DECISION ON ADMISSIBILITY AND MERITS

(delivered on 5 September 2003)

Case no. CH/99/2386

Pavle DRAGIČEVIĆ

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 1 September 2003 with the following members present:

Mr. Mato TADIĆ, President
Mr. Jakob MÖLLER, Vice-President
Mr. Mehmed DEKOVIĆ
Mr. Giovanni GRASSO
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI

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:

I. INTRODUCTION

1. The case concerns the attempts of the applicant to obtain fulfilment of an contract on fixed-term deposit that he concluded with the Company "Certisana" from, at that time, Sanski Most.

2. The case raises issues under Article 6 paragraph 1 (length of proceedings) of the European Convention on Human Rights (the "Convention") and Article 13 (right to an effective remedy) of the Convention.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was introduced on 12 October 1999 and registered on the same date.

4. On 19 May 2000, the case was transmitted to the respondent Party for its observations on admissibility and merits under Articles 6 and 13 of the Convention.

5. On 10 July 2000, the respondent Party submitted its observations on admissibility and merits.

6. In his response to the respondent Party's observations, dated 11 August 2000, the applicant expresses his opinion opposite to the respondent Party's observations. In the same submission, the applicant defines his compensation claim. He requests to be compensated for pecuniary damage in the amount of 8000 DEM, with corresponding interest at the rate of 12% per month for the period of 30 July 1993 through 31 July 1994, plus interest on overdue payments as prescribed by the law, counting from 31 July 1994 until settlement in full. Further, he requests 100,000 DEM as compensation for non-pecuniary damage.

7. On 23 January 2001, the respondent Party submitted its observations regarding the applicant's compensation claim.

8. On 9 December 2002, the applicant informed the Chamber that he maintains his claim before the Chamber as it was initially lodged. The respondent Party did not make any comments after this letter was transmitted to it for its information.

9. On 2 June 2003, the respondent Party informed the Chamber that the court proceedings have not been completed yet.

10. The Chamber deliberated on the admissibility and merits of the application on 13 May 2000, 5 June 2003 and 1 September 2003. On the latter date, the Chamber adopted the present decision on admissibility and merits.

III. STATEMENT OF THE FACTS

11. On 30 July 1993, the applicant entered into a contract on fixed-term deposit with IBC "Certisana" (the Company/the defendant Party), a company at that time located in Sanski Most, the Republic of Bosnia and Herzegovina, and now located in Prijedor, the Republika Srpska. According to the contract, the applicant invested 8000 DEM (*Deutsche Marks*) in this Company under the condition that he would receive 12% monthly interest on the principal sum and be reimbursed for his monetary investment on 31 July 1994.

12. On 6 June 1995, the applicant initiated proceedings before the First Instance Court in Sanski Most. He alleges that he is not aware of any developments in these proceedings. However, in 1995 due to the hostilities, both the applicant and the registered office of the mentioned Company moved to Prijedor. As a result, the applicant's claim before the Chamber is related to the proceedings before the judicial organs of the Republika Srpska, as described below.

13. On 12 June 1996, the applicant lodged a lawsuit against the Company before the First Instance Court in Prijedor. On 22 December 1999, the First Instance Court in Prijedor, while deciding upon the applicant's lawsuit, ruled in the applicant's favour. The Court ordered the defendant Party to disburse to the applicant the amount of 8000 Convertible Marks (*Konvertibilnih Maraka* "KM"), with corresponding interest in the amount of 12% per month for the period of 30 July 1993 through 31 July 1994, plus interest on overdue payments as prescribed by the law, counting from 31 July 1994 until settlement in full.

14. On 2 October 2000, the Second Instance Court in Banja Luka, while deciding upon the defendant Party's appeal, annulled the judgment of 22 December 1999 and returned the case to the First Instance Court for renewed proceedings. The Second Instance Court found that the First Instance Court had failed to summon the defendant Party to the main hearing in a proper manner.

