

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (3) 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:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. David Feldman

Mr. Mato Tadić

Mr. Mirsad Ćeman

Having deliberated on the appeal of Mr. **Sakib Musić** in case no. **AP 717/08**, at its session held on 9 July 2010 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. **Sakib Musić** against the Ruling of the Cantonal Court in Zenica No. 004-0-Gž-08-000 027 of 21 January 2008 and the Ruling of the Municipal Court in Zenica No. 043-0-V-06-000177 of 15 November 2007 is hereby dismissed as ill-founded.

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 3 March 2008, Mr. Sakib Musić ("the appellant") from Zenica, represented by Mr. Miro Blaž, the lawyer practicing in Vitez, lodged with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") an appeal against the Ruling of the Cantonal Court in Zenica ("the Cantonal Court") No. 004-0-Gž-08-000 027 of 21 January 2008 and the Ruling of the Municipal Court in Zenica ("the Municipal Court") No. 043-0-V-06-000177 of 15 November 2007. At the same time, the appellant submitted a request for interim measure whereby the Constitutional Court would suspend the enforcement of the Municipal Court's ruling No. 043-0-V-06-000177 of 15 November 2007 pending its decision on the appeal.

II. Procedure before the Constitutional Court

2. The Constitutional Court adopted the Decision on interim measure No. *AP 717/08* of 3 April 2008 whereby it dismissed the appellant's request.
3. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 28 May 2010, the Cantonal Court, the Basic Court and the Public Institution Social Work Center Zenica were requested to submit their respective replies to the appeal.
4. The Cantonal Court submitted its reply to the appeal on 4 June 2010 and the Public Institution Social Work Center Zenica did so on 7 June 2010 and the Municipal Court submitted its reply on 14 June 2010.

III. Facts of the Case

5. The facts of the case, as they appear from the appellant's assertions and the documents submitted to the Constitutional Court, may be summarized as follows.

6. On the basis of proposal of the Public Institution "Centar za socijalni rad" (Social Work Center Zenica) ("applicant"), by the ruling of the Municipal Court No. 043-0-V-06-000177 of 15 November 2007, the appellant and Ms. Suada Musić were deprived of the right to live with their four underage children while the appellant and Ms. Silvana Bajramović were deprived of the right to live with their six underage children. By the same ruling the custody over underage children was entrusted to the Children's Institution "Selo mira" Lukavac and the Public Institution "Dom-porodica" in Zenica. This measure was imposed for the period of one year starting from the day of placing the underage children in the two aforementioned institutions.

7. In the reasoning of the quoted ruling the Municipal Court states that the proceedings were initiated upon a motion of the applicant to deprive the appellant and women he lives with ("the mothers of underage children") of the right to live with their underage children in accordance with Article 152(2) of the Family Law. In the course of proceedings the children were allocated a guardian for special cases in person of an employee of the Cantonal Institute for Legal Assistance, pursuant to the ruling of the Public Institution Social Work Center. Furthermore, the Basic Court states that in the proceedings it heard the applicant, the appellant and the mothers of underage children, the authorized person for carrying out supervision, and a social worker of the Center, inspected the birth certificates for some of the children, the Report on sanitary and hygienic conditions, the Minutes of the onsite investigation, the Report on the family history and other substantive documentation. After the conducted proceedings, the Municipal Court established that the underage children live in a rundown house with unsatisfactory sanitary conditions, without water or electricity, that there is a series of factors which are detrimental to the health of the children, primarily the outbreak and spread of infectious diseases, that the appellant has no permanent job, that school age children do not attend elementary school, that some of them are not registered in the register of births, that mothers of the underage children with whom the appellant lives are engaged in begging on the streets together with their children on a daily basis and secure the means for life in that manner. Moreover, the Municipal Court notes that it is established on the basis of the official Report of the Social Work Centre that the appellant and the mothers of underage children neglected to care for the health and upbringing of children, that that housing and material conditions in which the children live are extremely poor, and that the grounds exist indicating the abuse of the right to

