The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (3) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 22/14) and Article IX of the Decision on Amendments to the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 57/14), 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 Knežević,

Having deliberated on the appeal of **Mr. Dragan Kovačević** in case no. **AP 2749/08,** at its session held on 24 September 2014 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. **Dragan Kovačević** against the Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina No. 070-0-Rev-07-001025 of 14 July 2008, the Judgment of the Cantonal Court in Bihać no. 001-0-Gž-06-001 744 of 17 April 2007 and the Judgment of the Municipal Court in Bosanska Krupa No. Rs. 385/05 of 2 October 2006 is 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 9 September 2008, Mr. Dragan Kovačević ("the appellant") from Banjaluka 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. 070-0-Rev-07-001025 of 14 July 2008, the Judgment of the Cantonal Court in Bihac ("the Cantonal Court") No. 001-0-Gz-06-001 744 of 17 April 2007 and the Judgment of the Municipal Court in Bosanska Krupa ("the Municipal Court") No. Rs. 385/05 of 2 October 2006.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) and (2) of the Rules of the Constitutional Court, the Supreme Court, the Cantonal Court and the Public Company Veterinarska stanica (*Veterinary Office*), Bosanska Krupa Regional Department ("the employer"), were requested on 22 December 2008 to submit their respective replies to the appeal. Also, the Cantonal Commission for the Implementation of Article 143 of the Labor Law was requested on 20 September 2010 to submit information as to whether a decision was adopted on the appellant's appeal lodged on 1 December 2000.

3. The Supreme Court, the Cantonal Court and the employer submitted their respective replies to the appeal on 25, 30 and 31 December 2008 respectively, while the Cantonal Commission failed to submit the requested information.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court (previously applicable), the replies of the employer, the Cantonal Court and the Supreme Court were communicated to the appellant on 15 January 2009.

5. The Constitutional Court adopted decision no. AP 2794/08 of 21 January 2011, whereby the appeal was partially granted and found that the appellant's right to trial within a reasonable time was violated, while as regards other aspects of 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 and as regards the right to non-discrimination under of Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as regards the rights under Article 5(e) and (i) of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 6 and 7(a) and (i) of the International Covenant on Economic, Social and Cultural Rights, the appeal is considered dismissed. In the reasons for the decision the Constitutional Court stated all relevant facts and legal provisions and it offered legal arguments "for" and "against" the decision being granted/dismissed. Seven judges of the Constitutional Court took part in the decision making and the Constitutional Court, by applying Article 40 paragraph 3 and 4 of the previously applicable Rules of the Constitutional Court given the fact that minimum five judges did not vote identically for the proposal of the relevant decision, adopted a decision *considering the appeal dismissed*.

6. The European Court of Human Rights, while dealing (*inter alia*) with the application of the appellant, rendered the Judgment in the case of *Avdić and Others vs. Bosnia and Herzegovina*, Applications nos. 28357/11, 31549/11 and 39295/11 of 19 November 2013), whereby a violation of the right under Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") was established *in relation to the right of access to court* by the appellant and other applicants. The European Court of Human Rights obligated Bosnia and Herzegovina to pay compensation to the appellant and other applicants for the non-pecuniary damage due to the fact that a violation was established (the amount of compensation is 3,600.00 EUR per each person). In the reasons for the decision the European Court of Human Rights stated that the applicants (including the appellant) were faced with a situation where the "determination" on their civil rights was only formal for them as the Constitutional Court did not decide on the admissibility and the merits of the case due to the fact that the Constitutional Court had

no majority vote for a decision whereby the appeal would be granted or dismissed, in which case the right of access to court became "illusory" for the applicants.

7. On 3 December 2013, the Ministry for Human Rights and Refugees, the Office of the Agent of the Council of Ministers before the European Court of Human Rights submitted to the Constitutional Court the translation of the judgment of the European Court of Human Rights, and on 26 February 2014 it submitted to the Constitutional Court the Information about the binding character of the judgment of the European Court of Human Rights in the case of *Avdić and Others vs. Bosnia and Herzegovina (*"the Information"). In the Information which was submitted to the Constitutional Court it is stated as follows: *Taking into account that the judgment in the case of Avdić and Others vs. Bosnia and Herzegovina became final and that the violations found relate to the manner in which the Constitutional Court of BiH acted, you are kindly requested to start implementing individual and general measures which Bosnia and Herzegovina is obligated to implement under the judgment.* It is further stated in the Information: *within the obligation of implementation of individual measures under the judgment in the case of Avdić and Others vs. Bosnia and Herzegovina, the Constitutional Court is obliged to make it possible for the applicants S. Avdić, V. Adamović and D. Kovačević to have a renewal of the proceedings before the Constitutional Court of BiH.* In the submitted Information the Agent of Council of Ministers before the European Court of Human Rights presented the following standpoint*: Within the obligation of implementation of general measures, the Constitutional Court is obliged to amend Article 40 paragraph 3 of the Rules of the Constitutional Court in order to ensure that the Constitutional Court of BiH takes decisions in which civil rights and obligations of the appellants will be decided in accordance with the guarantees under Article 6 of the Convention with regards to the right of access to a court*.

8. The Constitutional Court adopted new Rules of the Constitutional Court which were published in the *Official Gazette of Bosnia and Herzegovina* no. 22/14 of 24 March 2014 and entered into force on 1 April 2014 and Decision on Amendments to the Rules of the Constitutional Court of Bosnia and Herzegovina which is published in the *Official Gazette of Bosnia and Herzegovina* no. 57/14 of 22 July 2014 and entered into force on 30 July 2014.

9. At the session of the Constitutional Court held on 24 September 2014 the Constitutional Court adopted a decision on exemption of Judge Zlatko M. Knežević, upon his request, from taking part in deliberation and decision-making in this case, as envisaged under Article 91(1)(c) of the Rules of the Constitutional Court.

III. Facts of the Case

10. 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.

11. On 3 February 2000, the appellant addressed the employer wit the request to restore his employment status in accordance with Article 143 of the Labor Law. Given that the employer failed to reply to the request, on 1 December 2000 the appellant lodged an appeal with the Cantonal Commission for the Implementation of Article 143 of the Labor Law ("the Cantonal Commission"). Since the Cantonal Commission failed to decide his appeal the appellant lodged a lawsuit on 30 October 2003 with the Municipal Court stating the same requests that he had stated before the Cantonal Commission. On 19 February 2004, the appellant lodged an appeal with the FBiH Commission fro the Implementation of Article 143 of the Labor Law ("the FBiH Commission"). At the time of the adoption of the decision by the Constitutional Court, according to the information that the Constitutional Court has at its disposal, the proceedings before the Cantonal and the FBiH Commissions has not been completed.

