The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 40(3), Article 59(2)(2) and Article 61(1) and (2) and Article 76(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05, 64/08 and 51/09), in Plenary and composed of the following Judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. Mirsad Ćeman

Having deliberated on the appeal of Mr. **Šaćir Hodžić** in case no. **AP 541/08,** at its session held on 21 January 2011 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. **Šaćir Hodžić** is hereby partially granted.

A violation of the right under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established with respect to a violation of the right to adoption of a decision within a reasonable time in the proceeding concluded upon the adoption of the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no. Rev-807/05 of 26 December 2006.

Pursuant to Article 76(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina is ordered to pay Mr. **Šaćir Hodžić,** within three months from the delivery of this decision, the amount of 2,100.00 KM for non-pecuniary damages due to a failure to adopt a decision within a reasonable time.

The Government of the Federation of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within three months as from the date of delivery of this Decision, about the measures taken to execute this Decision as required by Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The appeal of Mr. **Šaćir Hodžić** is hereby considered dismissed as lodged against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina no.

Rev-807/05 of 26 December 2006, the judgment of the Cantonal Court in Mostar no. Gž-790/04 of 14 April 2005 and the judgment of the Municipal Court in Čapljina no. P-9/04 of 7 July 2004 with respect to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in part relating to arbitrary application of Article 143 (8) of the Labor Law of the Federation of Bosnia and Herzegovina and in part relating to impartiality of the court.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 16 February 2008, Mr. Šaćir Hodžić ("the appellant") from Stolac, represented by Mr. Semir Kajtaz, a lawyer practicing in Mostar, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the judgment of the Supreme Court of the Federation of Bosnia and Herzegovina ("the Supreme Court") no. Rev-807/05 of 26 December 2006, the judgment of the Cantonal Court in Mostar ("the Cantonal Court") no. Gž-790/04 of 14 April 2005 and the judgment of the Municipal Court in Capljina ("the Municipal Court") no. P-9/04 of 7 July 2004.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22 (1) of the Rules of the Constitutional Court, the Supreme, Cantonal and Municipal Court and the Secondary School Stolac ("the employer") were requested on 22 August 2008 to submit their respective replies to the appeal.

3. The Supreme Court, the Municipal Court and the employer submitted their replies to the appeal respectively on 6 March, 13 March and 11 March 2008. The Cantonal Court failed to submit the requested reply.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 13 September 2010.

5. On 26 May 2010 the Constitutional Court requested to view the case-file of the Municipal Court and the Municipal Court submitted the original case-file on 11 June 2010. On 8 September 2010 the Constitutional Court returned the case-file concerned to the Municipal Court.

III. Facts of the Case

6. The facts of the case, arising from the appellant's allegations and documents submitted to the Constitutional Court, may be summarized as follows.

7. On 3 February 2000, the appellant submitted to the employer a request for establishing his employment status and on 29 November 2000 filed a complaint before the Cantonal Commission for Implementation of Article 143 of the Labor Law ("the Cantonal Commission"). On 15 March 2001, the Cantonal Commission adopted a ruling no. UP/I-06-34-1168-1/00, dismissing the appellant's complaint as ill-founded. On 4 March 2003, the Federal Commission for Implementation of Article 143 of the Labor Law ("the Federal Commission") adopted a ruling no. 03-34-659/01 annulling the ruling of the Cantonal Commission and ordered the employer to establish the appellant's laid-off employment status within 15 days time-limit as stipulated under Article 143 of the Labor Law of 3 February 2000.

8. On 23 October 2003, the employer adopted decision no. 05-III-450/03 establishing the appellant's status as a laid-off employee effective with 3 February 2000 for the period of six months. It is established in the decision that the appellant's employment would cease on 3 July 2009 by the force of law, in which case he is entitled to severance pay for which a separate agreement should be concluded.

9. On 10 February 2004, the appellant filed a lawsuit against the employer to the Municipal Court seeking the reinstatement to his previous work position. On the preliminary hearing of 9 June 20004, the appellant modified his claim. By the modified claim the appellant requested the Municipal Court to establish that the employer had unlawfully employed another person to the working position of the physical education teacher ("the PE teacher") and owing to the relevant finding the employer was obliged to conclude a permanent employment contract with the appellant and to assign to the working position of the PE teacher, as well as to pay him the compensation for

the salaries and meal allowances with the statutory default interest thereto in the amounts and for the periods precisely determined in the claim. On 29 June 2004 the Municipal Court held the main hearing.

