

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(c) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2), Article 61(1), (2) and (3) and Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Ms. Valerija Galić, President

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Mirsad Ćeman

Ms. Margarita Tsatsa-Nikolovska

Mr. Zlatko M. Knežević

Having deliberated on the request of **the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo, Silvana Brković-Mujagić)** in the case no. U 8/12, at its session held on 23 November 2012 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by **the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo, Silvana Brković-Mujagić)** is partly granted.

It is hereby established that the provision of Article 4 of the Law on the Court Fees of the Sarajevo Canton (*Official Gazette of the Sarajevo Canton*, nos. 21/09,

29/09 and 14/11) is not in conformity 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.

The Sarajevo Canton Assembly is ordered, in accordance with Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to bring in line the provision of Article 4 of the Law on the Court Fees of the Sarajevo Canton (*Official Gazette of the Sarajevo Canton*, nos. 21/09, 29/09 and 14/11) 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, within six months from the date of the publication of this decision in the *Official Gazette of Bosnia and Herzegovina* at the latest.

The Sarajevo Canton Assembly is ordered, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to inform the Constitutional Court of Bosnia and Herzegovina of the measures taken with the aim to enforce this decision.

The request lodged by **the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo, Silvana Brković-Mujagić)** for review of constitutionality of Article 384 of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, nos. 53/03, 73/05 and 19/06), in relation 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, is dismissed.

It is established that Article 384 of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of BiH*, nos. 53/03, 73/05 and 19/06) is in conformity with the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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 18 May 2012, the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo, Ms. Silvana Brković-Mujagić, “the applicant”) filed with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) a request for review of compatibility of Article 4 of the Law on the Court Fees of the Sarajevo Canton (*Official Gazette of the Sarajevo Canton*, nos. 21/09, 29/09 and 14/11; “the Law on the Court Fees”) and Article 384 of the Law on Civil Procedure of the Federation of BiH (*Official Gazette of the Federation of BiH*, nos. 53/03, 73/05 and 19/06) 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 (“the European Convention”).

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, the House of Representatives and the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (“the

Parliament of FBiH”), and the Sarajevo Canton Assembly (“the SC Assembly”) were requested on 31 May 2012 to submit their respective replies to the request within 30 days.

3. The Parliament of FBiH and the SC Assembly failed to submit their respective replies to the request.

III. Request

a) Allegations stated in the request

4. The applicant stated that Article 4 of the Law on the Court Fees determines that a court will not undertake any actions whatsoever if a taxpayer failed to pay the fee prescribed by that law. Next, the same provision prescribes that the court will, in the event of lodging a submission without a proof of fee payment, call on the party or the attorney to pay the fee within eight days “with a caution that the submission will be sent back”. If the party fails to comply with the court order within the given time limit, the court will send back the submission to that party as a result of the failure to pay the court fee and “will consider it as if it has never been submitted”. The applicant also mentions that the challenged provision prescribes the same conduct in the case where the court dismisses the request for the exemption from fees payment. Exceptionally, as further prescribed by law, the court will act “upon the lodging of an ordinary or extraordinary legal remedy without a previously paid court fee, but will collect the fee under coercion then”. The applicant also stated that Article 384 of the Law on Civil Procedure stipulates that each party shall cover the costs they incurred through their respective actions.

5. The applicant stated that, while proceeding in the case no. 65 0 P 194758 11 P, the ruling dated 8 June 2011 dismissed the request for the exemption of Ms. Mia Komljenović and Mr. Stefan Komljenović (“the plaintiffs”) from the costs of the proceedings, and ordered the plaintiffs to note in the lawsuit the value of dispute, and to pay the court fees accordingly. Also, the mentioned ruling, as the applicant stated, read that if the plaintiffs fail to comply with the order, the lawsuit will be referred back and will be considered as if it has never been filed. The applicant further stated that the Cantonal Court in Sarajevo (“the Cantonal Court”), by the ruling dated 16 November 2011, granted partly the plaintiffs’ appeal against the mentioned first-instance ruling so as to quash it in the part reading that in the case of failure to comply with the first-instance ruling the lawsuit will be referred back and considered as if it has never been filed. The applicant stated that, following the adoption of the second-instance ruling, it called once again on the plaintiffs to pay the court fees, which they failed to do. Therefore, the applicant stated that considering the challenged provision of the challenged law “it cannot act upon the lawsuit”, and considering the decision of the Cantonal Court, “the plaintiff’s lawsuit cannot be referred back and considered as if it has never been filed”. Therefore, the applicant halted its work on the mentioned case pending the answer of the Constitutional Court to the question

