application based on the Agreement and to satisfy the Chamber that the remedy was an effective one.

48. The Chamber notes that the applicant's domestic court proceeding has been pending for three and one-half years. The court first sent the case to the Cantonal Commission, even though the central issue in the case — whether or not the applicant was validly dismissed in the first place — was a question that should have been decided before any referral to the Commission. Thus, the applicant lost nearly two years, between 7 November 2000 and 26 October 2002, while court proceedings were suspended and there were no effective remedies for him to pursue to obtain reinstatement. Although the Commission eventually referred his case back to the first instance court, that court, acting in a manner inconsistent with its earlier decision, rejected the case on procedural grounds on 16 September 2003. While the applicant has appealed this decision to the Cantonal Court, the Chamber considers that the length of proceedings in this case — and the fact that in three and one-half years the courts have never addressed the merits of the case — establish that there are no effective remedies that the applicant can be expected to exhaust for the purposes of Article VIII(2)(a) of the Agreement before the domestic courts.

49. The Chamber concludes that there are no effective domestic remedies for the applicant to obtain reinstatement. The application is therefore admissible in its entirety against the Federation of Bosnia and Herzegovina.

B. Merits

1. Discrimination in the enjoyment of the right to work and free choice of employment as guaranteed by Articles 6 and 7 of the ICESCR

50. Under Article II of the Agreement, the Chamber 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.

51. The Chamber has repeatedly held that the prohibition of discrimination is a central objective of the Dayton Peace Agreement to which the Chamber must attach particular importance. Article II(2)(b) of the Agreement affords the Chamber 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 International Covenant on Economic, Social and Cultural Rights (see case no. CH/01/7351, *Kraljević*, decision on admissibility and merits, delivered on 12 April 2002, paragraph 62).

52. Article 6(1) of the ICESCR, as far as relevant, reads as follows:

> "The States Parties to the present Covenant recognise 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."

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

53. Article 7 of the ICESCR, as far as relevant, reads as follows:

> "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable 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

54. Acts and omissions possibly implicating the responsibility of the Federation under the Agreement include the failure to re-employ the applicant after the end of the armed conflict and the hiring of others for a position the applicant previously held.

55. These acts affect the applicant's enjoyment of the rights guaranteed by Articles 6(1) and 7(a)(i) and (ii) of the ICESCR. The Chamber will therefore examine whether the Federation has secured protection of these rights without discrimination.

(b) Differential treatment and possible justification

56. The Chamber 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 realised. 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 case no. CH/99/2696, *Brkić*, decision on admissibility and merits of 8 October 2001, paragraph 71, Decisions July-December 2001).

57. The applicant asserts that his employment was terminated and he was not re-employed solely because of his Serb origin. The respondent Party does not dispute that the applicant was employed by the Institute, but argues that his employment was lawfully terminated. The Federation claims that the employment was terminated by a procedural decision of 7 July 1992, in accordance with the Decree of the Government of the Republic of Bosnia and Herzegovina on Entry into Force of Compulsory Work Order, because the applicant did not report to work on 6 July 1992 and did not justify his absence.

58. The Chamber notes that, due to the circumstances in Sarajevo at the time, and for reasons known to his employer, it was not possible for the applicant to report to work on 6 July 1992. Nonetheless his labour relations were terminated, and he was later replaced by a "trainee" — presumably an individual of lesser experience — of Bosniak origin. The Federation further admits that two mechanical engineer positions have been filled with less experienced employees of Bosniak origin, but it relies on job title changes for mechanical engineer positions from an October 2002 reorganisation manual to argue that the applicant has not been replaced. The Federation provides no explanation, however, as to why the applicant, an experienced mechanical engineer, was not qualified for these positions. The applicant, meanwhile, was made to wait more than two years with no answer to his 23 March 1996 written request for reinstatement, and has so far been denied reinstatement for more than seven and one-half years. In light of all these considerations, the Chamber finds that the applicant has been subjected to differential treatment in comparison with persons of different ethnic origin. There is no evidence that the applicants treatment was objectively justified by law either during or after the armed conflict.

59. The Chamber concludes that the applicant has been discriminated against in the enjoyment of his right to work, and to just and favourable conditions of work, as defined in Articles 6 and 7 of the ICESCR, the Federation thereby being in violation of its obligations under Article I of the

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

Agreement to secure to all persons within its jurisdiction, without discrimination on any ground, the rights guaranteed by the ICESCR.