10. By the judgment of the Municipal Court no. P-9/04 of 7July 2004, which was upheld by the judgment of the Cantonal Court no. Gz-790/04 of 14 April 2005, the appellant's claim was dismissed in its entirety as ill-founded.

11. While reasoning its judgment, the Municipal Court stated that the appellant could not claim reinstatement to his employment pursuant to Article 143 of the Labor Law of the FBiH (*Official Gazette of the Federation of Bosnia and Herzegovina* nos. 43/99, 32/00 and 29/03) as he had already obtained all the rights he was entitled to under that Article. The Municipal Court recalled that the appellant's allegations that another person was employed at his position contrary to Article 143(8) were groundless as another person had been employed on the basis of the temporary service contract. The temporary service contract does not represent an employment relation but obligatory-legal relation. Furthermore, the Municipal Court stressed that as the appellant was employed in the Secondary Medical School in Mostar under the temporary employment contract from 31 August 2003 to 31 August 2004, his employment status had been solved by the employer's decision of 23 October 2003, therefore, he was not entitled to the rights stipulated by Article 143(8) of the Labor Law as he was not unemployed. Indeed, the Municipal Court emphasized that pursuant to the provision of Article 19 of the Labor Law the temporary employment contract is employment relation.

12. In the reasons for its judgment, the Cantonal Court stated that the first instance court had correctly established the facts of the case and had applied the substantive law appropriately and had given sufficient and well-founded reasons for its decision which this second instance court accepted in their entirety. Moreover, the Cantonal Court emphasized that the appellant stated without any grounds that the first instance court had established the facts incorrectly and that it had misapplied the substantive law under Article 143 of the Labor Law. In this connection, the Court stated that the court of first instance was wrong when it had taken the period between 31 August 2003 and 31 August 2004 as a relevant period for the resolution of this legal issue as the appellant was employed under the temporary employment contract in the Secondary Medical School in Mostar in the period concerned. In the opinion of the Cantonal Court, the period between 1 August 2000 and 1 August 2001 is to be taken as a relevant period for the resolution of this issue as the employer was banned, pursuant to Article 143(8) of the Labor Law, from employing another employee with the same

qualifications or educational background within one year period of time except for an employee referred to under paragraphs 1 and 2 of Article 143 of the Labor Law. The claims would stand if the first instance court had evaluated the challenged ruling without presentation of any other evidence. When adopting the challenged decision the first instance court had taken into account the information given by the employer regarding the engagement of another person as an outside associate and this information had been certified by the employer's stamp and the signature of the acting Director, and the appellant himself had not objected to this evidence. The Cantonal Court concluded that on the basis of evidence presented it indisputably followed that the defendant had not concluded a contract on temporary employment with any other person within the disputable period of time, but, as correctly concluded by the first instance court, the other person was in the obligatory relation with the employer on the basis of the temporary service contract, which did not represent the employment relation. Furthermore, the Cantonal Court stressed that for deciding on this legal issue the period between 31 August 2003 and 31 August 2004 when the plaintiff was employed under the permanent employment contract in the Secondary Medical School in Mostar was of no significance but the period after the termination of his employment relation between 1 August 2000 and 1 August 2001.

13. On 14 June 2005, the appellant lodged the revision-appeal before the Supreme Court against the second instance judgment. In his revision-appeal the appellant stated that the second instance court had erroneously applied the substantive law and incorrectly interpreted the provisions under Article 143(8) of the Labor Law. Moreover, the appellant underlined that both the first instance and second instance judgments had been adopted unlawfully as the judge who had adopted the first instance judgment was also the President of the Cantonal Commission and he had adopted the decision by which the appellant's request has not been decided in favor of the appellant.

14. On 26 December 2006, the Supreme Court rendered judgment no. Rev-807/05 dismissing the appellant's revision-appeal against the second instance judgment as ill-founded.