whether the provisions of Article 4 of the Law on the Court Fees and Article 384 of the Law on Civil Procedure are in contravention of Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention “in relation to the segment of that right which guarantees the right of access to court”.

b) Facts of the case regarding which the request was filed

6. On 25 April 2011, the plaintiffs filed a lawsuit against Mr. Nikola Komljenović for the establishment of unfitness to inherit, and on 4 May 2011 they filed a request for a security measure. Along with the lawsuit, the plaintiffs also submitted the request for the exemption from the costs of the proceedings, thereby providing a reasoning that “the mother of the plaintiff is unemployed, that the second plaintiff is unemployed, that only the first plaintiff is employed and that her monthly salary that they all subsist on is KM 1,510.00”. By the ruling no. 65 0 P 194758 11 P of 8 June 2011 the applicant dismissed the plaintiffs’ request for the exemption from the costs of the proceedings, ordered them to specify the value of the dispute in the lawsuit and in the proposal for a security measure, and to pay, in accordance with the challenged law, the court fee according to the value of the dispute and to submit the proof thereof to the Court. Paragraph 3 of the enacting clause of the first-instance ruling reads that unless the plaintiffs comply with these orders, the court will refer back the lawsuit along with the proposal for a security measure to the plaintiffs and will consider it “as if they have never been lodged”. In the reasoning of the ruling, the applicant, among other things, reasoned why the plaintiffs’ request for the exemption from the costs of the proceedings was dismissed, as well as that the plaintiffs were obliged, in accordance with the provision of Article 23 of the Law on the Court Fees, to undertake necessary actions to establish the value of the dispute, and then to submit the proof of the payment of the court fees, “under the Tariff 1, paragraphs 1 and 7 of the Tariff of Court Fees”.

7. By its Ruling no. 65 0 P 194758 11 Gž of 16 November 2011, the Cantonal Court partly granted the plaintiffs’ appeal thereby quashing the mentioned paragraph 3 of the first-instance ruling, and upheld the remainder of that ruling. In the reasoning of its decision, the Cantonal Court stated that the provision of Article 11 paragraph 1 of the Law on the Court Fees prescribes “a possibility to exempt a taxpayer from the payment of a fee, if the fee payment, considering the amount of the funds which are used to sustain the taxpayer and members of his/her household, would result in the reduction of those funds to such an extent so as to jeopardize their existence”. Paragraph 2 of the same article, as further stated by the Cantonal Court, prescribes that the court will assess all circumstances, “and particularly the value relevant for the fee collection, the total income and property of the taxpayer and of the members of his/her household that are his/her dependants”. The Cantonal Court also referred to Article 12 of the Law on the Court Fees which stipulates evidence which the court may assess prior to

taking a decision on the exemption from the fee payment, thus in view of that it concluded that the first-instance court correctly assessed that “the plaintiffs are not and cannot fall in the category of persons at social risk”, and that “the presented general means of the plaintiffs does not indicate that they cannot cover those costs without damage to their necessary sustenance”. The Cantonal Court did not accept either the complaint that the plaintiffs are unable to determine the value of the dispute, because the portions of inheritance have not been determined, stating that the plaintiffs ought to “determine the value of the dispute according to the value of the legacy itself or a portion of the legacy which they consider to belong to them and to fulfill the obligation of the fee payment”.