12. While deliberating in the new proceedings, the Municipal Court adopted a new judgment no. RS. 385/05 of 2 October 2006, partly granting the appellant's claim obliging the employer as follows: to recognize to the appellant the status of a laid-off employee in the period from 3 February 2000 to 5 May 2000; to pay to the appellant in damages the amount of BAM 600.00 (compensation of unpaid salaries for the period during which the appellant is considered a laid-off employee) with the statutory default interest starting from 30 October 2003 pending the payment; to calculate and pay the relevant contributions in the name of the appellant with the competent public funds of pension and disability and healthcare insurance in FBiH, according to the amount of the awarded damages as the salary of the appellant and cover the costs of the civil proceedings in the amount of BAM 1,127.00. The same judgment rejected as untimely the appellant's request for the reinstatement to work with the employer and his appointment to a commensurate work position, whereas the remainder of the appellant's request (in the granting part of the judgment) was dismissed as ill-founded.

13. The Municipal Court reasoned that the appellant, by way of the lawsuit and during the course of the proceedings, requested from the court to oblige the employer to reinstate the appellant to work position he had occupied or to other commensurate work position; that the employer compensates the damage to the appellant in the amount of the salary for the work position he had occupied up until 15 May 1992, starting from 3 February 2000 pending the restitution to work, more precisely the amount of BAM 37,000 with the statutory default interest; that the employer pays in the name of the appellant

the relevant contributions for Pension and Disability Insurance as well as contributions for healthcare insurance, and that the period "starting from 3 February 2000 pending the restitution of the employment status" be registered as years of service in the employment record book; that the employer compensates to the appellant the costs of the proceedings. The Municipal Court reasoned that the court dismissed that complaint of the defendant lodged regarding untimely lawsuit and the lack of competence of the court in this dispute, by issuing procedural decision which was noted in the minutes dated 9 March 2006. Also, by referring to the decision of the Constitutional Court no. AP 311/04, the Municipal Court dismissed the defendant's complaint that it is not possible to discuss the issue of the claiming of the payment of the relevant contributions in the name of the appellant that the employer pays to the public funds of the Pension and Disability Insurance and the healthcare insurance as the appellant has no standing to sue. The Municipal Court explained that it established that in the present case the appellant had been the employee of the employer as of 31 December 1991; that he had not gotten employed in the meantime and that he had lodged within a legitimate time limit the request to the employer for the reinstatement of employment status starting from 3 February 2000 as the day of lodging the request. Moreover, that at the hearing held on 28 July 2004 the attorney for the employer officially informed the appellant that his employment record book had been concluded as of 5 May 2000, and of the decision of the employer which terminated his employment on 5 May 2000 (the decision had not been delivered to the appellant).

14. The appellant's allegations that the employer failed to reply to his offer to continue working for the employer was found to be true by the Municipal Court as well as irrelevant, for the reason that the very Labor Law that the appellant referred to determined the maximum duration of the status of a laid-off employee, namely six months from the date of entry into force of the Labor Law, on 5 May 2000. Therefore, the court did not accept the stance of the appellant that, as a result of the fact that the employer failed to reply to his request, the appellant still has the status of a laid-off employee with the defendant. The Municipal Court recalled that the employment of a worker with a laid-off status, including the appellant, ceases *ex lege* six months after the entry into force of the Labor Law, unless the employer invites him back to work in the meantime. In the event of the termination of the employment in the mentioned case, the worker, including the appellant, would be entitled to severance pay. However, since the appellant failed to make such a request before the court, the Municipal Court was in no position to decide it.

15. By rejecting the claim of the appellant seeking that the court obliges the employer to reinstate the appellant to work and to assign him to commensurate position, the Municipal Court stated that the provision of Article 103 of the Labor Law prescribes that the worker can file a lawsuit before the

competent court over the violations of the rights arising from employment within one year from the delivery of the decision violating his right, that is from the day of learning of the violation of the right arising from employment. As to the allegation of the appellant that the employer's decision on his request that is on the termination of employment had not been delivered to him and that as a result thereof he was unable to seek "within a reasonable time" protection of his rights before the court, the Municipal Court stated that Article 103 of the Labor Law, among other things, prescribes that lodging a request with the employer in order to exercise the right he deems to have been violated does not prevent the employer from seeking protection of the violated right before the competent court. The Municipal Court reasoned that a year went by since the appellant learnt that his employment ceased, as it is a well-known fact that the Labor Law had been published on 28 October 1999 and went into force 8 days after the publication thereof, namely on 5 November 1999, thus this fact cannot be proved as well-known. First amendments to the Labor Law went into force on 7 September 2000 and the claim is based thereon, thus the Municipal Court holds that the appellant cannot state that up until 28 July 2004 (the date of the hearing before the court in this dispute following the previously quashed judgment of the same court) he was unaware of the fact that his employment had ceased *ex lege* and that the employer had tacitly dismissed the appellant's request for reemployment which he had sought in his request dated 3 February 2000. The reason being that the provision of Article 143 paragraph 4 of the Labor Law explicitly prescribes that, if a laid-off employee referred to in paragraphs 1 and 2 of this article is not invited back to work within the time limit provided for in paragraph 1 of the same article, his employment shall cease. As the appellant's claim for the restitution of employment had been submitted on 30 October 2003, it follows that it had been submitted after the expiry of a one year time limit "which is effective as of 7 September 2000 (when amendments to the Labor Law referred to in the lawsuit went into force), hence it is obvious that the time limit fro seeking court protection had expired as of 8 July 2001", thus the lawsuit was to be rejected in the mentioned part as untimely. As to the allegations of the appellant on the violation of his rights under Article 5 of the Labor Law, the Municipal Court stated that the appellant had not proven in any way that the defendant had put him in a less favorable position when compared to other employees of the defendant who were "laid-off employees for real" during the same time, thereby discriminating against him on any ground whatsoever.