15. In the reasoning of its judgment the Supreme Court noted that the courts correctly applied the substantive law on the established facts when they had dismissed the appellant's claim as ill-founded. The Supreme Court stressed that the temporary service contract, as the lower-instance courts established, had been concluded between the third party and the employer due to shortage of sufficient number of hours for the full-time work which, in this specific case, was a requirement for the conclusion of the employment contract, constituted the obligatory relation among the parties, in which case the performance of a certain job had been agreed upon for an agreed price and this

relation was supposed to cease upon the fulfillment of obligations taken over under the contract and it did not represent the employment within the meaning of Article 143(2) of the Labor Law.

IV. Appeal

a) Statements from the appeal

16. The appellant alleges a violation of the right to a fair trial due to erroneous application of the substantive law and failure to adopt a decision within reasonable time referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). The appellant sees the violation of the right concerned in the erroneous interpretation of Article 143(8) of the Labor Law by the ordinary courts, in fact, arbitrary application of the substantive law when adopting judgments on all of three judicial instances by which his claim was dismissed. The appellant especially emphasizes that the violation of this right is also reflected in the fact that the Supreme Court did not consider his revision claims which are of the essential importance for the outcome of the case and which consist of the fact that the judge who adopted the first instance judgment was the President of the Cantonal Commission and he adopted the decision no. UP/I-06-34-1168-1/00 of 15 March 2001 by which the appellant's request was also negatively decided upon. Finally, the appellant stresses that the proceedings at issue, although considered as urgent, from the date of lodging his complaint to the Cantonal Commission (29 November 2000) to the date of delivery of the Supreme Court's judgment (18 December 2007) lasted for seven years in whole and due to such lengthy proceedings he suffered mental pain and holds he is entitled to the compensation in the amount of 4,809.00 KM in accordance with the case-law of the Constitutional Court expressed in its Decision on Admissibility and Merits, *Abaz Ganibegović vs. Republika Srpska,* (CH/02/9270 of 5 July 2006).

b) Reply to the appeal

17. In its reply to the allegations of the appeal, the Supreme Court stresses that it maintains the reasons presented in the reasoning of its judgment no. Rev-807/05 of 26 December 2006 and holds that in the process of its adoption the appellant was not deprived of his rights endorsed by the Constitution of Bosnia and Herzegovina and the European Convention to which he referred. The Supreme Court especially emphasized that the application of the law in the procedure of adoption of the revision judgment had not been arbitrary.

18. In the reply to the allegations of the appeal, the Municipal Court repeated the reasons presented in the reasoning of the judgment no. P-9/04 of 7 July 2004. Moreover, the Municipal

Court noted that the appellant's rights guaranteed by the Constitution of BiH and the European Convention have not been violated in any of their segments.

19. In its reply to the allegations of the appeal the employer stressed that in this particular dispute the facts had been fully and correctly established and that the substantive law had been correctly applied and that in the entire procedure of adoption of the challenged decisions the appellant's rights referred to in his appeal had not been violated.

V. Relevant Law

20. The **Labor Law** (*Official Gazette of the Federation of Bosnia and Herzegovina*, nos. 43/99, 32/00 and 29/03), in the relevant part, reads:

Article 143

An employee who has the status of a laid off employee on the effective date of this law shall retain that status no longer than six months from the effective date of this law, unless the employer invites the employee to work before the expiry of this deadline.

An employee who was employed on 31 December 1991 and who, within three months from the effective date of this law, 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 a laid off employee.

While laid off, the employee shall be entitled to compensation in the amount specified by the employer.

If a laid off employee referred to in paragraphs 1 and 2 of this Article is not invited to work within the deadline referred to in Paragraph 1 of this Article, his or her employment shall be terminated with a right to a severance pay which shall not be lower than three average salaries paid at the level of the Federation within the three previous months, as published by the Federal Statistics Bureau, for up to five years of service and for each additional year of service at least another half of the average salary.

Exceptionally, instead of the severance pay the employer and employee may agree on another form of compensation.

The way, conditions and deadlines for the severance payment referred to in paragraphs 4 and 5 of this Article shall be determined in a written contract between the employer and employee.

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.

21. In the **Civil Procedure Code** (*Official Gazette of F BiH*, nos. 53/03, 73/05 and 19/06) the relevant provisions read as follows:

Article 10

The court shall be obliged to conduct the proceedings without any unnecessary delay, with the lowest possible costs, and prevent any abuse of rights to which the parties in the proceedings are entitled.