15. On 23 February 2001, the First Instance Court in Prijedor, while deciding in renewed proceedings, reached a judgment of the same substance as the previous one (see paragraph 13 above).

16. On 28 January 2002, the Second Instance Court in Banja Luka, while deciding upon an appeal lodged by the Company, annulled the judgment of 23 February 2001 and, once again, returned the case to the First instance Court for renewed proceedings. The Second Instance Court again found that there were irregularities while summoning the defendant Party.

17. According to information received from the respondent Party on 2 June 2003, the court proceedings are still pending.

IV. RELEVANT LEGISLATION

A. Law on Civil Proceedings

18. Article 10 of the Law on Civil Proceedings that was in force at the relevant period (Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 4/77, 36/80, 69/82, 58/84, 74/87, 27/90 and 35/91 and the Offical Gazette of the Republika Srpska nos. 17/93, 14/94 and 32/94) provided that "the Court shall ensure that the proceedings are conducted without delay and with the least possible expenses and it shall prevent any misuse of the rights of the parties in the proceedings." On 1 August 2003, the new Law on Civil Proceedings enters into force which contains the identical provision.

V. COMPLAINTS

19. The applicant claims that his rights as protected under Article 6(1) of the Convention were violated due to the length of the court proceedings before the organs of the Republika Srpska. He further complains of a violation of his rights as protected under Article 13 of the Convention in relation to his allegations of a violation of Article 6(1) of the Convention.

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

20. In its submissions of 10 July 2000, the respondent Party argues with respect to admissibility that the application is inadmissible because the applicant has failed to exhaust domestic remedies by failing to appeal against the judgment of 22 December 1999 (see paragraph 13 above).

21. As to the merits, the respondent Party argues that the applicant's complaints are ill-founded. According to the respondent Party, Article 6 of the Convention was not violated since the reasons for the length of the proceedings are attributable to the complexity of the case. In addition, the

respondent Party opines that further reasons for the length of the proceedings are attributable to the applicant's conduct because the court twice requested the applicant to complete his lawsuit in order to specify the name and address of the defendant Party, which had changed in the meantime. Therefore, according to the respondent Party, the conduct of the court did not have any influence on the length of proceedings, and there could not be an excess of "reasonable time".

22. On 23 January 2001, the respondent Party provided the Chamber with its observations on the applicant's compensation claim. It particularly notes that the applicant's request to be compensated for pecuniary damage should not be directed against the Republika Srpska but rather raised in regular civil proceedings. The respondent Party opines that the compensation claim should be rejected.

B. The applicant

23. On 11 August 2000, in response to the respondent Party's observations, the applicant points out that the he initiated proceedings in 1996 for monetary compensation based upon his contract on fixed-term deposit; therefore, the case was of a simple nature. Further, regarding the court's request for specification of the lawsuit, the applicant alleges that it was difficult for him to obtain the requested information (*i.e.* the defendant Party's details), in part because an employee of the First Instance Court in Banja Luka refused to provide him with the information. He contends that the First Instance Court in Prijedor could more easily have obtained that information by requesting it directly from the Court of First Instance in Banja Luka.

VII. OPINION OF THE CHAMBER

A. Admissibility

24. The respondent Party has argued that the applicant has not exhausted domestic remedies since he filed his application to the Chamber while the proceedings are still pending before the competent domestic bodies and he failed to appeal against the first instance court judgment.

1. Exhaustion of domestic remedies

25. In accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept.... In so doing, the Chamber shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted...".

26. The Chamber observes that the applicant's primary complaint before it concerns a violation of his right to have his civil claims decided by the courts within a reasonable time, as protected under Article 6 paragraph 1 of the Convention. Such a complaint cannot be remedied by awaiting the final decision in the civil court case initiated by the applicant in 1996. As the Chamber has already held, the fact that proceedings are still pending will not prevent it from examining the applicant's complaint in relation to the length of the proceedings (see, *e.g.*, case nos. CH/02/11108 and CH/02/11326, *Basić and Ćosić*, decision on admissibility and merits delivered on 9 May 2003, paragraph 113).