16. While deciding the appellant's appeal against the first-instance judgment, the Cantonal Court adopted a Judgment No. 001-0-Gz-06-001 744 dated 17 April 2007, dismissing the appeal and upholding the first-instance judgment. In the reasoning of the judgment, the Cantonal Court accepted

the facts established and legal positions taken by the Municipal Court, concluding that the Municipal Court, by correct assessment of the presented evidence established the relevant facts, and correctly applied substantive law to the established facts of the case. As to the complaint of the appellant that the employer's decision on the termination of his employment was not delivered to the appellant and that he learnt of it only at the hearing of 11 April 2006 after reasonable time limits expired, hence his lawsuit is timely in that part too, the Cantonal Court concluded that the first-instance court drew a valid conclusion that the appellant's lawsuit for the reinstatement of employment with the defendant was untimely as the appellant had learnt already on 6 May 2000 of the potential violation of the right arising from employment in relation to the restitution to work, since the provision of Article 143 of the Labor Law stipulates that, if a laid-off employee is not invited back to work within six months from the day of entry into force of the Labor Law, that is by 5 May 2000, his employment shall cease. As the appellant had not been invited back to work by 5 May 2000, within the meaning of the provision of Article 143 of the Labor Law, already on 6 May 2000 he knew that potential violation of his right arising from employment in relation to reinstatement to work had occurred. Therefore, the provisions of Article 103 of the Labor Law, which stipulates that an employee is obliged, within one year from the day of learning of or from the day of receiving the decision violating his employment-related right, to lodge a lawsuit with the court. As to the complaint that the appellant had been put in a less favorable position, within the meaning of the provision of Article 5 of the Labor Law, when compared to other workers of the employee, the Cantonal Court concluded that it was ill-founded, that is arbitrary, as it did not refer to any ground provided for by Article 5 of the Labor Law, indicating that the appellant had been put in a less favorable position when compared to other employees of the employer, nor did he prove these facts before the first instance court.

17. When deciding the appellant's revision-appeal against the second-instance judgment, the Supreme Court adopted a Judgment No. 070-0-Rev-07-001025 dated 14 July 2008 dismissing the revision-appeal. In the reasons for the judgment the Supreme Court first noted that a legally binding judgment was adopted on the part of the claim granting the claims of the appellant and that part of the claim is not subject to examination in the revision-appeal. Next, part of the legally binding judgment relating to the rejection of the lawsuit in relation to the appellant's request to oblige the employer to reinstate the appellant to work is disputed, as well as the remainder of the monetary claim that the appellant requested for the period from 5 May 2000 pending the reinstatement to work. The Supreme Court dismissed as ill-founded the complaints of the appellant related to the violations of the proceedings committed before the second-instance court, as the second-instance court failed to carry out

assessment of evidence under Article 8 of the Law on Civil Procedure, but it decided on the appellant's allegations stated in the appeal on the basis of the presented evidence and assessment made before the first-instance court. Next, the Supreme Court assessed that the second-instance court correctly applied the substantive law by dismissing the appellant's appeal in relation to the part of the challenged decision of the first-instance court which rejected the lawsuit of the appellant. However, according to the Supreme Court, this decision is not based on the fact that the appellant had lodged the lawsuit in an untimely fashion, but that by lodging an appeal with the Cantonal Commission for the Implementation of Article 143.a of the Labor Law, he lodged a premature lawsuit regarding the request for the reinstatement to work. Since he was not a laid-off employee within the meaning of paragraph 1 Article 143 of the Labor Law, but claimed his rights pursuant to paragraph 2 Article 143 of the Labor Law, in order to establish the existence of the status of the appellant as a laid-off employee under the provision of paragraph 2 Article 143 of the Labor Law, and the rights he is entitled to under paragraphs 3, 4 and 5 of the same norm, the preliminary issue was the deliberation on the appeal before the Cantonal Commission for the Implementation of Article 143 of the Labor Law, which had not been done. Namely, the provision of Article 143(a) of the Labor Law prescribes the right of the employee who holds that the employer had violated his right stipulated in Article 143 paragraphs 1 and 2 to lodge an appeal, within 90 days from the day of entry into force of amendments to the Labor Law, with the Cantonal Commission for the Implementation of Article 143 of the Labor Law. "On the basis of undisputed fact that the proceedings before the Cantonal Commission have not been completed, and since the court has no competence to establish the status of the plaintiff as a laid-off employee, it follows that the filed lawsuit, with respect to all the rights that the appellant would possibly be entitled to on the mentioned basis, is premature. Therefore the decision of the second-instance court whereby it dismissed the appellant's appeal in that part and upheld the part of the first-instance judgment (ruling) rejecting the appellant's lawsuit is correct, however both lower instance courts erroneously applied the substantive law by assessing that the lawsuit is untimely under Article 103 of the Labor Law. However, this erroneous application of the substantive law is not less favorable for the person lodging revision-appeal than the decision which was adopted, thus the Supreme Court, by applying Article 230 in conjunction with Article 253 of the Law on Civil Procedure did not modify the second-instance judgment. This is related to the correct application of the substantive law in relation to the remainder of the legally binding decision which is related to the payment of salaries for the entire period pending the reinstatement of the appellant to work." On the basis of the status of the case it follows, as the Supreme Court concluded, that the rest of the complaints raised in the revision-appeal referring to Article 5 of the Labor Law are ill-founded.

IV. Appeal

a) Allegations stated in the appeal

18. The appellant holds that the challenged decisions violated his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). The appellant mentioned chronology of proceedings in his case and, among other things, stated that he saw the violation of his rights in the fact that, although he addressed the pre-war employer within a legal time limit to restore his employment status in accordance with Article 143 of the Labor Law, the employer failed to decide "within a reasonable time" on the appellant's request, which made it impossible for the appellant to protect his respective rights before the competent institutions. Also, neither the Cantonal Commission nor the FBiH Commission has ever decided on the appellant's appeal. The ordinary courts, which the appellant addressed after lodging an appeal with the Cantonal Commission, decided on the appellant's requests. However, in the part whereby the appellant requested that the court obliges the employer to reinstate him to the position he had occupied as of 15 May 1992, and to pay the salaries starting as of 6 May 2000 as the day when his employment had ceased pending the reinstatement to work, the courts rejected the appellant's lawsuit – the first-instance and the second-instance courts on the grounds of being untimely, and the Supreme Court on the grounds of being premature. The decision of the employer on the termination of employment, which the appellant had learnt of only during the course of the proceedings before the court, had not been delivered to the appellant, including the employment record book, in order for him to be able to seek "the review of lawfulness of such a decision before the competent court". Also, the appellant complains of a violation of the right to prohibition of discrimination under Article II(4) the Constitution of Bosnia and Herzegovina in conjunction with the right to labor under Article 5(e) and (i) of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 6 and 7(a) and (i) of the International Covenant on Economic, Social and Cultural Rights. The appellant considers that he was discriminated against on the grounds of the right to employment, as by seeking court protection he referred not only to the provisions of Article 143 of the Labor Law, but also to the provisions of Article 5 of the same law. The appellant holds that the Supreme Court failed to give its opinion about the violations of Article 5 of the Labor Law "and about putting the appellant, as a person of Serb ethnicity, into a less favorable position when compared to other employees of the employer". Besides, *his right to employment had not been decided upon within a reasonable time*, neither by the employer nor by the competent Commissions for the Implementation of Article 143 of the Labor Law. In addition to the

aforementioned, the appellant holds that, within the meaning of Article 143 of the Labor Law, the decisions of the competent commissions are reviewed by the court, and given that the commissions are competent to decide only with respect to the fact whether the appellant has or not the status of a laid-off employee, which the appellant holds not to be disputed, the appellant asks the following question – what is the purpose whatsoever to have commissions adopt a decision, particularly for the reason that the reinstatement of the appellant to work can only be ordered by the competent court, whereby he referred to the decision of the Constitutional Court No. *U 38/02* of 19 November 2003, *"according to which position it is obvious that the plaintiff's claim is well-founded*", which the courts of FBiH should have been aware of.

b) Reply to the appeal

19. In the reply to the appeal the Supreme and the Cantonal Court stated that they fully stand by the reasons they offered in their respective judgments. The courts stated that in the present case the appellant's rights he referred to in the appeal were not violated, and proposed that the appeal be dismissed as ill-founded.