Article 357

A judge cannot adjudicate the case if:

(4) He/she has participated in reaching the judgment of the inferior instance court or another organ in the same case.

[...]

Article 358

A party shall submit the request for the exemption of a judge as soon as it learns that the reason for the exemption exists, until the conclusion of the hearing at the latest and if the hearing has not been held - until rendering the decision.

[...]

Article 420

In the litigation on labor relations, particularly when setting the deadlines and hearings, the court shall always give expedited treatment to the labor disputes where it is necessary.

VI. Admissibility in relation to the right to a decision within a reasonable time under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention (partial granting of the appeal)

22. In accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues contained in this Constitution, when they become a subject of dispute arising out of any judgment of any court in Bosnia and Herzegovina.

23. In the instant case the issue of admissibility of the appeal will be considered solely in relation to the allegations about violation of the right to a fair trial within a reasonable time. In this connection, the Constitutional Court notes that, as to the aforementioned, the appeal meets the requirements of admissibility according to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16 (1)(2)(3)(4) of the Rules of the Constitutional Court.

VII. Merits

As to a part of the decision whereby the appeal is partially granted

24. The appellant holds that his right to a fair trial and the right to a "trial within a reasonable time" under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention have been violated.

I. The right to a fair trial – reasonable time

25. Article II (3) (e) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and freedoms referred to in paragraph 2 above; these include:

[...]

(e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

26. Article 6 (1) of the European Convention, in its relevant part, reads:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]

27. The Constitutional Court notes that the proceeding in the particular case relates to the employment dispute, and thus, the dispute is of civil-legal nature in which the appellant's legal rights are determined and the appellant has an interest in having a final decision on his claim adopted within a reasonable time. Therefore, Article II(3)(e) of the Constitution of BiH and Article 6(1) of the European Convention are applicable in the appellant's case

a) Relevant principles

28. First of all, the Constitutional Court stresses that under the consistent case-law of the European Court of Human Rights ("the European Court") and the Constitutional Court, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of individual case, having regard to the criteria laid down in the European Court case-law and in particular the complexity of the case, the conduct of the parties to the proceedings and of the competent court or the relevant authorities and the importance of what is at stake for the applicant in the litigation (see the European Court, *Mikulić vs. Croatia*, application no. 53176/99 of 7 February 2002, Report no. 2002-I, paragraph 38).

29. Finally, the European Court stressed that special diligence was necessary in the all the disputes which include personal status and conditions, and this requirement was of special

importance in the states in which the national law provides for the urgent nature of certain judicial proceedings (see the European Court, *Borgese vs. Italy,* judgment of 26 February 1992, Series A, no. 228-B, paragraph 18).

b) Period to be taken into consideration

30. The appellant addressed the bodies of public authorities for the protection of his rights arising from the employment on 29 November 2000 by lodging the complaint to the Cantonal Commission. According to the documentation submitted to the Constitutional Court, the proceedings at issue were finalized by the judgment of the Supreme Court no. Rev-807/05 of 26 December 2006. The Constitutional Court observes that the Supreme Court's judgment was delivered to the appellant only on 18 December 2007, that is, with a delay of nearly one year. In view of the aforesaid, the Constitutional Court holds that in the particular case the relevant period that must be taken into consideration is the period between the lodging of the complaint with the Cantonal Commission and the delivery of the final judgment of the Supreme Court to the appellant. Therefore, the period to be taken into consideration regarding the length of proceedings upon the appellant's request for protection of rights arising from his labor relation lasted for total of seven years.

c) Complexity of the case – analyses of the length of proceedings

31. Regarding the complexity of the case, the Constitutional Court notes that the present case concerned the proceedings in which the rights and obligations arising from the employment relations had been decided. Considering the factual and legal issues that needed to be resolved, the Constitutional Court holds that it was not the complex case.

32. The Constitutional Court concludes that the Cantonal Commission resolved the appellant's claim during a very short period of three months and the Federation Commission did so after 11 months by adopting a ruling upon the appellant's complaint against the first instance ruling. The Constitutional Court further notes that the Municipal Court, after the lawsuit had been filed, adopted a decision within five months, and after that the Cantonal Court decided the lodged complaint against the first instance judgment within the period of eight months. Furthermore, the Constitutional Court observes that the Supreme Court, after a year and six months, decided the appellant's revision appeal against the second instance judgment, which was delivered to the appellant only on 18 December 2007, which means that the delivery of judgment was almost a year late.