care for children (the fact that the school age children do not attend school and that they are engaged in socially unacceptable behaviour such as begging and vagrancy). The Municipal Court referred to Article 152 paragraphs 1, 2 and 3 and Article 153 paragraphs 1 and 2 of the Family Law and issued the measure of revocation of the right of parents to live with the children. Further, the Municipal Court states that it did not accept the appellant's proposal to submit the birth certificates for all underage children as that, in the opinion of the Court, would contribute to the delay in the proceedings as the parents failed to register all the children in the Register of Births, and the procedure is conducted in the children's interest. Also, in the evaluation of the Municipal Court, the allegation that the guardian for children was appointed by the Social Work Center Zenica which is the also the applicant, is not justified as the guardian is obliged to protect the rights and interests of children and the purpose of the entire procedure is in fact the protection of the rights and interests of children. Therefore, in the particular case, the conflict of interests could not have occurred.

8. The appellant filed an appeal against the first instance ruling. The Cantonal Court issued the ruling no. 004-0-Gž-08-000 027 of 21 January 2008 dismissing the appellant's appeal as ill-founded and upholding the first instance ruling. In the reasoning of its ruling, the Cantonal Court states that the Municipal Court established the facts correctly, applied the substantive law appropriately and the reasons for the decision were clearly and compellingly presented. In respect of the appellant's claim that the respective proceedings were instituted without obtaining the birth certificates for all underage children, the Cantonal Court states that the first instance court correctly established that lack of birth certificates for all underage children does not constitute a precondition for the institution and conduct of these proceedings and especially so for the reason that further waiting for acquisition of such documentation would lead to unnecessary delay of the proceedings and "it would be to the detriment of their underage children considering their living conditions". In relation to the appellant's seventeen-year-old daughter that the imposed measure failed to include all as other underage children, the Cantonal Court emphasizes that, in accordance with the supplement to the proposal of 11 December 2006, she "is put under the supervision of the parenting care", which supervision is carried out by the applicant, and that this circumstance offers a possibility to the appellant to show, while the imposed measure is in force, whether he is able to fulfil his parenting duties under the relevant provisions of the Family Law. The Cantonal Court also stresses that the failure to obtain the opinion from the underage children before imposing the mentioned measure, as well as the procedure of appointing the guardian for this case, as well as her relation to the underage children, in no way affected the adoption of a lawful and correct decision by the first instance court.

In that respect the Cantonal Court notes that the respective proceedings were completed in a reasonable time, and the appellant did not challenge the appointment of Ms. Nadžija Talić as a guardian for the particular case. Furthermore, the Cantonal Court emphasizes that based on the status of the case-file – social background prepared by the applicant it follows clearly that the underage children do not wish to be separated from their parents but that circumstance is not crucial in the present case, as, considering their age and their way of life so far, it is obvious that underage children cannot understand the meaning and legal consequences of their actions (vagrancy, begging, not attending school) or the fact that the appellant and the mothers of underage children, by failing to fulfil their basic duties stipulated by the relevant law violate their fundamental rights and interests. The Cantonal Court notes that the appellant's allegations that in the present case they could have been helped in order to fulfil their parenting duties to their underage children, without imposing the respective measure, in such a manner so that the funds envisaged for the custody of their underage children in the mentioned institutions be directed to the appellant and the mothers of underage children to fulfil their parenting duties, are unacceptable. In relation to that, the Cantonal Court stresses that appellant and the mothers of underage children cannot be exempted from the legal obligation of sustaining their underage children on any grounds, not even in case of unemployment, and thereby they are obliged to use all their abilities and capacities to provide, through their own contribution, living conditions to their underage children necessary for their development. The Cantonal Court concludes that the challenged ruling represents the best way to protect the rights and interests of the underage children in the given circumstances.