20. In the reply to the appeal, the employer stated that in the present case the appellant, as other employees, in accordance with Article 143 of the Labor Law, lodged a request for the reinstatement of employment status. Given that due to the workload there was no need to engage all their employees, the employer did not invite the appellant back to work within the time limit provided for by law, so that, consequently, his employment ceased on 5 May 2000. The employer further mentions that it acted in accordance with the legally binding judgment of the Municipal Court thereby inviting the appellant to collect the awarded amount and the appellant failed to do so. It is further stated that the appellant's rights he referred to in the appeal were not violated, and that the present appeal is completely unacceptable.

V. Relevant Law

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

Article 5

(1) A person seeking employment, as well as a person who becomes employed, shall not be discriminated against based on race, color, sex, language, religion, political or other opinion, ethnic or social background, financial situation, birth or any other circumstance, membership or non-membership in a political party, membership or non-membership in a trade union, and physical or mental impairment in respect of recruitment, training,

promotion, terms and conditions of employment, cancellation of the contract of employment or other matters arising out of the employment relationship.

(2) The first paragraph shall not preclude:

1. *Good faith distinctions based on the inherent requirements of a particular job;*
2. *Good faith distinctions based on the incapacity of a person to perform the work that is required for the job or to undertake training sought, provided that the employer or person providing training has made reasonable efforts to adapt the job or the training to the situation of such person or to provide suitable alternative employment or training, where this is possible;*
3. *Any program, activity or provision that has as its object the improvement of the situation of persons who are economically, socially, educationally or physically disadvantaged.*

(3) Where an infringement of the provisions under paragraphs 1 and 2 is alleged:

1. *The person whose rights are alleged to have been infringed may bring a complaint of infringement to the courts;*
2. *If the complainant makes a showing of obvious evidence of a discriminatory distinction prohibited by this article, the respondent shall have to prove that such distinction was not made on a discriminatory basis;*
3. *If the court finds the complaint to be well-founded, it shall make such order as it deems necessary to ensure compliance with this article, including an order for employment, reinstatement, the provision or restoration of any right arising from the contract of employment.*

Article 103

(1) An employee who deems that the employer violated some of his employment-related rights may request from the employer to exercise the relevant right.

(2) Filing a request referred to in paragraph 1 of this article does not prevent the employee from seeking protection of the violated right before the competent court.

(3) An employee may bring a lawsuit before the competent court for the violation of the employment-related right within one year from the day of delivery of the decision violating his right, or from the day of learning of the violation of employment-related right.

(4) Collective agreement or book of rules, in accordance with law, can provide for the procedure of peaceful settlement of labor dispute, in which case the time limit for lodging a request with the competent court starts running from the day of the completion of the said procedure.

(5) If the procedure is not completed in accordance with paragraph 4 of this article within a reasonable time, the employee has the right to bring a lawsuit with the competent court.

Article 143

(1) 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.

(2) 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.

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

(4) 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 employment shall be terminated with a right to a severance pay which shall not be less than two thirds of the

average monthly salary paid at the level of the Federation valid at the effective day of this Law, as published by the Federal Statistics Bureau.

Article 143.a

(1) An employee who holds that the employer violated his/her right laid down in Article 143 paragraphs 1 and 2 may, within 90 days from the day of entry into force of this law, lodge an appeal with the Cantonal Commission for the Implementation of Article 143 of the Labor Law ("the Cantonal Commission"), formed by the Cantonal Minister in charge of labor-related affairs ("the Cantonal Minister").

(2) The FBiH Commission for the Implementation of Article 143 of the Labor Law ("the FBiH Commission"), formed by the FBiH Minister, shall deal with the appeals lodged against the rulings of the Cantonal Commission.

(3) In the event that the Cantonal Commission fails to exercise the function for which it has been formed, the FBiH Commission shall take over the competencies of the Cantonal Commission.

(4) If proceedings related to the rights of employees referred to in Article 143 paragraphs 1 and 2 of this law were brought before the competent court, the court shall refer the request to the competent cantonal commission and adopt a decision on the discontinuation of the proceedings.

Article 143.c

(2) Decisions of the FBiH, or Cantonal Commission shall be:

1. final and subject to judicial review in accordance with the law […]

VI. Admissibility

22. Foremost, bearing in mind the circumstances in which the case is again before the Constitutional Court, the Constitutional Court refers to the provision of Article 68(2) of the Rules of the Constitutional Court that reads:

"Exceptionally, if the European Court of Human Rights finds that human rights relating to the right of access to court have been violated in the proceedings before the Constitutional Court and if the decision of the Constitutional Court is based on such violation, the Constitutional Court shall conduct a renewed proceedings at the latest within a time limit of six months from the date on which the judgment of the European Court of Human Rights became final".

23. Taking into account the decision of the European Court of Human Rights in the case of *Avdić and others*, which is related to the appellant and the fact that the European Court of Human Rights found a violation of Article 6 (1) of the European Convention as regards the access to the court because of the decision of the Constitutional Court whereby the appeal is considered as dismissed, the Constitutional Court decided to reconsider the case and decide on the admissibility and merits of the case. In this connection, the Constitutional Court will firstly examine the admissibility of the case at the time when the appeal was filed.

24. In accordance with 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.

25. In accordance with Article 18(1) of the Rules of the Constitutional Court, the 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.

26. In accordance with Article 18(2) of the Rules of the Constitutional Court, the Constitutional Court may examine, exceptionally, an appeal even in the absence of a decision of the competent court, if the appeal points to serious violations of rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or international documents applicable in Bosnia and Herzegovina. In the present case the appellant refers to his right under Article 6 paragraph 1 of the European Convention containing the right to "a trial within a reasonable time", on the grounds that the Cantonal Commission and the FBiH Commission failed to decide the appellant's appeal, thus the appeal is admissible with respect to these allegations.

