DECISION ON ADMISSIBILITY

Case no. CH/98/948

Mile MITROVIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 7 September 1999 with the following members present:

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

Mr. Anders MÅNSSON, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

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

Adopts the following decision pursuant to Article VIII(2) and Article XI of the Agreement as well as Rules 52 and 53 of the Chamber's Rules of Procedure:

I. FACTS

A. The particular circumstances of the case

1. The applicant is of Croat and Serb origin. He was an employee of Elektroprivreda, a state-owned company in Sarajevo.

2. The applicant last reported to work on 26 May 1992. He alleges that he was unable to report for work during the hostilities because he lived in Grbavica, which was controlled by Bosnian Serb forces, and could not cross the front line.

3. The applicant's employment was terminated by a decision of the company dated 30 October 1993 on the grounds that he had not reported for work for five consecutive days without good reason.

4. The applicant reported to the head office of the company on 30 March 1996, after Grbavica became part of the territory of the Federation of Bosnia and Herzegovina. On that day he was notified of the company's decision of 30 October 1993 to terminate his employment. On the same day he submitted an objection to the company against the decision. His objection was dismissed, and the original decision confirmed, by the company's Commission for Appeals on 18 June 1996.

5. On 10 July 1996 the applicant initiated proceedings before the Court of First Instance II in Sarajevo claiming that the termination of his employment was unlawful. The Court issued a decision on 2 June 1997, rejecting the applicant's claim. It noted that the applicant had been on the "aggressor side" as a member of the Civil Defence of the Republika Srpska during the hostilities, which constituted a ground for dismissal under Article 15 of the Decree with Force of Law on Employment During State of War or Immediate Threat of War.

6. On 30 June 1997 the applicant appealed to the Cantonal Court in Sarajevo on the ground that the first instance had incorrectly applied the substantive law. The applicant argued that Article 15 of the Decree was contrary to the Constitution of Bosnia and Herzegovina. On 27 January 1998 the Court issued a judgment, refusing the applicant's appeal and confirming the application of the law by the first instance court. However, the Cantonal Court affirmed the termination of the applicant's employment based on his absence from work for five consecutive days without good reason, pursuant to Article 75 of the Law on Basic Rights Concerning Labour Relations.

B. Relevant domestic law

7. Article 75 paragraph 2(3) of the Law on Basic Rights Concerning Labour Relations (Official Gazette of the Socialist Federal Republic of Yugoslavia – hereinafter "OG SFRY" – nos. 60/89 and 42/90; taken over through a Decree with Force of Law, Official Gazette of the Republic of Bosnia and Herzegovina – hereinafter "OG RBiH" – no. 2/92) reads as follows:

> "The labour relation with the employee shall be terminated without his consent: ... [i]f he is absent from work for five consecutive working days."

8. Article 15 of the Decree with Force of Law on Employment During State of War or Immediate Threat of War (OG RBiH no. 21/92) reads as follows:

> "The Labour relation is to be terminated if the worker subject to a compulsory work order is absent without good reason from the job for more than twenty consecutive days or if the worker has been on the aggressor side and against Republika Bosnia and Herzegovina."

9. Relevant provisions of the Law on Civil Procedure (OG SFRY nos. 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90 and 27/90, and OG RBiH nos. 2/92, 16/92 and 13/94) read as follows:

Article 382:

"(1) Parties may submit e request for review against a final judgment issued by the second instance court within 30 days of the delivery of the judgment.

(2) No review is permitted in a pecuniary dispute concerning a monetary claim, delivery of property of the execution of any other action, if the value of the dispute of the impugned part of the final judgement does not exceed 20,000 [Yugoslav] Dinars.

(3) No review is permitted in a pecuniary dispute that does not concern a monetary claim, delivery of property of the execution of any other action, if the value of the dispute as stated by the plaintiff in the suit does not exceed 20,000 Dinars.

(4) Exceptionally, when the case concerns a complaint under paragraphs 2 and 3 of this Article, the review is always permitted as follows:

1. in disputes concerning alimony;
2. in disputes concerning labour relations
3. in disputes concerning copyright

..."

Article 383:

"The request for review shall be determined by the Supreme Court of the Republic ..."