27. The Chamber further notes that the respondent Party argues that the applicant failed to lodge an appeal against the judgment of 22 December 1999. In this respect, the Chamber recalls that in the judgment of 22 December 1999, the First Instance Court in Prijedor ruled completely in the applicant's favour, thus making an appeal unnecessary.

28. In these particular circumstances, the Chamber finds that the applicant could not be required to exhaust, for the purposes of Article VIII(2)(a) of the Agreement, any further remedy provided by domestic law. The Chamber will therefore reject this basis for declaring the application inadmissible.

2. Conclusion as to admissibility

29. The Chamber finds that no ground for declaring the case inadmissible has been established. Accordingly, the Chamber declares the application admissible with respect to Article 6 paragraph 1 of the Convention concerning the length of the proceedings and Article 13 of the Convention.

B. Merits

30. Under Article XI of the Agreement, the Chamber must next address the question of whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement, the Parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms", including the rights and freedoms provided for in the Convention.

1. Article 6 of the Convention

31. The applicant complains about the length of the court proceedings he initiated with an aim to obtain fulfilment of his concluded contract on fixed-term deposit. The respondent Party argues that the period of time to be considered in examining a potential violation of Article 6 paragraph 1 of the Convention was prolonged because of the complexity of the case and the applicant's conduct.

32. Article 6 of the Convention, insofar as relevant to the present case, reads as follows:

> "1. 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...."

33. Noting that the pending proceedings concern the applicant's monetary claim based on the contract on fixed-term deposit of 30 July 1993 (see paragraph 11 above), the Chamber finds that these proceedings relate to the determination of his "civil rights and obligations", within the meaning of Article 6 paragraph 1 of the Convention. Accordingly, that provision is applicable to the proceedings in the present case.

34. Therefore, the Chamber finds that for the purpose of Article 6 paragraph 1 of the Convention, the period of time to be considered starts on the date on which the applicant initiated proceedings before the First Instance Court in Prijedor, *i.e.* on 12 June 1996 (see paragraph 13 above). These proceedings are still pending. Thus, to sum up, the total proceedings have lasted more than seven years to date.

35. The reasonableness of the length of proceedings is to be assessed having regard to the criteria laid down by the Chamber, namely the complexity of the case, the conduct of the applicant and of the relevant authorities, and the other circumstances of the case (*see, e.g.,* case no. CH/97/54, *Mitrović*, decision on admissibility of 10 June 1998, paragraph 10, Decisions and Reports 1998, with reference to the corresponding case-law of the European Court of Human Rights).

36. The Chamber notes that the issue before the First Instance Court in Prijedor in the underlying case is whether the applicant is entitled to his monetary claim as lodged before the Court. This monetary claim is based upon the provisions of the contract on fixed-term deposit of 30 July 1993 that the applicant concluded with the Company. The case does not seem to the Chamber to be so complex as to require over seven years of proceedings.

37. As to the conduct of the applicant, the respondent Party highlights that he failed to specify details concerning the defendant Party in his lawsuit on two occasions. However, according to the applicant, he was prevented from specifying such information because an employee of the First Instance Court in Banja Luka refused to provide him with the information. Moreover, he claims such information could have been more efficiently obtained by the Court if it had requested the information in an official manner from the relevant institution. Further, the Chamber notes that only on 7 April 2003 the First Instance Court in Prijedor officially requested information about the Company's details from the Ministry for Internal Affairs, Department for Public Security Prijedor.

38. In addition, with respect to the conduct of the respondent Party, the Chamber recalls that on 22 December 1999, the First Instance Court in Prijedor issued a judgment in the applicant's favour based upon the contract on fixed-term deposit. Since that time, after appeals by the defendant Party, the proceedings have been renewed on two occasions due to the Court's failure to summon the defendant Party in a proper manner. These procedural irregularities have resulted in over two and one half years of delay in the proceedings and they are attributable to the respondent Party.