8. However, the Cantonal Court concluded that the decision regarding the referring back of the lawsuit and of the proposal for a security measure is contrary to the provision of Article 321(2) of the Law on Civil Procedure, due to the obligation on the part of the court “to determine the value of the dispute itself if the plaintiff has specified a too high or too low value of the dispute, which leaves a possibility to carry on with the proceedings at the value of the dispute set by the court itself”. Further, the Cantonal Court stated that the provision of Article 53(1) of the Law on Civil Procedure prescribes that the civil procedure shall be instituted by way of lodging a lawsuit, which generates “consequences relevant for the civil procedure, such as, for instance, the termination of the statute of limitations, the acquiring of the right to an interest, the establishment of a two-party legal relation between the plaintiff and the court etc., and therefore, irrespective of the legal obligation of the court, not to undertake any actions whatsoever until the taxpayer pays the prescribed fee under [the challenged law] [...] the first-instance court cannot refer back the lawsuit to the plaintiffs and hold that it has not been filed, as the legal consequences had already taken place upon the filing of a lawsuit and they cannot cease as a result of the failure to pay the court fees”.

IV. Relevant Law

9. The **Constitution of Bosnia and Herzegovina**, in its relevant part, reads as follows:

Article II(2) - International Standards

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

Article II(3) – Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental 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. [...]*

Article II(6) - Implementation

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.

10. **The Law on the Court Fees of the Sarajevo Canton** (*Official Gazette of the Sarajevo Canton*, nos. 21/09, 29/09 and 14/11), in its relevant part, reads as follows:

Article 3

(Compulsory communication of proof of fees payment)

(1) Along with the submission (lawsuit, proposal, legal remedy etc.) one is obliged to submit a proof of the fee payment. [...]

Article 4

(Reciprocity of fee payment and the undertaking of actions in a procedure)

(1) A Court will not undertake any actions whatsoever if a taxpayer has failed to pay the fee prescribed by this law. In the event of lodging a submission without a proof of fee payment, the court will call on the party, or their attorney, to pay the fee within 8 days, with a caution that the submission will be sent back. If the party fails to meet the given time limit, the court will send back the submission with a notice that it has been sent back as a result of the failure to pay the court fee and will be considered as if it has never been submitted.

(2) A Court will proceed in the manner set forth in paragraph 1 of this article and in the event it dismisses a request for the exemption from fee payment.

(3) Under the Law on Civil Procedure the time limits shall not start to run until the fee has been paid or until the court has resolved a request for exemption from fee payment.

(4) With exception to paragraph (1) of this article, if a taxpayer fails to comply with the order of a court and fails to pay the fee for the ordinary or extraordinary legal remedy within the given time limit, the submission will not be sent back, rather the procedure upon the lodged legal remedy will carry on, and the coercive collection of court fee will be carried out in accordance with the provisions of this law.

Article 5

(The time of the occurrence of the obligation of fee payment)

Unless provided for otherwise by this law, the fee obligation shall occur:

a) regarding submissions – on the day of the lodging thereof; [...]

Article 8

(Statute of limitations on the collection of fee)

The right to collect fee shall be barred by the statute of limitations within five (5) years from the day the fee obligation has occurred.

Article 11

(Eligibility for exemption from the obligation to pay a fee)

(1) A Court may exempt a taxpayer from the payment of a fee, if the fee payment, considering the amount of the funds which are used to sustain the taxpayer and members of his/her household, would result in the reduction of those funds to such an extent so as to jeopardize their existence.

(2) A decision referred to in paragraph 1 of this article shall be adopted by a court upon a request in writing lodged by a taxpayer. Prior to adopting a decision, a court will assess all circumstances, and will particularly take into account the value relevant for the collection of a fee, the total income and property of a taxpayer and members of his/her household who are his/her dependants. [...]

Article 12

(Evidence for exempting one from the obligation to pay a fee)

(1) The income amount of a taxpayer and members of his/her household shall be proven on the basis of an attestation by a competent social work center, or other evidence in writing which a taxpayer is obliged to submit regarding his/her means.

(2) The attestation referred to in paragraph 1 of this article shall serve as evidence to exempt one from fee payment only if no longer than six months have elapsed from the day of the issuing thereof to the day of lodging a request for exemption.

(3) When necessary, a court may, ex officio, obtain necessary data and notifications on the means of a taxpayer and members of his/her household, and can hear the opposing party regarding the same.

(4) No special appeal may be lodged against a court decision granting a proposal for the exemption from fee payment.