Article 385:

"(1) A request for review may be filed in the following circumstances:

1. if a fundamental error has been made in the civil procedure ..., unless the error concerns the competence [*ratione loci*] ... or the court of first instance has issued a judgment without holding a full hearing when it was obliged to do so ... or it has decided on a claim that had already been determined ... or if, in contravention of the law, the public was excluded from the hearing ...;
2. if a fundamental error has been made in the civil procedure ... which occurred in the proceedings before the second instance court;
3. if the substantive law has been wrongfully applied.

(2) A request for review may be submitted on the ground that judgment went beyond the claim only if such an error occurred in the second instance proceedings. No request for review may be filed because of incorrectly established facts.

(4) A request for review [may be submitted] against a judgment issued by a second instance court, confirming a judgment on the basis of a confession, only for the reasons under paragraph 1(1) and (2) and paragraph 2 of this Article."

Article 394:

"(1) If it has been established that there has been a fundamental error of the civil procedure ... which may constitute a ground for submitting a request for review ..., the reviewing court shall issue a procedural decision, quashing in whole or in part the judgements of both the second and first instance courts or only the judgment of the second instance court and returning the case for retrial to the same or another panel of either the first or second instance court, or another competent court.
..."

Article 395:

> "(1) If the reviewing court has established that substantive law was incorrectly applied, it shall issue a judgement granting or accepting the request for review and modifying the impugned judgment.
>
> (2) If the reviewing court has found that the facts were incompletely established because of an incorrect application of substantive law and that, because of this, the conditions for modifying the impugned judgment have not been established, it shall grant the request for review by a procedural decision, quash in whole or in part the judgments of both the first instance or second instance courts or only the judgment of the second instance court and return the case for retrial to the same or another panel of either the first or second instance court."

10. The new Law on Civil Procedure (Official Gazette of the Federation of Bosnia and Herzegovina no. 42/98) entered into force on 11 November 1998 on which date it repealed the old law. Article 495 reads, in so far as relevant, as follows:

> "(3) A request for review filed against a final decision of the second instance court in the proceedings instituted before the entry into force of this law shall be dealt with under the regulations regarding civil proceedings which were applicable until the entry into force of this law."

II. COMPLAINTS

11. The applicant submits that he was discriminated against because of his national origin in violation of Article 14 of the European Convention on Human Rights in conjunction with his right to fair proceedings guaranteed by Article 6 paragraph 1 of the Convention and his right to an effective remedy before a national court as guaranteed by Article 13 of the Convention. The applicant also alleges that he was discriminated against on the basis of his national origin in his right to work as guaranteed under Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

III. PROCEEDINGS BEFORE THE CHAMBER

12. The application was introduced on 8 September 1998 and registered on 14 September 1998. The applicant is represented by Ms. Senija Poropat, a lawyer in Vogošća.

13. On 18 December 1998 the Chamber decided to transmit the application to the respondent Party for observations pursuant to Rule 49(3)(b) of the Rules of Procedure.

14. On 18 March 1999 the respondent Party submitted its observations on the admissibility and merits. The applicant submitted this claim for compensation on 16 April 1999. On 18 May 1999 the respondent Party submitted its observations on this claim.

15. The Chamber deliberated on the admissibility of the case on 7 July and 7 September 1999.

IV. SUBMISSIONS OF THE PARTIES

A. The respondent Party

16. The respondent Party submits that the application should be rejected as being incompatible *ratione temporis* under Article VIII(2)(c) of the Agreement, since the decision to terminate the applicant's employment was issued 30 October 1993, and thus before the Agreement came into force.

17. The respondent Party further submits that the case should de declared inadmissible under Article VIII(2)(a) of the Agreement for failure to exhaust domestic remedies, since the applicant could have requested a review by the Supreme Court of the Federation of Bosnia and Herzegovina.

B. The applicant

18. The applicant maintains that the termination of his employment occurred after the entry into force of the Agreement as according to the domestic legal norms, employment is terminated at the moment of delivery of the final decision, which he received on 30 March 1996. The case is therefore within the competence of the Chamber *ratione temporis*. The applicant further submits that he has exhausted all effective domestic remedies available to him.

V. OPINION OF THE CHAMBER

19. Before considering the merits of the case the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII of the Agreement.

A. The Chamber's competence *ratione temporis*

20. According to Article VIII(2)(c), the Chamber shall dismiss an application which it considers incompatible with the Agreement.