39. Even if the Chamber accepts that a certain delay was partially caused due to applicant's conduct, it is still beyond any doubt that the domestic courts, in this particular case, have not met their responsibility to ensure that the proceedings have been expedited within a reasonable time. The proceedings have been pending for over seven years. Due to failure of the domestic courts to conclude the proceedings, the applicant has been in a state of uncertainty with regard to his property for a prolonged time.

40. In view of the above, the Chamber finds that the respondent Party violated Article 6 paragraph 1 of the Convention in that the proceedings in the applicant's case have not been determined within a reasonable time.

2. Article 13 of the Convention

41. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

42. Considering that it has found a violation of the applicant's right projected by Article 6 paragraph 1 of the Convention with regard to the length of proceedings, the Chamber does not consider it necessary separately to examine the application under Article 13 of the Convention.

VIII. REMEDIES

43. Under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the Republika Srpska to remedy the established breaches of the Agreement. In this regard, the Chamber shall consider issuing orders to cease and desist and for monetary relief.

44. The applicant has requested compensation for pecuniary damage in the amount of 8000 DEM with corresponding interest of 12% per month and legal interest on overdue payments. He further has requested to be paid the amount of 100,000 DEM for compensation for non-pecuniary damage.

45. The Chamber notes that it has found a violation with regard to the length of proceedings. The Chamber considers it appropriate to order the respondent Party to take all necessary steps to conclude the pending civil proceedings by reaching a final and binding decision in the case within a period of 5 months after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

46. Furthermore, the Chamber considers it appropriate to award a sum to the applicant in recognition of the sense of injustice he has suffered as a result of his inability to have his case decided within a reasonable time.

47. Accordingly, the Chamber will order the respondent Party to pay to the applicant the sum of 1000 Convertible Marks ("*Konvertibilnih Maraka*") as compensation for non-pecuniary damages in recognition of his suffering as a result of his inability to have his case decided within a reasonable time.

48. Additionally, the Chamber further awards simple interest at an annual rate of 10% on the sum awarded to be paid to the applicant in the preceding paragraph. The interest shall be paid as of one

month from the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the sum awarded or any unpaid portion thereof until the date of settlement in full.

49. The reminder of the applicant's claims for compensation will be rejected.

IX. CONCLUSIONS

50. For these reasons, the Chamber decides,

1. by 6 votes to 1, to declare the application admissible;

2. unanimously, that there has been a violation of the applicant's rights under Article 6 paragraph 1 of the European Convention on Human Rights with regard to the length of proceedings, the Republika Srpska thereby being in breach of Article I of the Human Rights Agreement;

3. by 6 votes to 1, that it is not necessary separately to examine the application under Article 13 of the European Convention on Human Rights;

4. unanimously, to order the Republika Srpska, through its authorities, to take all necessary steps to conclude the pending civil proceedings in the applicant's case initiated on 12 June 1996 before the courts by reaching a final and binding decision within a period of 5 months after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure.

5. unanimously, to order the Republika Srpska to pay to the applicant, no later than one month after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure, one thousand (1,000) Convertible Marks ("*Konvertibilnih Maraka*") by way of compensation for non-pecuniary damages;

6. unanimously to order the Republika Srpska to pay simple interest at the rate of 10 (ten) per cent per annum over the above sum or any unpaid portion thereof from the date of expiry of the above one-month period until the date of settlement in full;

7. unanimously, to reject the reminder of the applicant's compensation claims; and

8. unanimously, to order the Republika Srpska to report to it no later than five months after the date on which this decision becomes final and binding in accordance with Rule 66 of the Chamber's Rules of Procedure on the steps taken by it to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Mato TADIĆ
President of the Second Panel

Annex : Partly dissenting opinion of Mr. Manfred Nowak

ANNEX

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Manfred Nowak.