27. Also the Constitutional Curt observes that the appellant challenges the judgment of the Supreme Court No. 070-0-Rev-07-001025 of 14 July 2008. To this end, the Constitutional Court notes that the appellant received the mentioned judgment on 30 July 2008, and the appeal was lodged on 9 September 2008, i.e. within the time limit of 60 days, as prescribed by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court, as it is not manifestly (*prima facie*) ill-founded, nor are there any other formal reasons rendering the appeal inadmissible.

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

VII. Merits

29. The appellant claims that his 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 was violated, on the grounds that his appeal, which had been lodged with the Cantonal Commission over the failure of the employer to act upon his request for the reinstatement of employment status, at the time of lodging the appeal has been pending still after seven years and nine months after the lodging thereof, and on the grounds that the courts failed to decide the appellant's request to be reinstated to work by his employer following the termination of his employment *ex lege* on 5 May 2000.

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

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.

31. 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. [...]

1. The right of access to court, as part of the right to a fair trial

32. The Constitutional Court emphasizes that, according to the consistent case-law of the European Court of Human Rights and the Constitutional Court, the length of the proceedings must be viewed in the light of the circumstances of an individual case, being mindful of criteria established by the case-law of the European Court, especially regarding the complexity of the case, the conduct of the parties to the proceedings and the competent court or other public authorities, and regarding the importance that the particular legal matter has for the appellant (see, the European Court of Human Rights, *Mikulić vs. Croatia,* Application No. 53176/99 of 7 February 2002, Report No. 2002-I, paragraph 38).

33. Also, the Constitutional Court emphasizes that the right of access to court ensures everyone's right to raise before a court, which has a full jurisdiction to decide on the subject of dispute, or on the merits of the case, any legal claim related to their civil rights and obligations (see, the European Court of Human Rights, *Le Compte, van Leuven and De Mayere vs. Belgium,* judgment of 23 June 1981, Application Nos. 6878/75 and 7238/75). In the present case, the Constitutional Court observes that disputable issue here is the issue of reinstatement of the employment status as regulated by Article 143

of the Labor Law, for which implementation special commissions for decision-making were established. Accordingly, paragraph 4 Article 143 of the Labor Law (went into force on 7 September 2000) prescribes as follows "*If proceedings were instituted before the competent court relating to the rights of employees referred to in Article 143 paragraphs 1 and 2 of this law, the court will refer the request to the competent commission to handle it and issue a decision discontinuing the proceedings*." Likewise, the provision of paragraph 2 item 1 of Article 143.c of the Labor Law prescribes that the decision of the FBiH or Cantonal Commission shall be final and subject to examination by courts in accordance with law.

34. The Constitutional Court shall not go into the assessment of the legal nature of the proceedings before the mentioned commissions, but recalls the position of the Supreme Court of the Federation of Bosnia and Herzegovina, stated in the decision No. *U 388/01* of 12 December 2001, according to which: commissions are not organs conducting proceedings under the laws regulating administrative proceedings, but are *sui generis* bodies specific for the field of labor relations. That is why their final decisions are not subject of court examination *in administrative disputes* in the ordinary proceedings, which are limited to the examination of administrative acts. Extraordinary legal remedies can be lodged against decisions of commissions, as they can solely be lodged against executive court decisions. Decisions of commissions, however, should be subject of examination by the competent ordinary courts under the Law on Civil Proceedings. The Constitutional Court, also, recalls that it follows, on the basis of the provisions of paragraph 1 of Article 143(a) of the Labor Law, that the mentioned commissions, albeit appointed as Commissions for the Implementation of Article 143 of the Labor Law, are competent to examine potential violation of the right referred to only in paragraphs 1 and 2 of Article 143 of the Labor Law, and not the implementation of the rest of the paragraphs of this article. Furthermore, it follows, on the basis of the provisions of paragraph 4 of Article 143 of the Labor Law, that the competent litigation court will issue decision discontinuing the already instituted proceedings relating to the rights of employees under Article 143 paragraphs 1 and 2 of this law, and refer the request to the competent commission to deal with it. It follows therefrom that the court will, following the meting of conditions set by law, resume the discontinued proceedings upon the request of the party. On the basis of the provisions of paragraph 2 item 1 of Article 143(c) of the Labor Law, it follows that the decisions of the FBiH or Cantonal Commissions shall be final and subject to examination in accordance with law, i.e. the court is competent to review them in the civil proceedings. So, if the competent commissions adopt a decision on the employee's appeal who complained of a violation of his right under paragraphs 1 and 2 of Article 143 of the Labor Law and the employee is content with it, there will be no court proceedings, i.e. the discontinued proceedings shall not be resumed, as the

employee will not request so. Otherwise, the employee can institute the civil proceedings against the decision of the commission, or address the court with a proposal for the resumption of the proceedings as soon as the reasons for the discontinuation cease to exist.

35. Furthermore, the Constitutional Court observes that by addressing the competent commission with the employee's request which was done by the court with which the lawsuit was filed, or in the present case, by the appellant's lodging the appeal before the Cantonal Commission, the appellant's remainder of requests could not be successful, except for those related to the implementation of paragraphs 1 and 2 of Article 143 of the Labor Law. In view of the provision of paragraph 1 of Article 143 of the Labor Law, which reads as follows: *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* and the provision of paragraph 2 of Article 143 of the Labor Law, according to which: *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*, the Constitutional Court concludes that the Commissions for the Implementation of Article 143 were competent to decide only on the issue whether a person referred to in paragraph 1 of Article 143 of the Labor Law was recognized the right of a laid-off employee, or to the person referred to in paragraph 2 of the same article, also the right referred to in paragraph 1 of Article 143 of the Labor Law, i.e. to 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. Obviously the appellant himself was aware of this fact, since, after addressing the employer with the request for the reinstatement of employment status, in accordance with Article 143 of the Labor Law, within the time limit prescribed by law, which employer failed to decide that request, on 1 December 2000 (again within the time limit prescribed by law) he lodged an appeal with the Cantonal Commission. As the Cantonal Commission failed to adopt a decision on the appellant's appeal, on 30 October 2003 the appellant filed a lawsuit with the Municipal Court raising the same requests as he did before the Cantonal Commission. After that, on 19 February 2004, the appellant lodged an appeal with the FBiH Commission, which is authorized by law to take over the competencies of the Cantonal Commission when *it fails to exercise the function for which it has been formed*. The conduct of the Cantonal Commission and of the FBiH Commission subsequently, in the appellant's case, in the opinion of the Constitutional Court, is absolutely beyond any professional relation of those commissions as public authority bodies. However, the Constitutional Court observes that the appellant

had lodged a lawsuit with the Municipal Court before he lodged the appeal with the FBiH Commission, which shows that he no longer expected to exercise his rights through commissions, which he anyway stated in the appeal, when stating that, *within the meaning of the provisions of Article 143 of the Labor Law, the decisions of the competent commission are examined by the court, and since the commissions are competent to decide solely with respect to the fact whether the appellant has or not the status of a laid-off employee, which the appellant does not find disputed, the appellant asks the following question – what is the purpose of adopting a decision by the commission, especially for the reason that the reinstatement of the appellant to work can only be ordered by the competent court*.