Article 20

(Establishing the value of a dispute in a civil procedure)

(1) In a civil procedure a fee shall be paid according to the value of the subject-matter of the dispute.

(2) Unless otherwise provided for by this law, the provisions of regulations on civil procedure, on which basis a value of the dispute shall be established, shall be applied also when determining the value of the dispute for the fee payment.

Article 23

(Establishing the value of a subject-matter of a dispute in disputes arising from inheritance law)

If the subject-matter of a dispute is the right to the entire inheritance, one shall take as the value of the subject-matter of a dispute the value of the real inheritance, and if the subject-matter of a dispute concerns solely one portion of the inheritance or a certain item of the inheritance, one shall take as the value of the subject-matter of a dispute the real value of that portion, or item.

Article 31

(Coercive collection of unpaid fee)

(1) A taxpayer shall be obliged to pay the fees, which amount shall be determined at the end of the proceedings, within eight days from the day of receiving the ruling referred to in Article 19 of this law. If a taxpayer fails to pay the fee within the given time limit, a court shall request from the competent Tax Administration of the Federation of Bosnia and Herzegovina ("the competent office") in which territory a tax payer has permanent or temporary residence, that the collection of the fees due be carried out by way of coercion.

11. The **Civil Procedure Code of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of Bosnia and Herzegovina*, nos. 53/03, 73/05 and 19/06), in its relevant part, reads as follows:

Article 53

(1) A civil procedure shall be instituted by way of filing a lawsuit. [...]

Article 384

Each party shall bear in advance the costs they have brought about through their own actions.

V. Admissibility

12. In examining the admissibility of the request, the Constitutional Court invoked the provision of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina.

Article VI(3)(c) of the Constitution of Bosnia and Herzegovina reads as follows:

c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

13. The request for the review of constitutionality was filed by the Municipal Court in Sarajevo (the Judge of the Municipal Court in Sarajevo Ms. Silvana Brković-Mujagić), which means that the request was filed by an authorized person under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 5/10* of 26 November 2010, paragraphs 7-14, published in the *Official Gazette of Bosnia and Herzegovina*, no. 37/11). Bearing in mind the provisions of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Rules of the Constitutional Court, the Constitutional Court deems that the present request is admissible as it was filed by an authorized entity, and that there is no single formal reason under Article 17(1) of the Rules of the Constitutional Court rendering this request inadmissible.

VI. Merits

14. The applicant demanded that the Constitutional Court decides on the compatibility of Article 4 of the Law on the Court Fees and Article 384 of the Law on Civil Procedure with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, which guarantee the right of access to court as an inseparable part of the right to a fair trial.

a) Relevant principles in relation to the right of access to court

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

(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. [...]

16. As consistently indicated by the European Court and the Constitutional Court in their respective jurisprudence, the right to a fair trial under Article 6(1) of the European Convention ensures, among other things, the right for everyone to present their respective request in relation to civil rights and obligations before a court or “a tribunal”. In this way, this provision contains “the right to court” although it is not explicitly stated in the provision of Article 6(1) of the European Convention, and “the right of access to court” is but one element of that right, without which it would not be possible to enjoy other guarantees prescribed by the mentioned provision. Namely, the principles of equity, publicity and

expeditiousness of a court procedure would have no value whatsoever if a court procedure could not be instituted. Besides, it would be difficult to envisage the rule of law, as a fundamental principle of the right to a fair trial, without a possibility to institute a procedure before a court or “a tribunal”, thus one will not consider the right of access to court to be effective if there are procedural hindrances in the national law, which, *de facto*, make it impossible for a person to file a lawsuit with a court (see the European Court of Human Rights, *Kreuz vs. Poland*, judgment of 19 June 2001, Application no. 28249/95, paragraph 52 with further references and, the Constitutional Court, Decision on Admissibility and Merits no. U-6/12 of 13 July 2012, paragraph 26, published in the *Official Gazette of BiH*, no. 75/12).