PARTLY DISSENTING OPINION OF MR. MANFRED NOWAK

While I agree with the finding of a violation of Article 6 of the Convention, I disagree with the way in which the majority dealt with Article 13 of the Convention. As far as I am aware, this is the first case in which the Chamber declared admissible a complaint of a violation of the right to an effective remedy (Article 13) in relation to the right to a hearing within a reasonable time as safeguarded by Article 6(1) of the Convention. Traditionally, the European Commission and Court of Human Rights have interpreted Article 13 as an accessory right that can be invoked in relation to other Convention rights with the exception of Article 6, which in itself provides a right of access to a court and a fair trial in civil and criminal matters. Where the Convention right asserted by the applicant is a civil right recognised under domestic law – as the right to property – the protection afforded by Article 6(1) will, in principle, also be available. As the judicial safeguards of Article 6 are stricter than those of Article 13, the European Court and the Chamber usually ruled that a possible violation of Article 13 was absorbed by the finding of a violation of Article 6 and, therefore, they found it not necessary also to rule on a violation of Article 13 in relation to the right to property or another civil right protected by the Convention.

In view of the increasing number of cases in which it has found a violation of the right to a hearing within a reasonable time, the European Court reconsidered its long-standing case law in a judgment of 26 October 2000 in *Kudla v. Poland* (Eur. Court HR, Decisions and Reports 2000-XI, paragraphs 146 *et seq.*). If Article 13 is, as has traditionally been argued, to be interpreted as having no application to the right to a hearing within a reasonable time, then "individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened" (*id.*, *paragraph* 155). This reasoning makes sense in the context of the international monitoring of the domestic remedies by the European Court and has been confirmed in later judgments, as in *Silva v. Italy* (Eur. Court HR, judgment of 11 December 2001). By finding a violation of Article 13 in conjunction with Article 6, in addition to a finding of a violation of Article 6 in isolation, the European Court in fact conveys the message to the States parties of the Convention that they should create specific remedies against excessive length of judicial proceedings. These remedies do not necessarily have to be judicial ones. Italy, which has been the subject of a considerable amount of judgments of the European Court finding violations of the right to a hearing within a reasonable time, reacted, *e.g.*, by adopting a special law on 24 March 2001.

The applicant in the present case has explicitly alleged a violation of Article 13 in relation to his right to a hearing within a reasonable time pursuant to Article 6(1). The Chamber had, in principle, two options. It could have declared this complaint inadmissible in accordance with the traditional jurisprudence of the European Court. In view of the special situation in Bosnia and Herzegovina and the role of the Chamber as a human rights court, which is half domestic and half international, this would have been the most appropriate solution. The finding of a violation of Article 6 would have been sufficient to address the problem of delayed justice in the country. The other option would have been to follow the revised jurisprudence of the European Court since *Kudla v. Poland*, *i.e.* to declare the complaint under Article 13 admissible and to find an explicit violation of Article 13 in conjunction with Article 6(1). In this case, the Chamber would also have to order a specific remedy which would have to go beyond the traditional order to take all necessary steps to promptly conclude the pending civil proceedings and to pay compensation to the applicant. The Chamber could have ordered the respondent Party, *e.g.*, to create a special mechanism, to which applicants could complain against excessive delays of judicial proceedings.

Unfortunately, the Chamber decided to follow a third option: It declared the complaint regarding Article 13 in relation to Article 6(1) admissible (see paragraph 30 above of the decision on

admissibility and merits), and at the same time decided on the merits to "not consider it necessary separately to examine the application under Article 13 of the Convention" (see paragraph 43 above of the decision on admissibility and merits). Such a course of action, which has been applied in many cases in which Article 13 had been invoked in relation to another civil right, such as the right to property, simply does not make sense if Article 13 has been invoked in conjunction with Article 6(1). A finding of a violation of Article 6 might absorb a finding of a violation of Article 13 in relation to another civil right, but not in relation to Article 6(1)! For these reasons, I respectfully dissent and express my hope that this unfortunate decision will not create a precedent to be followed in future judgments of the Chamber.

(signed)
Manfred Nowak