33. Taking into account all that was presented to the Constitutional Court and after having inspected the case-file, the Constitutional Court could not reach the conclusion that that the public authorities - the Cantonal Commission or the Federation Commission in charge of implementation of Article 143, or the Municipal Court or the Cantonal Court, went beyond the legal powers they are vested with or that they misused them in a manner that would lead to the prolongation of proceedings and would result in the lack of compliance with the requirement for the proceedings within a reasonable time in terms of the right to a fair trial. However, the Constitutional Court notes that the proceeding before the Supreme Court, from the day when the appellant filed the revision appeal until the adoption of the judgment, that is until the day of the delivery of the judgment, lasted almost two years and five months. The Constitutional Court considers that the period of a year and six months, which is the time it took for the Supreme Court to adopt a decision upon the appellant's revision appeal, is relatively a long period of time, particularly bearing in mind the fact that the Municipal and Cantonal Court needed total of a year and a month to render their judgments. The Constitutional Court recalls that in the instant case the issue deals with the employment related dispute which, pursuant to Article 420 of the Civil Procedure Code, is considered an urgent proceedings. The Constitutional Court considers that there is no excuse for the failure of the Supreme Court to deliver the revision judgment to the appellant almost a year after the appeal had been lodged, which has also unnecessarily contributed to the violation of the appellant's right to reach a final decision on his claim within a reasonable period of time.

d) Appellant's conduct

34. As to the civil cases, a hearing within a reasonable time depends on the conduct of the parties participating in the proceedings (see the Decision of the former European Commission on Human Rights no. 1154/85 of 12 April 1989, O.I. 70).

35. As to the appellant's conduct regarding the proceedings at issue, the Constitutional Court notes that the appellant's conduct in no way caused the delay of the proceeding since he actively participated in the proceeding and was using the legal remedies available under the law. Given the aforesaid, the Constitutional Court could not establish that the appellant contributed to the length of the proceeding in the instant case in any way and considers that, to a large extent, the Supreme Court may be solely held responsible for such unjustifiably lengthy proceeding.

36. Taking into account all aforementioned factors, the Constitutional Court concludes that in the instant case there was a violation of the right to "a trial within a reasonable time", which is one of the elements of the right to a fair trial under Article II (3) (e) of the Constitution of Bosnia and

Herzegovina and Article 6(1) of the European Convention and the Supreme Court, owing to its conduct, may be, to a large extent, held responsible for it.

e) Compensation for non-pecuniary damages

37. The appellant seeks that he be awarded the amount of total 4,809.00 KM for non-pecuniary damages due to a violation of the right to a fair trial within a reasonable time because the proceedings lasted for unjustifiably long period of time of seven years. Pursuant to Article 76(2) of the Constitutional Court's Rules, the Constitutional Court recalls that, unlike the proceedings before ordinary courts, the compensation for non-pecuniary damages is awarded in cases where the human rights and freedoms, which are safeguarded under the Constitution of Bosnia and Herzegovina, have been violated.

38. In deciding the claim in which the appellant sought the compensation for non-pecuniary damages, the Constitutional Court refers to the previously established principle regarding determination of the amount to be awarded as compensation for damages in similar case (see the Decision of the Constitutional Court no. 93/04 published in the O*fficial Gazette of Bosnia and Herzegovina* no. 20/06, paragraphs 48/51). According to the established principle, for each year of delay in adoption of a decision, the amount of 150 KM should be paid and if an urgent proceeding is at issue, that amount is 300 KM.

39. As to the instant case, the Constitutional Court stated that this case requires an urgent action, and therefore the appellant should be paid 300.00 KM per each month of unjustifiably long duration of the proceedings, in which case the total amount to be paid is 2,100.00 KM. The Government of the Federation of Bosnia and Herzegovina is obliged to pay this amount to the appellant within tree months from the day of delivering this decision.