21. The Chamber recalls that in accordance with generally accepted principles of international law, the Agreement cannot be applied retroactively (see case no. CH/96/1, *Matanović*, decision on admissibility of 13 September 1996, at section IV, Decisions on Admissibility and Merits 1996-1997). Evidence relating to events prior to the entry into force of agreement may, however, be relevant as a background to events occurring after the Agreement entered into force. Moreover, in so far as an applicant alleges a continuing violation of his rights after 14 December 1995, the case may fall within the Chamber's competence *ratione temporis.* (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 106, Decisions January-July 1999).

22. In an analogous case, the Chamber found it was competent to consider the employment discrimination claim as from 14 December 1995 onward (see case no. CH/97/35, *Malić,* decision on admissibility of 5 December 1997, paragraph 10, Decisions on Admissibility and Merits 1996-1997).

23. The Chamber notes that the decision by Elektroprivreda to terminate the applicant's employment was issued in 1993. However, the applicant submits that, according to the legal norms of labour relations in the Federation of Bosnia and Herzegovina, a decision to terminate employment does not become effective until the employee is notified of his or her dismissal. In this case, the applicant was notified of his dismissal only in 1996 at which point he began court proceedings to appeal the company's decision. The applicant complains in any event that these proceedings were unfair and discriminatory. The applicant's grievances relate therefore to a situation that took place after the Agreement entered into force. The Chamber is thus competent *ratione temporis* to examine this case in so far as it relates to events that occurred after 14 December 1995.

B. Requirement to exhaust domestic remedies

24. According to Article VIII(2)(a) of the Agreement, the Chamber must also consider whether effective remedies exist and that the applicant has demonstrated that they have been exhausted.

25. In the case of *Blentić* (case no. CH/96/17, decision on admissibility and merits delivered on 3 December 1997, paragraphs 19-21 with further references, Decisions on Admissibility and Merits 1996-1997), the Chamber considered this admissibility criterion in light of the corresponding requirement in Article 35 (previously Article 26) of the Convention to exhaust domestic remedies. It is incumbent on a respondent Party claiming non-exhaustion to satisfy the Chamber that the remedy

was an effective one available in theory and in practice, that it was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see, e.g., case no. CH/96/21, *Čegar,* decision on admissibility of 11 April 1997, paragraphs 11 and 14, Decisions on Admissibility and Merits 1996-1997, and the above-mentioned *Blentić* decision).

26. The respondent Party objects to the admissibility of the application, notably on the ground that the applicant could have requested review by the Supreme Court. This review would be considered an extra-ordinary remedy according to the Law on Civil Procedure as described in paragraphs 9 and 10 of this decision. The Chamber notes that the European Commission of Human Rights has extensive jurisprudence according to which an application for retrial or similar extraordinary remedies cannot, as a general rule, be taken into account in the application of Article 35 (previously Article 26) of the Convention, (see application no. 10326/83, *R. v. Denmark*, decision of 6 October 1983, Decisions and Reports 35, p. 218).

27. In practice, the Supreme Court has granted this extraordinary review only in a very small number of cases. The respondent Party has not demonstrated any specific reason why the Supreme Court should grant such review in the present case. Accordingly, the Chamber considers that there is very little prospect a request for review would be an effective remedy and that, thus the applicant does not have to avail himself of this remedy.

28. The Chamber therefore finds that the applicant has exhausted all effective domestic remedies for the purposes of Article VIII(2)(a) of the Agreement.

C. The admissibility of the application

29. Having made a preliminary examination of the application of the Chamber finds that it may raise issues within its jurisdiction, in particular discrimination in relation to Articles 6 and 13 of the convention and Article 6 of the ICESCR.

30. On the information available to it, the Chamber finds that the application is within the chamber's jurisdiction *ratione temporis* and that all available and effective remedies have been exhausted. Therefore, the case should be declared admissible and examined on its merits in so far as it relates to alleged or apparent violations of the applicant's rights since 14 December 1995.

VI. CONCLUSION

31. For these reasons, the Chamber, without prejudging the merits, by 10 votes to 3,

DECLARES THE APPLICATION ADMISSIBLE.

(signed)
Anders MÅNSSON
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

ANNEX

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Ms. Michèle Picard and Messrs. Jakob Möller and Andrew Grotrian.

DISSENTING OPINION OF MS. MICHÈLE PICARD AND MESSRS. JAKOB MÖLLER AND ANDREW GROTRIAN

We disagree with the decision of the majority of the Chamber to declare this case admissible. We consider that it should have been rejected under Article VIII(2)(a) of the Agreement for non-exhaustion of domestic remedies.