36. The Constitutional Court concludes that such inadmissible delay by the commissions as public authorities in making such important decisions concerning important personal status of the appellant would be contrary to the standards of the right to a decision "within a reasonable time" as required by Article 6 paragraph 1 of the European Convention, that the competent court, after the appellant had lodged a lawsuit, failed to found its competence and to act in the appellant's case. Thanks to the fact that the courts, which decisions are enforceable, based their full jurisdiction for decision-making on the dispute, that is on the merits of the case and thereby provided the appellant with the sought protection, the Constitutional Court cannot conclude that the appellant, in the present case, had only a formal and not effective access to court.

37. In view of the aforementioned, the Constitutional Court concludes that the appellant's right of access to court, as 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, was not violated in the present case.

2. Other aspects of the right to a fair trial

38. The Constitutional Court observes that the remainder of the appellant's allegations about the violation of the right to a fair trial come down to assertions on erroneously established facts of the case and erroneous application of the substantive and procedural law before the ordinary courts, that is on failure to decide all request raised by the appellant before the court. In this respect, the Constitutional Court suggests that, according to the case-law of the European Court and the Constitutional Court, it is not the task of these courts to examine the conclusions of the ordinary courts regarding the facts of the case and the application of the substantive law (see, the European Court of Human Rights, *Pronina vs. Russia,* Decision on Admissibility of 30 June 2005, Application No. 65167/01). That is to say that the Constitutional Court has no jurisdiction to substitute the ordinary courts in the assessment of facts and evidence, but in general it is the task of the ordinary courts to appraise the presented facts and evidence (see, the European Court of Human Rights, *Thomas vs. the United Kingdom,* judgment of 10 May

2005, Application No. 19354/02). The Constitutional Court is therefore called upon to examine whether the constitutional rights (right to a fair trial, right of access to court, right to an effective legal remedy, etc.) were violated or neglected or whether the application of law was arbitrary or discriminatory. So, as part of its appellate jurisdiction, the Constitutional Court is exclusively dealing with the issue of possible violation of constitutional rights or rights under the European Convention in the proceedings before ordinary courts, so in the present case the Constitutional Court will examine whether the proceedings as a whole were fair as required by Article 6 paragraph 1 of the European Convention (see Constitutional Court, Decision No. *AP 20/05* dated 18 May 2005, published in the *Official Gazette of BiH* No. 58/05).

39. In the present case, the Constitutional Court observes that the appellant, by referring to rights laid in Article 143 of the Labor Law, raised before the ordinary courts in the lawsuit field on 30 October 2003 a request for the court to oblige the employer to reinstate the appellant to position eh had occupied on 15 May 1992, and to reinstate his employment status, and to compensate the damage arising from unpaid salaries starting as of 3 February 2000 as the day of lodging the request with the employer for the reinstatement of employment status, and to pay the relevant contributions.

40. The Constitutional Court recalls that Article 143 of the Labor Law is enshrined in the Transitional and Final Provisions of the Labor Law (*Official Gazette of FBiH* No. 43/99), which went into force on 5 November 1999, which implies that the provisions of this article are established in such a way so as to regulate the transition of the existing legal norms to new norms. The reason primarily being that at the time of adoption of the new Labor Law the law had been in force which had been adopted to the time before the war of 1992-1995 and had not dealt at all with the issue of employees who had been *de iure* laid-off or whose employment had been terminated as a result of unjustified absence form work in duration of five consecutive days or who had not had at all employment status which would recognize that there had been the war in Bosnia and Herzegovina which had lasted for four years. The provisions of the mentioned article, in the part which is relevant for the claim of the appellant and which was in force at the time when the appellant addressed his pre-war employer, and consequently addressing the court with a lawsuit, paragraph 1 regulates the issue of employees who had been put on a laid-off status by an act of the employer and who had that status at the time of entry into force of the new law, in the way that they cant hold that status for a maximum of six months from the day of entry into force of this law, that is until 5 May 2000 unless the employer invites the employee back to work before the expiry of the mentioned time limit; paragraph 2 regulates the issue of employees who did not receive the act of the employer on placing them on laid-off status, in such a away that they would be considered laid-off employees provide that on 31 December 1991 they had

been employed by the defendant, that within three months time from the day of entry into force of this law they address the employer either in writing or directly in order to reinstate their respective employment status, whereas they did not start employment with another employer; paragraph 3 prescribes that while on a laid-off status the employee has the right to the compensation of salary in the amount specified by eth employer; paragraph 4 prescribes that, if the laid-off employee referred to in paragraphs 1 and 2 of this article is not invited back to work within the time limit referred to in paragraph 1 of this article, his employment shall cease, with the right to a severance pay…; paragraph 7 prescribes that, 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. On 7 September 2000 the Law on Amendments to the Labor Law went into force, which intervened in the relevant part of Article 143 of the Labor Law in such a way that the manner of determining severance pay was altered in paragraph 4; that paragraph 5 was added relating to the calculation of severance pay, so that hitherto paragraph 7 became paragraph 8 of Article 143 of the Labor Law. So, at the time when he addressed the employer, and subsequently the court, with the request for the reinstatement of employment status under Article 143 of the Labor Law, *the appellant could expect to exercise only those rights as provided for by Article 143 of the Labor Law.*

41. The Constitutional Court notes that the appellant was an employee referred to in paragraph 2 of Article 143 of the Labor Law. Upon meeting the conditions that are laid down in that article he was to be considered a laid-off employee as well as the employee referred to in paragraph 1 of Article 143 of the Labor Law. Such an employee, i.e. the appellant, could retain the status of a laid-off employee of a maximum of six months, which means until 5 May 2000 unless invited by the employer back to work before the expiry of the mentioned time limit. The appellant addressed his employer with the request for the reinstatement of employment status on 3 February 2000. the employer failed to decide his request, but if it did and if it did recognize his status as a laid-off employee and did not invite him back to work by 5 May 2000, under the provision of paragraph 4 of Article 143 of the Labor Law, the appellant's employment would be terminated *ex lege*, with the right to a severance pay and the right to be paid compensation of salary, while laid-off (which should be the period form 15 May 1992 to 5 May 2000), in the amount specified by the employer and the relevant contributions, and the employer, under paragraph 8 of Article 143 of the Labor Law, might 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 – including the appellant if unemployed at the time.