IV. Appeal

a) Allegations of the appeal

9. The appellant claims that his right to fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms ("the European Convention") and the right to family life safeguarded by Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention have been violated by the challenged decisions. He alleges that his poverty is an essential reason that he was deprived of the right to live with his children. Furthermore, the appellant emphasizes that his underage children could not appear before the court to state with whom they want to live and that "violates his right to fair trial" and that the guardian of the underage children should have been appointed by the court as it is "obliged by Article 124 of the

Family Law” but that function was performed by the person appointed by the applicant, thus, the party to the proceedings.

b) Reply to the Appeal

10. In its reply to the appeal the Cantonal Court stated that it maintains its reasoning given in the ruling No. 0004-0-Gz-08-000027. The Cantonal Court underlined that the decision is lawful and the appeal manifestly ill-founded.

11. In the reply to the appeal the Municipal Court stated that the appellant’s rights were not violated which is supported by the fact that the first instance ruling of the Municipal Court had been upheld by the ruling of the Cantonal Court.

12. In its reply to the appeal the Public Institution Social Work Center Zenica stressed that there had not been any violation of the rights the appellant alleged and the decisions of the ordinary courts were based upon the correctly established facts and the appropriate application of substantive law.

V. Relevant Law

13. **Family Law of the Federation of Bosnia and Herzegovina** („Official Gazette of Federation of Bosnia and Herzegovina“ No 35/05) as far as relevant, reads:

c) Supervision of parental responsibility

Article 152

(1) If parents neglected to care for the health and rearing of a child or when parents need assistance in child rearing, the guardianship authority shall set a supervision of the parental responsibility that shall be in force as long as in the interest of a child and for at least three months.

(2) In the decision on supervision, the guardianship authority shall set a program of supervision and appoint a person to follow the development of a child, control actions of parents, submit periodical reports to the authority and take other measures in the interest of a child. This person must meet requirements for a guardian.

(3) By this decision the parents shall be obligated to regular visits by the guardianship authority, educational or health care institution and to submit periodical notifications on the measures taken towards a child.

(4) Person referred to in paragraph 2 of this Article shall have the right to compensation of justified costs and monthly reimbursement from the budget of the social care funds.

(5) Persons who have the legal obligation to support a child shall not be entitled to the right to reimbursement referred to in paragraph 4 of this Article

(6) The amount and manner of payment of this reimbursement shall be established by the Federal Labour and Social Politics Minister.

d) Revoking the parent's right to live with a child

Article 153

(1) The Court shall revoke the parent's right to live with the child in a non-contentious proceedings and the care and rearing shall be entrusted to another person or institution if parents or parent with whom the child lives jeopardizes the interests of a child and to a greater degree neglects rearing and education of a child or if does not prevent another parent or member of a family community to act towards a child in this manner or if the child exhibits significant disorders in his/her rearing.

(2) By issuing a measure referred to in paragraph 1 of this Article other duties, responsibilities or rights toward a child shall not cease.

(3) While the measure is in force, the Court may, if it establishes it as being in the interest of a child, issue other measure for protection of a child or reissue same measure.

(4) The court shall reinstate the parent's right to live with a child when it becomes in a interest of a child.

(5) The court shall inform guardianship authority on issuing measure referred to in paragraph 1 of this Article, for the purpose of protection of the child's rights and interests and shall appoint a special guardian while the measure is in force.

14. The **Convention on the Rights of the Child**, which was adopted by the General Assembly of the United Nations (*Official Gazette of the SFRY – International Agreements no. 15/90*) adopted on 20 November 1989, and which Bosnia and Herzegovina took over by the notification on the succession of the International Agreements on 23 November 1993, in its relevant part reads as follows:

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

(...)

VI. Admissibility

15. According to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

16. According to Article 16(1) of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

17. In the present case, the subject matter of the appeal is the Ruling of the Cantonal Court against which there are no other effective remedies available under the law. Furthermore, the challenged ruling was adopted on 21 January 2008, and the appeal was filed on 10 March 2008 that is, within the 60 days time-limit as provided for under Article 16(1) of the Rules of the Constitutional Court. In conclusion, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as neither being manifestly (*prima facie*) ill-founded nor inadmissible for any formal reason.

18. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1),(2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the admissibility requirements have been met in the relevant appeal.

VII. Merits

19. The appellant challenges the aforementioned ruling claiming the violation of his rights under Article II(3)(e) and (f) of the Constitution of Bosnia and Herzegovina and Articles 6(1) and 8 of the European Convention.