In his observations the applicant argues that all effective remedies have been exhausted and that an application to the Supreme Court for review of the Cantonal Court's decision of 28 January 1998 would not have been effective. He argues that this remedy would not have been effective since the value of the dispute did not exceed 15,000 KM. He further argues that "since the courts have obviously violated human rights" it can be presumed that such an application would merely lengthen the proceedings. We cannot accept these arguments. In particular, as we understand the national law, the 15,000 KM value threshhold referred to by the applicant was not in force at the time of the decision in question but was introduced by the Law on Civil Procedure promulgated in November 1998. This law did not have retroactive effect and applied only in relation to proceedings instituted after it came into force (see paragraph 10 of the Chamber's decision). Under Article 382 of the Law on Civil Procedure in force at the relevant time no value threshhold was applicable in relation to labour disputes (see paragraph 9 of the decision). Under that law the applicant had the right to make a request for review within a time-limit of 30 days after delivery of the Cantonal Court decision but he did not do so.

The majority of the Chamber take the view that an application to the Supreme Court does not have to be exhausted under the case-law of the Strasbourg institutions because it is an "extraordinary remedy". It is true that the remedy in question is described as an extraordinary remedy in the relevant law. However, that is not decisive in determining whether it is an effective remedy. The Strasbourg case-law is more subtle. It disregards the legal qualification of the remedy given by domestic law and examines the precise characteristics of the remedy case by case to determine whether it is effective for the purposes of the Convention.

An example of the Commission's approach can be found in the case of *X. and Church of Scientology v. Sweden* (Application No. 7805/77, Decisions and Reports 16, p. 68). In that case the Commission held that an application to the Swedish Supreme Court for the re-opening of a case was an effective remedy for the purposes of Article 26 of the Convention. In its decision the Commission stated *inter alia* as follows:

> "The Commision observes that a procedure which is directed towards a reopening of a case or a re-trial of its merits is not normally a remedy which need be exhausted [...]. In the applicant's case, however, he based his appeal on a provision of the Swedish Code of Civil Procedure according to which the Supreme Court may examine whether the application of the law [...] was manifestly contrary to the law [...]. Such an appeal is only allowed if brought within six months after the decision of the Court in question [...]. If it had been admissible the Supreme Court would have acted further as a court of cassation. [...] [T]he Supreme Court may order that a judgement should not be executed and, if it admits a case, it may choose to send the matter back to the lower court, or, if the case is obvious, the Supreme Court may decide itself. In the Commission's case-law, appeals on points of law and pleas of nullity have always been held to be important for complying with the requirements of Art. 26. [...]"

The remedy at issue in the present case appears substantially similar to that considered by the Commission in the above-mentioned case. The grounds for review are indeed broader in the present case than in the case considered by the Commission. In particular, in an application for

review the Supreme Court can examine whether the substantive law has been wrongly applied. If it finds this to be the case “it shall issue a judgement granting or accepting the request for review and modify the impugned judgement” (see Article 395 of the law, paragraph 9 of the decision).

The dispute between the applicant and the company was clearly related to the substantive law of the Federation. Before the first and second instance courts the applicant did not deny the fact that he had not reported for work for more than five consecutive days, but argued that he had had good reasons (war conditions) for not reporting in accordance with Article 75 of the Law on Basic Rights Concerning Labour Relations (see paragraph 7 of the decision). The Cantonal Court did not address this argument and the application of the law by this court was therefore open to question before the Supreme Court. Before the Chamber the applicant complains of discrimination. If the company discriminated against him he should have complained of it before the first and second instance courts, which he did not do. If the courts discriminated against him, there appears to be no reason why he could not have raised the matter in the Supreme Court.

The second basis of the reasoning of the majority is that in practice the Supreme Court has granted the remedy in question only in a very small number of cases and, furthermore, that the respondent Party has not demonstrated any specific reason why the Supreme Court should grant a review in the present case. In our view it is clear that the Supreme Court could have reviewed the application of the law by the lower courts. There is no factual material before the Chamber to suggest that it would not have done so in practice. In these circumstances we find no reason to suppose that this *prima facie* effective remedy was not effective in practice.

(signed)
Michèle Picard

Jakob Möller

Andrew Grotrian