17. However, the right to court is not absolute. It can be subject to certain restrictions, since this right, by its nature, requires to be regulated in an appropriate manner. By guaranteeing individuals the right to an effective access to court for the purpose of deciding on their respective civil rights and obligations, Article 6(1) of the European Convention leaves to the states a free choice of instruments they are to use in that direction, thus the member states have a certain degree of margin of appreciation in that respect. Still, a decision on it cannot be to the detriment of the rights guaranteed by the European Convention (see the European Court of Human Rights, *Kreuz vs. Poland*, judgment of 19 June 2001, Application no. 28249/95, paragraphs 52-53 with further references).

18. The Constitutional Court indicates that the European Court, in its case-law, has never ruled out a possibility that the interests of a fair procedure can justify the imposing of financial restrictions on the right of access to court. In this respect, the European Court concluded that the obligation of guaranteeing an effective right of access to court does not mean solely the absence of interference, rather it can require from the state to undertake various forms of positive action, but that one cannot deduce from it that each and every person must be ensured the right to a procedure before a court free of charge, or the right to a legal assistance free of charge. Bearing that in mind, the European Court concluded that the request for the payment of a court fee, when requesting from the court to decide on a civil right, cannot be *per se* considered incompatible with Article 6(1) of the European Convention. However, the amount of the fee, including the ability of a party to the proceeding to pay that fee, and the stage of the proceeding at which such a restriction on access to court is imposed, are the factors to be taken into account when taking a decision on whether or not a person has the right of access to court (*ibid.*, *Kreuz vs. Poland*, paragraphs 59-60).

19. Further, when assessing whether the right of access to court has been violated, the European Court assesses whether the imposed restrictions are such that they diminish the very essence of the right to a fair trial. In that respect, the European Court particularly emphasizes that the restrictions on the

right of access to a court or tribunal will not be in conformity with Article 6(1) of the European Convention if they do not have the legitimate aim and if there is no proportionality between the instruments of restricting that right and the aim sought to be achieved (*ibid.*, *Kreuz vs. Poland*, paragraph 55). The aim of such analysis is based on the principle that the European Convention guarantees the rights which are practical and effective, and not theoretical and illusory, which has a special significance for the right of access to court given the prominent place that the right to a fair trial has in a democratic society (*idem.*, *Kreuz vs. Poland*, paragraph 57 with further references).

b) Application of the relevant principles and the issue of constitutionality of Article 4 of the challenged law

20. In the case at hand, the Constitutional Court indicates that the challenged Article 4 of the Law on the Court Fees prescribes “the reciprocity of the court fee payment and the undertaking of actions in a procedure” so as to explicitly prescribe in paragraph 1 of the mentioned article that “a Court will not undertake any actions whatsoever if a taxpayer has failed to pay the fee prescribed by this law”. Further, this provision also prescribes that the court will call on the party to pay the fee within 8 days, with a caution that the submission will be sent back, if the party “fails to meet the given time limit, the court will send back the submission with a notice that it has been sent back as a result of the failure to pay the court fee and will be considered as if it has never been submitted”. On the basis of such a provision it follows that the Law on the Court Fees explicitly thwarts the proceeding of a court following submissions, including lawsuits, if no proof of the fees paid in advance has been attached thereto, and the party has not been exempted from paying the costs of the proceeding.

21. While analyzing the question as to whether such a provision is in conformity with the right of access to court, the Constitutional Court, first and foremost, observes that the court fees prescribed by the Law on the Court Fees constitute public revenues to be paid to the account of the Sarajevo Canton budget, by a person at whose request or in whose interest actions are being taken in a proceeding. On the basis of the Law on the Court Fees, it follows that the legislator took into consideration a variety of situations related to a taxpayer (means and social status and such like), and that, accordingly, it envisaged, under certain conditions, a possibility to exempt one from paying court fees. Also, the Law on the Court Fees prescribed, in certain cases stipulated by Article 4(4), a possibility to collect court fees coercively, which constitutes a certain type of a sanction for a failure to fulfill this obligation. However, by the challenged provision of Article 4 of the Law on the Court Fees the legislator prescribed “the reciprocity of the court fee payment and the undertaking of actions in a procedure”, by making the conduct of a court proceeding, following a lawsuit filed, conditional upon the payment of a court fee, which also constitutes a sort of a sanction resulting from a failure to pay the prescribed court

fee. In that respect, the Constitutional Court notes that collecting public revenues for the budget, namely court fees in the case at hand, and the compliance with the regulations in that respect, constitutes a legitimate goal that the legislator pursues. However, a question arises as to whether, by prescribing the restriction on the right of access to court so as to make it impossible for a party to have a court proceeding resulting from a failure to pay a court fee at the time of lodging a submission, or a lawsuit with a court, a proportionality has been stricken between a legitimate goal sought to be achieved and the right of access to court of an individual.