Right to family life

20. Article II(3)(f) of the Constitution of Bosnia and Herzegovina reads as follows:

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:

[...]

f) The right to private and family life, home, and correspondence.

Article 8 of the European Convention reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

a) Applicability of Article 8 of the European Convention

21. The Constitutional Court recalls that under the case-law of the European Court (see the European Court, *W. vs. United Kingdom* of 8 July 1987, series A no. 121) the mutual enjoyment of parents and children in each other's company constitutes the basic element of a family life. As the European Court indicated, in all of that, the natural parental relation cannot be disrupted by the fact that a child was placed into the custody of public institution.

22. The particular case, therefore, concerns the family relation between the appellant and his children. Furthermore, the challenged decisions, whereby the appellant was deprived of the right to live with his underage children and the children were placed into the custody of the public institution, constitutes the interference with family life. It is, therefore, necessary to examine whether the interference with the right to family life was justified. For this kind of interference to be justified it must: (a) be provided for by the law, (b) have a legitimate aim which is in the public and general interest, and (c) be in harmony with the proportionality principle.

b) Lawfulness of interference and existence of "legitimate aim"

23. The Constitutional Court shall further examine whether the interference was "provided for by the law" and whether "a legitimate aim of general and public interest" exists for such interference. The Constitutional Court notes that the ordinary courts referred to Article 153(1) of the Family Law which prescribes that the court shall revoke the parent's right to live with a child if a parent violates the interest of a child and neglects, to a greater extent, the raising, upbringing and education of a child. Therefore, the law indisputably provides for the possibility of public authorities' interference with the right to family life in the manner it was done in the case at hand.

24. The Constitutional Court further recalls that in any organized system the family is a basic cell of the society, and anything concerning the “family law” enjoys a special protection. Further, the Constitutional Court notes that the underage children are especially sensitive category for their inability to care for themselves because of their age and lack of legal and business skills as well as the fact that the future of individual children and the entire society also depends on the development, upbringing and education of children. The Constitutional Court, therefore, holds that the pronouncing of measures prescribed by the law, restricting the parental rights under certain conditions, has as its aim the protection of rights and interests of a child which, beyond any doubt constitutes “a legitimate aim of general and public interest” within the meaning of Article 8 of the European Convention.

c) Proportionality of interference

25. Since, on one hand, the right of the appellant to live with his children and, on the other hand, the public interest of protecting the children exists, the Constitutional Court shall examine whether the proportionality is struck between a legitimate aim and the measure taken as a burden placed on the appellant, i.e. whether it was necessary to remove the children from the appellant. The Constitutional Court notes that the courts established that sanitary conditions and the housing and financial conditions in which the children lived were unsatisfactory, that the school age children were not attending school, and that they were engaged in socially unacceptable behaviour such as begging and vagrancy. The courts evaluated such circumstances in which the children live as a substantial neglect of parenting duties. These facts were not disputed by the appellant but he held that the courts should not have placed the children under the custody of public authorities but should have, as he stated in his appeal, used the funds envisaged for that purpose to aid the appellant to take care of his children.

26. The Constitutional Court notes that the care and upbringing of children was entrusted to the appropriate institutions specialized for such care. Furthermore, the appellant's right to live with his children was revoked for the period of one year, hence, temporary, with the aim of “correctional” effect to the appellant, so that he would take better care of his children in future and that he would influence the whole family with the aim of restoration of their family life. Furthermore, the important fact in the present case is that the measure pronounced does not completely cut off the relation between the appellant and his children. Namely, the appellant may continue visiting his children placed in the appropriate institutions, and the challenged decisions clearly state that his parental obligations and duties do not end with such decision as pronounced. Accordingly, the

Constitutional Court holds that the excessive burden was not imposed on the appellant but the pronounced measure which is proportionate to the legitimate aim sought – the protection of rights and interests of underage children and therefore it is “necessary in a democratic society” within the meaning of Article 8 of the European Convention.

27. In view of all aforementioned, the Constitutional Court concludes that the violation of the appellant’s right to family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention has not occurred.