2. Article 6 of the Convention

60. 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) Length of proceedings

61. The Chamber notes that the applicant initiated court proceedings on 27 May 1999 before the Municipal Court I in Sarajevo. In its procedural decision of 7 November 2000, the court established that the lawsuit had been timely filed, but it suspended the proceedings and referred the case to the Cantonal Commission for proceedings in accordance with Article 143 of the Law on Labour. On 4 December 2000, the applicant appealed to the Cantonal Court in Sarajevo against this procedural decision. On 8 November 2001, the Cantonal Court refused the appeal and affirmed the first instance decision.

62. On 26 October 2002, the Cantonal Commission issued a procedural decision rejecting the applicant's claim as ill-founded (see paragraph 22 above). The Commission noted, however, that the applicant had initiated a claim for reinstatement before the Municipal Court I in Sarajevo, and the Commission returned the case to that court for finalisation of the labour dispute.

63. Thereafter, on 16 September 2003, the Municipal Court I in Sarajevo issued a judgement rejecting the applicant's court action as untimely, finding that the applicant had not filed his case within the statutory time limit. This decision was inconsistent with the 7 November 2000 procedural decision of the same court.

64. When assessing the length of proceedings for the purposes of Article 6 paragraph 1 of the Convention, the Chamber must take into account, *inter alia*, the conduct of the applicant and the authorities and the matter at stake for the applicant. The issues in the applicant's case are whether his working relationship was terminated in accordance with law and whether he should have been reinstated when employment opportunities arose. These are not issues of a particularly complex nature. Further, there is no indication that the length of proceedings can be imputed to the applicant. Nor has the respondent Party provided any explanation from which it would appear that the delays should not be imputed to the judicial authorities of the respondent Party itself.

65. The failure to bring proceedings to a conclusion within a reasonable time is further compounded by the fact that an employee who considers that his working relationship was wrongly terminated and that he should have been reinstated has an important personal interest in a speedy outcome of the dispute and in securing a judicial decision, considering that his very livelihood depends on it. Domestic law requires that matters concerning employment are to be resolved as a matter of urgency.

66. The Chamber notes that the Municipal Court first sent the case to the Cantonal Commission, even though the central issue in the case — whether or not the applicant was validly dismissed in the first place — was a question that should have been decided before any referral to the Commission. Thus, the applicant lost nearly two years, between 7 November 2000 and 26 October 2002, while court proceedings were suspended and there were no effective remedies for him to pursue to obtain reinstatement. Although the Commission eventually referred his case back to the first instance court, that court, acting in a manner inconsistent with its earlier decision, rejected the case on procedural grounds on 16 September 2003. While the applicant has appealed this decision to the Cantonal Court, the Chamber considers that the fact that the proceedings in this case have already extended over three and one-half years without any decision establishes a violation of the applicant's right to a hearing within a reasonable time under Article 6 paragraph 1 of the Convention.

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

(b) Conclusion

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

3. Conclusion on the merits

68. The Chamber concludes that the applicant's rights as guaranteed under Article 6 of the Convention have been violated and that he has been discriminated against in the enjoyment of his rights under Articles 6(1) and 7(a) of the ICESCR.

VIII. REMEDIES

69. Under Article XI(b) of the Agreement, the Chamber must next address the question of what steps shall be taken by the Federation of Bosnia and Herzegovina to remedy the breaches that it has found.

70. The applicant requests the Chamber to order the respondent Party to reinstate him to his pre-war employment, to compensate him for lost salary, to pay contributions for his pension and health insurance, and to pay him moral damages for suffering in the amount of KM 10,000.

71. The Chamber has found the Federation to be in breach of its obligations under the Agreement by discriminating against the applicant on the basis of national and ethnic origin in the enjoyment of his rights under Articles 6 and 7 of the ICESCR and by failing to secure his rights guaranteed by Article 6 of the Convention. Therefore, the Chamber finds it appropriate to order the applicant's reinstatement to his previous employment and to award the applicant pecuniary and non-pecuniary compensation.

72. The Chamber will order the Federation to undertake immediate steps to ensure that the applicant is no longer discriminated against in his right to work and to just and favourable conditions of work, and that he be offered the possibility of resuming his previous position, or another position appropriate to his skills and training, with a salary commensurate to his previous position.

73. The Chamber will further order the Federation to calculate and pay all benefits, including unpaid contributions to the applicant's pension and health insurance, from 23 June 1996 through the date of his reinstatement, into the appropriate funds for the applicant's benefit, not later than one month after the date of delivery of this decision, i.e., by 22 January 2004.