42. The Constitutional Court observes that the ordinary courts based their jurisdiction in the appellant's case and acted upon his lawsuit despite the opposition of the appellant's pre-war employer as the defendant. The Municipal Court reasoned its decision No. RS. 385/05 of 2 October 2006, which was upheld by the judgment of the Cantonal Court, by stating that conditions under paragraph 2 of Article 143 of the Labor Law were met in the appellant's case, and therefore it obliged the employer to reinstate the appellant's employment status effective as of the day of filing the request, as the appellant specified in his claim, staying within the scope of the claim, with 5 May 2000 being the final date allowed by paragraph 1 of Article 143 of the Labor Law, when the appellant's employment with the defendant had been terminated *ex lege* (paragraph 4 of Article 143 of the Labor Law). The Municipal Court obliged the employer to pay the compensation for damage to the appellant for the period during which the appellant is considered to be a laid-off employee (from 3 February 2000 through to 5 May 2002), in respect of the salaries in the amount of BAM 600.00 with the statutory default interest starting form the day of filing the lawsuit, by applying the provision of Article 146 of the Labor Law, since the employer failed to determine by its own act the compensation for laid-off employees, considering that the lowest salary in FBiH in May 2000 was BAM 200.00 and that it was calculated and paid to al employees working for the appellant's employer, and to pay contributions in the name of the appellant for the Pension and Disability Insurance, taking into account the base of BAM 600.00 for the relevant period and to cover the costs of the civil proceedings. Since the appellant did not request the payment of the severance pay, accordingly the Municipal Court did not deal with it.

43. In addition, as to the allegations of the appellant related to the violation of his rights under Article 5 of the Labor Law, that is allegations state din the appeal that the ordinary courts failed to decide his request to find the violation of the appellant's rights under Article 5 of the Labor Law, the Constitutional Court observes that, contrary to the appellant's allegations, the Municipal Court decided that request and the Cantonal Court upheld the decision of the first-instance court, thereby dismissing it and reasoning it by stating that the appellant failed to prove in any way whatsoever that the employer had put him in a less favorable position when compared to the rest of his employees who were "actually laid-off" during the same period of time, thus discriminating against him on any ground whatsoever.

44. The Municipal Court reasoned the part of the judgment rejecting the appellant's request for the reinstatement to work by providing a stance that the lawsuit was untimely in that part, as the appellant knew or could have known that his employment had ceased *ex lege* on 5 May 2000, since the law itself prescribes that if he is not invited back to work by 5 May 2000 his employment shall cease then. And considering that the Labor Law was published that fact being a well-known fact needed not to be proved, and that the decision on the termination of appellant's employment, which the employer

adopted afterwards but failed to deliver it to the appellant, is only of declaratory nature. So, since the appellant knew that his employment was terminated on 5 May 2000, that Article 104 of the Labor Law was amended and entered into force as such on 7 September 2000 and that it introduced a preclusive time limit of one year for persons to file lawsuits, and that the appellant filed his lawsuit on 30 October 2003, the Municipal Court concluded that the lawsuit was filed upon the expiry of the time limit of one year referred to in Article 103 of the Labor Law, and as such is untimely.

45. The Constitutional Court observes that the subject of revision-appeal before the Supreme Court was only part of the legally binding judgment related to the rejection of the lawsuit as far as it concerns the request of the appellant for the defendant to be obliged to reinstate the appellant to work, and the remainder of the monetary claim raised by the appellant for the period after 5 May 2000, that is after the termination of the employment pending the reinstatement to work. The Supreme Court assessed that the second-instance court correctly applied the substantive law by dismissing the appellant's appeal regarding the part of the challenged decision of the first-instance court rejecting the appellant's lawsuit, not on the grounds though that the lawsuit was untimely, but, in the opinion of the Supreme Court, on the grounds that the lawsuit was premature with respect to the request for reinstatement to work. Since the appellant was not a laid-off employee in terms of paragraph 1 of Article 143 of the Labor Law, instead he sought his rights pursuant to paragraph 2 of Article 143 of the Labor Law, in order to establish the existence of the appellant's status as a laid-off employee referred to in the provision of paragraph 2 of Article 143 of the Labor Law, and the rights he is entitled to under paragraphs 3, 4 and 5 of the same norm, the Supreme Court holds that the preliminary issue was the appeal before the Cantonal Commission for the Implementation of Article 143 of the Labor Law, as the court has no competence to establish the appellant's status as a laid-off employee. Hence, it follows that the field lawsuit is premature with respect to all the rights that the appellant would possibly be entitled to on the mentioned grounds. Therefore, the Supreme Court took a position that both lower instance courts erroneously applied the substantive law. However, this erroneous application of the substantive law, according to the Supreme Court, is not less favorable for the appellant than the decision which had been adopted. Thus, by applying Article 230 in conjunction with Article 253 of the Law on Civil Procedure, the Supreme Court did not modify the second-instance judgment. On the basis of the case file it follows that the rest of the complaints raised in the revision-appeal referring to Article 5 of the Labor Law are not well-founded, as concluded by the Supreme Court in its respective reasoning.

46. The Constitutional Court is of the opinion that the reasoning of the first-instance and the second-instance judgments in the granting part is clear, precise and show that the substantive law was not violated to the detriment of the appellant, and that all rights guaranteed by Article 143 of the Labor

Law were recognized to the appellant. The Constitutional Court cannot conclude that the reasoning of the ordinary courts, particularly of the judgment of the Supreme Court, is clear and unambiguous when it comes to the basis for jurisdiction of the court and the reasons for rejecting the part of the lawsuit as being untimely or premature. However, the Constitutional Court observes that the decisions of the ordinary courts are not to the detriment of the appellant. Namely, the decisions of the ordinary courts made it possible for the appellant to exercise all rights he is entitled to under Article 143 of the Labor Law, whereby the appellant himself sought less than provided for by Article 143 of the Labor Law when it comes to the moment of the reinstatement of employment, as he sought the status of a laid-off employee from the day of lodging the request with the employer on 3 February 2000, and not from the day when he had *de facto* stopped working, namely on 15 May 1992, and the court, under Article 2 paragraph 1 of the Law on Civil Procedure, *in the civil proceedings, decides within the scope of the request raised in the proceedings*. Next, in the part where the appellant requested the reinstatement to work, which the courts rejected, the Constitutional Court observes that the courts, actually, decide this *implicite* by ordering the employer to reinstate the appellant's employment status in the period from 3 February 2000 to 5 May 2000. It follows that on 5 May 2000 a condition referred to in paragraph 4 of Article 143 of the Labor Law was met, and that the appellant's employment, according to the decisions of the ordinary courts, was terminated on 5 May 2000, through the application of the substantive law, which in no way can be considered arbitrary. The Constitutional Court observes that the ordinary courts by providing reasoning for the rest of the appellant's requests also explained that this request would neither be well-founded, as the appellant's employment ceased *ex lege* by the very fact that Article 143 of the Labor Law limits the status of a laid-off employee to a maximum of six months from the entry into force of the Labor Law, and by the fact that the employer did not invite the appellant to return to work in that period, that is before 5 May 2000.