Right to a fair trial

28. Article II(3) of the Constitution of Bosnia and Herzegovina reads as follows:

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 6 paragraph 1 European Convention 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. [...]

29. The Constitutional Court holds that Article 6(1) of the European Convention is applicable in the instant case as it concerns the proceedings of the applicant’s deprivation of the right to live with his children by which the civil rights and obligations of the appellant are determined.

30. The appellant challenges courts’ decisions alleging that his right to fair trial safeguarded by Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention has been violated as the court refused to hear his underage children and because of the manner the guardian was appointed to his underage children. In relation to these allegations the Constitutional Court indicates that under the jurisprudence of both, the European Court and the Constitutional Court, it is not the task of these courts to review the facts as established by the ordinary courts or their application of the substantive law (see the European Court, *Pronina vs. Russia*, Decision on Admissibility of 30 June 2005, application no. 65167/01). Namely, the Constitutional Court cannot generally substitute its own appraisal of the facts or evidence for that of the domestic courts but, in general, it is the task of ordinary courts to assess the facts and evidence they presented (see the European Court, *Thomas vs. the United Kingdom*, judgment of 10 May

2005, application no. 19354/02). The assignment of the Constitutional Court is to assess whether a possible violation or neglect of the constitutional rights have occurred (the right to a fair trial, the right of access to court, the right to efficient remedy, etc.) and whether there has been any possible arbitrary or discriminatory application of the law. Moreover, the Constitutional Court recalls the jurisprudence of the European Court for Human Rights under which all the items of evidence the decision was based upon had to be presented before the court but the refusal of the court to present certain evidence does not necessarily lead to the violation of the right to a fair trial (see the European Court, *Ankerl vs. Switzerland*, judgment of 23 October 1996, application no. 17748/91, Reports 1996-V).

31. The Constitutional Court notes that the allegations on the refusal of the court to hear the underage children in the proceedings relate to the alleged breach of the principle of equality of arms of the parties before the court. In that regard the Constitutional Court remarks that the first instance court clearly reasoned why it did not hold it necessary to hear the underage children and that it took into account the children's wish not to be separated from the appellant and their respective mothers but, having in mind the age of children and their previous way of life, that circumstance was of no determining importance for the issuance of the decision in the particular case. The reasons given by the ordinary courts in this respect fulfil the requirements set out in Article 6(1) of the European Convention and the Constitutional Court does not hold them arbitrary. The Constitutional Court, therefore, holds that the appellant's allegations do not indicate that his equal treatment in the proceedings was brought to doubt in any way. Furthermore, the appellant holds that his right to a fair trial has been violated in the proceedings also because the Social Work Centre (which is the party to the proceedings) appointed the guardian for the children. Concerning that, the Constitutional Court notes that the courts evaluated all the allegations and reasoned that the guardian for the protection of interests of the underage children was appointed in accordance with the law, that she fulfils all the conditions set out in the law, and that there was nothing that would indicate that the guardian has not been protecting the interests of children in the particular proceedings. Therefore, the Constitutional Court considers that these allegations of the appellant do not indicate in any way that his right to a fair trial was brought into question by the appointment of the guardian for the children.

32. In view of the fact that save for these allegations, the appellant does not offer any other argument justifying his claim that his right to a fair trial has been violated, except being unsatisfied by the outcome of proceedings, and having regard to the position taken by the European Court and

the Constitutional Court's position presented in this case, the Constitutional Court concludes that the appellant's 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 has not been violated.

VIII. Conclusion

33. The Constitutional Court concludes that no violation of the right to family life under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention has occurred when the appellant's right to live with his underage children was revoked due to substantial neglect of parental duties given the fact that the circumstances of the present case indicate that such measure is "necessary in a democratic society" within the meaning of Article 8 of the European Convention. Moreover, the Constitutional Court holds that in the particular case no violation of 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 has occurred when the court refused to hear the underage children and when the children were appointed the guardian in accordance with the law, and the courts gave reasoning for their decisions that satisfy the requirements of the right to a fair trial.

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

35. Pursuant 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