74. The Chamber will further order the Federation to pay the applicant, by way of compensation for both pecuniary and non-pecuniary damages suffered during the period from 23 June 1996 through 31 December 2003, the sum of 20,000 Convertible Marks (*Konvertibilnih Maraka*, "KM"), not later than one month after the date of delivery of this decision, i.e., by 22 January 2004.

75. The Chamber will further award ten percent interest per annum on the sums referred to in the preceding paragraphs and this paragraph. This interest shall be paid as of the date of the expiry of the one-month period set for the implementation of this decision until the date of settlement in full.

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

IX. CONCLUSIONS

76. For the above reasons, the Chamber decides,

1. unanimously, to declare the application admissible;

2. by 11 votes to 1, that the applicant has been discriminated against in the enjoyment of his right to work as guaranteed by Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, in conjunction with Article II2)(b) of the Human Rights Agreement, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

3. by 11 votes to 1, that the applicant's right to a fair hearing within a reasonable time under Article 6 paragraph 1 of the European Convention on Human Rights has been violated, the Federation of Bosnia and Herzegovina thereby being in violation of Article I of the Agreement;

4. by 11 votes to 1, to order the Federation of Bosnia and Herzegovina to take all necessary steps to ensure that the applicant is immediately, an in any event no later than 22 January 2004, offered the possibility to resume his previous position, or another position appropriate to his skills and training, with a salary commensurate to his previous position;

5. by 11 votes to 1, to order the Federation to calculate and pay all benefits, including unpaid contributions to the applicant's pension and health insurance, from 23 June 1996 through the date of his reinstatement, into the appropriate funds for the applicant's benefit, not later than one month after the date of delivery of this decision, i.e., by 22 January 2004;

6. by 11 votes to 1, to order the Federation of Bosnia and Herzegovina to pay the applicant the amount of 20,000 KM by way of compensation for pecuniary and non-pecuniary damages suffered during the period from 23 June 1996 through 31 December 2003, not later than one month after the date of delivery of this decision, i.e., by 22 January 2004;

7. by 11 votes to 1, 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 sums stated in conclusion no. 6 or any unpaid portion thereof, as of the date of the expiry of the of the one-month period set for such payments until the date of settlement in full, and

8. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Human Rights Commission within the Constitutional Court, not later than 22 January 2004, on the steps taken to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the First Panel

Annex Dissenting opinion of Mr. Hasan Balić

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. Hasan Balić.

DISSENTING OPINION OF MR. HASAN BALIĆ

Why do I consider the application ill-founded and believe that the applicant's request should be rejected as manifestly ill-founded?

As to the facts:

The war in Bosnia and Herzegovina from 1992 to 1995 is to be blamed for everything. It destroyed the economy of the State. According to the Republic/Federation of Bosnia and Herzegovina Public Health Institute Report, 278,000 persons were killed. Out of this there are 140,800 (or 7.3%) fewer Bosniaks, 97,300 (or 7.1%) fewer Serbs, 28,400 (or 3.7%) fewer Croats, and 12,300 (or 3.5%) fewer Yugoslavs and others.[1]

Sarajevo is the city that, in the history of war, was held under the longest siege. For this crime, the Hague Tribunal sentenced General Galić to 20 years imprisonment.[2]

Consequently, jobs were destroyed by the war, and tens of thousands of engineers and other experts, including the applicant, lost their jobs. The applicant left Sarajevo voluntarily and went to the aggressor's country. Assuming that he did not take part in military forces he, *de facto* and *de jure,* was on the aggressor's side. Such a situation implies two parties, the victim and the aggressor. The applicant is not the victim. Actually, he victimised the son of Alija Izetbegović and other citizens of Sarajevo, and not the opposite as concluded by the Chamber.

As to the application of the law:

Article 14 of the Convention prohibits discrimination on any grounds. The applicant discriminated against the victim by abandoning it and refusing to identify himself with it. One should have understanding for the applicant's desire to work. In my opinion, however, the explicit blame for his situation is on him and on the war. Therefore, his application should have been rejected.

(signed)
Hasan Balić

[1] *See* Dr. Hasan Balić, *Bosnian Cataclysm, the case of Foča – Magistrat*, (Sarajevo 2002), at 22.
[2] *See* ICTY judgement in case no. IT-98-29, *Galić*, 5 December 2003.

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