22. The Constitutional Court notes that the Human Rights Chamber considered in its case-law the issue relating to the right of access to court, exclusively though in respect of the amount of a court fee that a party to the proceeding had to pay and the dismissal of the request for exemption from court fee payment, being a possible factor of restricting the right of access to court. However, in that case, the relevant law, which had been applied at the time, prescribed that “a court may not dismiss registration and processing of a civil suit only on the account of the failure of the party launching a suit to pay the court fee” (see, Human Rights Chamber, Decision on Admissibility and Merits no. CH/98/1297 D.B. and *J.B. vs. Bosnia and Herzegovina and the Federation of BiH*, dated 2 September 2003, published on <http://www.hrc.ba/commission/bos/default.htm>). In the case at hand, however, the situation is, as already mentioned, different with respect to the legal regulation.

23. In that respect, the Constitutional Court emphasizes that the regulation of the court fees payment as public revenues has to be in conformity with the constitutional principles of the protection of human rights and freedoms, which means, among other things, that the prescription of the manner of fulfillment of an obligation by citizens to pay court fees must not derogate the court protection of the constitutional rights and freedoms. In the case at hand, the Constitutional Court notes that, under Article 53 of the Law on Civil Procedure, a civil procedure shall be instituted by way of filing a lawsuit, which generates certain procedural and substantive consequences for a party to the proceeding: the preclusive time limits for lodging a lawsuit are terminated; the statutes of limitations on claims and maturity of obligations are terminated; the right to select an alternative obligation which the plaintiff is entitled to shall be exhausted upon the filing of a lawsuit; the competence of a court shall be determined according to the facts which existed at the time of filing a lawsuit, etc. In such cases, the referring back of a lawsuit to the party and considering it as if that lawsuit had not been filed at all, as prescribed by the provisions of Article 4 of the Law on the Court Fees, can lead to the loss of rights prescribed by other laws, which would undoubtedly generate for the party to the proceedings irreparable detrimental consequences and make the court protection of the recognized rights impossible. In that manner, according to the opinion of the Constitutional Court, the very essence of the right of

access to court, or the right to a fair trial under Article 6(1) of the European Convention, is brought into question. This conclusion is neither altered by the fact that Article 4(3) of the Law on the Court Fees prescribes that “under the Law on Civil Procedure the time limits shall not start to run until the fee has been paid or until the court has resolved a request for exemption from fee payment”, since this provision does not relate to the mentioned preclusive time limits or the statutes of limitations on claims which are not prescribed by the Law on Civil Procedure, but by other corresponding laws.

24. Further, as already mentioned, Article 4(4) of the Law on the Court Fees prescribes that the submission will not be sent back in the case of a failure to pay a fee, but only in relation to “the lodged ordinary or extraordinary legal remedy”, in which case the procedure will carry on, and the fee will be collected coercively in accordance with the provisions of the Law on the Court Fees. The Constitutional Court observes that it is unclear as to why the legislator decided that only fees on the lodged legal remedies can be collected coercively, and why such a mechanism has not been prescribed as an instrument to achieve a legitimate goal in the event of a failure to pay the fee on submissions, or lawsuit, instead of making it impossible to conduct a proceeding in such cases. The Constitutional Court also indicates that the competent legislator, the Sarajevo Canton Assembly, failed to give its opinion in that respect, as it failed to submit a reply to the request, and the Constitutional Court cannot find any reasonable justification for such a normative choice, all the more so because obviously there is a possibility and mechanisms for coercive payment, and considering the fact that the right of a public authority to collect court fees becomes barred by the statute of limitations within a rather lengthy time limit of five years from the day the fee obligation occurred, as prescribed by Article 8 of the Law on the Court Fees.