VIII. Legal arguments presented at the session regarding a part of the decision where the appeal is considered to be dismissed

Disputable issues

40. During the deliberation it was noted that the following issues are disputable: the issue of arbitrary application of the substantive law, i.e. Article 143 (8) of the Labor Law and the issue of "impartiality of the court".

Arguments that the challenged judgment of ordinary courts are inconsistent with the Constitution of Bosnia and Herzegovina and European Convention

41. During the deliberation on the case it was noted that Article 143 of the Labor Law provides that if a laid-off employee is not called to work within six months from the day of this law coming

into force, his or her employment shall be terminated *ex lege*, i.e. within six months from the day of this law coming into force, i.e. effective 5 May 2000. However, it is obvious from the judgment of the Cantonal Court that the courts did not comply with the law and then they decided that the appellant's employment status is to be terminated on 3 August 2000, i.e. within six months from the day of filing the request. It was emphasized during the deliberation that these time-limits have been prescribed by law and that they cannot be changed and it was supposed to be considered that the appellant's employment was terminated on 5 May 2000. It was also noted that the day of the termination of the appellant's employment is very important for the calculation of the time-limit under Article 143(8) of the Labor Law, which provides that: "*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*". It was concluded that the crucial period during which the employer was not authorized to employ another person was the period from 5 May 2000 to 5 May 2001 and that this period should be taken as a relevant period regarding the appellant's employment at some other work post. During the deliberation it was pointed out that given the documents attached to the case-file, it follows that the appellant, starting from 31 August 2002, was employed in the Medical School Mostar after signing the unlimited duration employment contract and that during the critical period of one year (from 5 May 2000 to 5 May 2001) he was not employed. It was pointed out that the employer hired an external associate during the period from 4 July 2000 (a month before the appellant's employment was terminated upon the employer's decision) to 5 February 2004, in other words the employer concluded the short term employment contract with the aforementioned person. During the deliberation it was also concluded that the external associate was hired, according to the short term employment contract, for the period of 3 years and 10 months and that he was teaching 12 hours a week, which is almost 60 % of the standard teaching hours. During the deliberation it was noted that concluding the short term employment contract with the third person was only the way in which the appellant was to be removed from the position of the teacher of physical and health education, in other words that was the only way how to prevent the appellant from being reinstated to his previous work position. In view of the aforesaid, it was noted that there was an evident abuse of the rights under Article 143(8) of the Labor Law. It was also noted that the prohibition under Article 143(8) of the Labor Law should not be interpreted in a manner in which it would be allowed to conclude a contract with someone only for the reason that such a contract does not amount to employment. It was stated during the deliberation that if there was no sufficient number of standard teaching hours there was a

possibility to conclude a part-time employment contract with the appellant, and if the employer did not want that, then this short term employment contract should have been definitely concluded with the appellant. It was also stated during the deliberation that the aim of this law, i.e. Article 143 of the Labor Law, was to take care of persons who lost their job due to the war and it was also stated that this law was providing a special advantage for them as to making it possible for them to be reinstated to their previous work positions. Finally, it was stated that in application of law the employer should have been on the appellant's side, particularly bearing in mind the fact that the appellant was to retire soon.

42. As to the issue of impartiality of the court (the disqualification of Mr. Zlatko Tanović), it was noted that Mr. Zlatko Tanović was holding the office of the President of the Cantonal Commission in the proceeding conducted before the Cantonal Commission, and that he, while holding this office, passed a decision whereby the appellant's complaint was dismissed as ill-founded. It was also noted that Judge Zlatko Tanović, in the proceeding before the Municipal Court, was a single judge and that he passed a decision whereby the appellant's claim was dismissed as ill-founded in its entirety. During the deliberation a special emphasis was placed on the fact that Judge Zlatko Tanović was a single judge in the first instance proceeding and the he, as a judicial body, was examining the decision which he passed in his capacity as a President of the Cantonal Commission. It was pointed out during the deliberation that Article 357 (4) of the Civil Procedure Code provided that "*a judge cannot adjudicate the case if she/he has participated in reaching the judgment of the lower instance court or another organ in the same case",* and Article 358 of the Civil Procedure Code provides that " a *party shall submit the request for the exemption of a judge as soon as it learns that a reason for the exemption exists* ". During the deliberation it was pointed out that regardless of the fact that the Cantonal Commission and Federation Commission were only entitled to determine the rights under Article 143 (1)(2) of the Labour Law, they, within the meaning of Article 357 of the Civil Procedure Code, fall within the category of other organs which were previously deciding the appellant's case. Also, it was stated that the court is mindful, *ex officio,* of the absolute grounds for disqualification and the parties to the proceedings may warn the court of the existence of those grounds. In view of the aforesaid, it was pointed out that the duty of Judge Zlatko Tanović was to ask for his disqualification from the procedure related to deciding the appellant's case, and if he had failed to do so the Cantonal Court and the Supreme Court, which are mindful of application of law *ex officio*, were obliged to remit the case to be decided in the first