25. In view of the aforementioned, the Constitutional Court holds that the restriction of the right of access to court, which the legislator had opted for, aimed at the regular and timely collection of court fees as public revenues – making it impossible to conduct a proceeding upon a filed lawsuit as a result of a failure to pay a court fee in advance, cannot be considered an instrument which is proportional to the achievement of a legitimate goal. On the contrary, this standardization violates the very essence of the right of access to court as an inseparable part 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.

26. On account of the aforementioned, the Constitutional Court holds that the provision of Article 4 of the Law on the Court Fees is in contravention 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.

27. Also, the Constitutional Court observes that the applicant stated that the Law on the Court Fees makes it impossible for courts to proceed on the filed lawsuit as a result of a failure to pay a fee, and

the decision of the Cantonal Court makes it impossible for an applicant to refer back the lawsuit and to consider it as if it has never been filed, and that as a result of all the aforesaid “it cannot proceed on the lawsuit”. In relation to these allegations, the Constitutional Court emphasizes that it is not called upon to give instructions to the applicant on how to conduct a proceeding. However, the Constitutional Court notes that Article II(6) of the Constitution of Bosnia and Herzegovina prescribes an obligation, among other things, of each and every court in Bosnia and Herzegovina to apply the European Convention directly, which, within the meaning of Article II(2) of the Constitution of BiH, shall have priority over all other law, including the Law on the Court Fees.

c) The issue of constitutionality of Article 384 of the Law on Civil Procedure

28. Also, the applicant seeks that the Constitutional Court examines the constitutionality of the provision of Article 384 of the Law on Civil Procedure which prescribes that each party “shall bear in advance the costs they brought about through their own actions”. In relation to this request, the Constitutional Court observes that this provision relates both to the plaintiff and the defendant, as well as to other parties to the proceedings: an intervener, the public attorney (Article 395 of the Law on Civil Procedure) and the Ombudsman (Article 394 of the Law on Civil Procedure), for instance, and it covers all costs of the civil procedure, such as, among other things, the costs of presenting the proposed evidence, the lawyer’s representation fees, the costs of the preparation of legal remedies and such like. Also, the Constitutional Court observes that the challenged provision establishes a general principle in relation to all costs of the civil procedure, and in no way whatsoever, not even implicitly, does it prescribe an impossibility to conduct a civil procedure in the manner prescribed by the provision of Article 4 of the Law on the Court Fees. Therefore, the Constitutional Court holds that the provision of Article 384 of the Law on Civil Procedure does not bring into question the right of access to court referred to in Article 6(1) of the European Convention.

29. In view of the aforementioned, the Constitutional Court holds that the provision of Article 384 of the Law on Civil Procedure is not in contravention 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.

VII. Conclusion

30. The Constitutional Court concludes that the provision of Article 4 of the Law on the Court Fees is in contravention 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, because rendering it impossible for a court to conduct a proceeding, if no court fee has been paid beforehand on a submission, including a lawsuit,

does not constitute an instrument which is reasonably proportional to the achievement of a legitimate goal, as that completely restricts the right of access to court and a possibility to conduct such a court proceeding, which can lead to irreparable detrimental consequences for a party to the proceeding, which is contrary to the very essence of the right to a fair trial under Article 6(1) of the European Convention.

31. The Constitutional Court concludes that the provision of Article 384 of the Law on Civil Procedure is in conformity with 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, since that provision does not thwart the conduct of a proceeding, rather it prescribes a general principle in relation to the costs of a civil procedure.

32. Pursuant to Article 61(1), (2) and (3) and Article 64(3) of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this decision.

33. Pursuant to Article 41 of the Rules of the Constitutional Court, Separate Dissenting Opinion of the Vice-President Tudor Pantiru Joined by Vice-President Miodrag Simović makes annex to this decision.