instance proceeding. Finally, during the deliberation it was noted that the European Commission obliges the member states of the Council of Europe to establish a judicial control over the administrative acts, in other words that the court must monitor whether the public authorities are working properly as in that way the rights of citizens are protected. Given the aforesaid, it was noted that in the appellant's case there was a lack of judicial control of acts and actions.

Arguments according to which the challenged judgments of ordinary courts are in compliance with the Constitution of Bosnia and Herzegovina and European Convention

43. As to the existence of arbitrary application of Article 143(8) of the Labor Law, an opinion was presented that the mentioned article clearly refers to the establishment of the employment relationship and not about some other kind of engagement. It was also noted that under positive legislation the short term employment contract is an obligatory legal relationship and not a labor relationship and it does not constitute the employment within the meaning of Article 143 of the Labor Law. As to the issue of impartiality of the court (disqualification of Judge Zlatko Tanović), it was noted that the appellant, during the proceedings before the Municipal Court and Cantonal Court, did not request the disqualification of the judge, to which he was entitled in accordance with Article 357 of the Civil Procedure Code, but he only made this request before the Supreme Court. It was noted during the deliberation that the participation of Judge Zlatko Tanović, as a single judge, is a fact which was known to the appellant from the very beginning of the proceedings before the ordinary courts, and if it was not known to them at that time, then it occurred at the time when he was delivered the first instance judgment. In that case, as it was pointed out during the deliberation, this appellant's allegation which was stated in the revision appeal was not a new fact for the Supreme Court and therefore, it is not the subject to be considered upon the pursuance of an extraordinary legal remedy. Finally, it was also noted that the issue of disqualification of Judge Zlatko Tanović is an issue that should have been resolved in the course of ordinary judicial proceedings and not in the course of the proceedings before the Constitutional Court.

Making a decision

44. With reference a part of the decision in which the appeal is considered dismissed and given that there was no identical voting of minimum five judges for any of the proposals for the decision, Article 40 (3) (4) of the Rules of the Constitutional Court was applied, reading as follows:

3. Exceptionally, when less than a total number of nine judges participate in a decision-making procedure at the plenary session, for the reasons referred to in Article 93 paragraph 1 or Article 99 paragraph 6 of these Rules, as well as in the event that all of the judges have not been appointed or there is a incapacity of one of the judges to exercise his/her office due to illness for a longer period, unless a minimum of five judges votes identically on a draft decision on the appeal/request, it shall be considered that the decision is taken dismissing the request/appeal.

4. Reasoning of the decision referred to in the previous paragraph shall contain statements on all legal positions presented at the session.

VIII. Conclusion

45. The Constitutional Court concludes that there is violation of the right to a fair trial in relation to the adoption of a decision within a reasonable time under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention when the conduct of the Supreme Court contributed, to a large extent, to the total duration of the proceedings of seven years and when that court failed to offer grounds which could be considered reasonable and objective justification for such a long duration of the proceeding and when the Constitutional Court did not find arguments based on which such a long duration of the proceeding could be justified taking into account that this proceeding is considered urgent under the law.

46. The appeal which was lodged by the appellant in relation to arbitrary application of Article 143 (8) of the Labor Law of the Federation of Bosnia and Herzegovina and impartiality of the court in connection with Article II (3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is considered as dismissed since minimum five judges did not vote identically for any of the proposals for the decision.

47. Having regard to Article (40)(3), Article 61 (1)(2) and Article 76 (2) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause of this decision

48. Having regard to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Prof. Dr. Miodrag Simović

President
Constitutional Court of Bosnia and Herzegovina