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

Valerija Galić
President
Constitutional Court of Bosnia and Herzegovina

**SEPARATE DISSENTING OPINION OF JUDGE TUDOR PANTIRU
JOINED BY JUDGE MIODRAG SIMOVIĆ**

By its Decision of 23 November 2012 in the mentioned case, the Constitutional Court of Bosnia and Herzegovina decided to partially grant the request lodged by the Municipal Court of Sarajevo (Judge Ms. Silvana Brković-Mujagić) and

“...established that the provision of Article 4 of the Law on the Court Fees of the Sarajevo Canton (*Official Gazette of the Sarajevo Canton, nos. 21/09, 29/09 and 14/11*) is not in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms”.

The request in part seeking to declare unconstitutional Article 384 of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina in relation to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms was dismissed.

While I agree with the decision of the majority in respect of the constitutionality of Article 384 of the Law on Civil Procedure of the Federation of Bosnia and Herzegovina, I respectfully disagree with the decision in the part establishing the unconstitutionality of Article 4 of the Law on Court Fees of the Sarajevo Canton.

In Chapter VII of its decision “... the Constitutional Court concludes that the provision of Article 4 of the Law on the Court Fees is in contravention 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, because rendering it impossible for a court to conduct proceedings, if no court fee has been paid beforehand in respect of a submission, including a lawsuit, does not constitute an instrument which is reasonably proportional to the achievement of a legitimate goal, as it completely restricts the right of access to court and the possibility to conduct such court proceedings, which can lead to irreparable detrimental consequences for a party to the proceedings, which is contrary to the very essence of the right to a fair trial under Article 6(1) of the European Convention”.

It has to be noted that Article 4 of the Law on Court Fees consists of several provisions and not of a single provision as stated in the Decision of the Constitutional Court and in the enacting clause as well. Indeed, if read separately the provision from Article 4(1) of the Law {“ *A Court will not undertake any actions whatsoever if a taxpayer has failed to pay the fee prescribed by this law. In the event of lodging a submission without a proof of fee payment, the court will call on the party, or their attorney, to pay the fee within 8 days, with a caution that the submission will be sent back. If the party fails to meet the given time limit, the court will send back the submission with a notice that it has been sent back as a result of the failure to pay the court fee and will be considered as if it has never been submitted*”} leaves the impression of an absolute impossibility to access the court without paying the fee.

However, when reading the provision from Article 4(2) of the Law on Court Fees {“ *A Court will proceed in the manner set forth in paragraph 1 of this article and in the event it dismisses a request for the exemption from fee payment*”} together with the provisions of Article 11 of the same Law {(1) *A Court may exempt a taxpayer from the payment of a fee, if the fee payment, considering the amount of the funds which are used to sustain the taxpayer and members of his/her household, would result in the reduction of those funds to such an extent so as to jeopardize their existence.*(2) *A decision referred to in paragraph 1 of this article shall be adopted by a court upon a request in writing lodged by a taxpayer. Prior to adopting a decision, a court will assess all circumstances, and will particularly take into account the value relevant for the collection of a fee, the total income and property of a taxpayer and members of his/her household who are his/her dependants*”} it becomes clear that the court may exempt certain claimants from the payment of a fee and that the provision from paragraph 1 of Article 4 does not impose a blanket and categorical prohibition to access a court without paying court fees.

The present case is in itself an example proving the possibility to have access to a court without paying court fees because the appellant did not pay the fees but instead submitted together with the claim a request of exemption from the obligation to pay the fee. It is irrelevant that after considering the evidence presented by the claimant the courts dismissed the request and concluded that he could afford paying the fee.

It should be mentioned that the ECtHR has ruled in some cases that various limitations, including financial ones, may be placed on the individual’s access to a “court” or “tribunal” (see, for instance, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, § 33, and *Tolstoy-Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, §§ 61 et seq.).

In *Clionov v. Moldova* (no. 13229/04, § 41, 9 October 2007), a case in which the problem of access to court and court fees were at issue, the ECtHR held that “... a blanket prohibition on granting court fee waivers... raises of itself an issue under Article 6 § 1 of the Convention”. Since in the present case, Article 4 of the Law on Court Fees does not impose a blanket prohibition on granting court fee waivers, as was the case in *Clionov*, I consider that this provision is in conformity with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and with Article 6(1) of the European Convention Human Rights and Fundamental Freedoms.