46. In connection with the aforesaid, the Constitutional Court refers to its case-law (see the Decision of the Constitutional Court No. *AP 1093/07,* paragraph 33, published in the *Official Gazette of BiH* No. 23/10 of 23 March 2010), according to which: *the Constitutional Court recalls that the Labor Law establishes that a laid-off employee, in accordance with Article 143 paragraph 1 of this law, shall retain that status for a maximum of six months from the day of entry into force of this law, unless the employer invites the employee back to work before the expiry of this time limit. On the other hand, in accordance with Article 143 paragraph 2 of this law, 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. In both cases, if the laid-off employee is not invited back to work within the time limit referred to in paragraph 1 of Article 143 of the Labor Law, his employment shall cease in accordance with Article 143 paragraph 4 of the Labor Law. In that case, the employee is entitled to a severance pay, and 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 Article 143 of the Labor Law, if that person is unemployed. In view of the cited part of the decision of the Constitutional Court in the case no. *AP 1093/07,* the Constitutional Court observes that the sole violation of the appellant's right, when it comes to the application of Article 143 of the Labor Law, may have taken place in the case that the employer employed in the period form 5 May 2000 to 5 May 2001, that is after the appellant's employment was terminated, another person with the same qualifications or educational background as the appellant's, and not the appellant provided that the appellant was unemployed during the relevant period. However, the appellant did not claim either before the ordinary courts or before the Constitutional Court that the employer had acted in such a way, thus the Constitutional Court concludes that the ordinary courts did not apply arbitrarily the substantive law, in particular the provisions of Article 143 of the Labor Law. The Constitutional Court finds that the appellant's allegation that the courts failed to decide on the alleged violation of Article 5 of the Labor Law is ill-founded, and that the courts did decide not that appellant's allegation and provided a reasoning thereto. With respect to the complaint raised in the appeal that the appellant, in terms of Article 5 of the Labor Law, was put in a less favorable position when compared to other workers of the employer, they found that complaint to be ill-founded, that is as only being arbitrarily raised, as no reason provided by Article 5 of the Labor Law was mentioned as suggesting that the appellant was put in a less favorable position when compared to other employees of the employer, nor did he prove these facts before the first-instance court. The Supreme Court upheld this position. The Constitutional Court does not find that this reasoning is insufficient or that the positive procedural or substantive laws were applied arbitrarily.

48. In view of the aforementioned, the Constitutional Court concludes that the appellant failed to offer any arguments whatsoever justifying his assertion that his right to a fair trial was violated in any way in the proceedings conducted before the ordinary courts, except that he is unhappy with the outcome of the present proceedings. Therefore, the Constitutional Court concludes that the appellant's allegations about the violation 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 are ill-founded.

3. As to the right to non- discrimination

49. The appellant complains of a violation of the right to non-discrimination under Article II(4) the Constitution of Bosnia and Herzegovina in conjunction with the right to labor under Article 5(e) and (i) of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 6 and 7(a) and (i) of the International Covenant on Economic, Social and Cultural Rights. In this respect, the appellant states that he was discriminated against on the grounds of the right to employment, as by seeking court protection he referred not only to the provisions of Article 143 of the Labor Law, but also to the provisions of Article 5 of the same law. The appellant holds that the Supreme Court failed to give its opinion about the violations of Article 5 of the Labor Law "and about putting the appellant, as a person of Serb ethnicity, into a less favorable position when compared to other employees of the employer".

50. According to the case-law of the European Court, the right to non-discrimination under Article 14 of the European Convention is an accessory right. This means that this article does not ensure independent and autonomous right to non-discrimination, but discrimination, according to this article, can only be invoked in conjunction with "the enjoyment of rights and freedoms guaranteed by the European Convention". Although the establishment of the violation of some of the guaranteed rights is not a prerequisite of the application of Article 14 of the European Convention, nevertheless this article cannot be applied unless the facts of the particular case do not fall "within the scope" of the guaranteed right (see European Court of Human Rights, *Karlheinz Schmidt vs. Germany*, Judgment of 18 July 1994, Series A, No. 291-B, paragraph 22).

51. Furthermore, the Constitutional Court observes that, according to the case-law of the European Court, discrimination occurs when a person or a group of persons who are in an analogous situation are treated differentially on the grounds of sex, race, color, language, religion (…) with respect to the enjoyment of rights under the European Convention, and there is no objective and reasonable justification for such a treatment or use of means aimed at the desired goal which are not proportionate (see e.g. *Belgium Linguistic Case*, 23 July 1968, Series A, No. 6, paragraph 10). Thereby, it is irrelevant whether discrimination is a consequence of differential treatment or of the application of the very law (see, the European Court of Human Rights, *Ireland vs. Great Britain*, judgment of 18 January 1978, Series A, No. 25, paragraph 226).

52. The Constitutional Court observes that the appellant stated, in support of his allegations about the right to non-discrimination, that he was discriminated against on the grounds of the right to employment, as the Supreme Court failed to give its opinion about the violations of Article 5 of the Labor Law "and about putting the appellant, as a person of Serb ethnicity, in a less favorable position when compared to the rest of the employees of the employer". The Constitutional Court, also, notes that

the appellant failed to present a single allegation as to the way how the appellant, as a person of Serb ethnicity, was put in a less favorable position when compared to the rest of the workers of the employer, whereas in the proceedings before the ordinary courts the appellant stated this complaint only arbitrarily without suggesting any single reason provided for by Article 5 of the Labor Law. Therefore, the Constitutional Court finds that the appellant failed to provide reasons for his allegations about discrimination in the appeal and in the proceedings before the ordinary courts.

53. As to the references of the appellant to the position of the Constitutional Court taken in the Decision No. *U 38/02*, the Constitutional Court recalls that it found a violation in the mentioned decision of the right to prohibition of discrimination in conjunction with the right to employment under Article II(4) the Constitution of Bosnia and Herzegovina in conjunction with Article 5(e) and (i) of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 6 and 7(a) and (i) of the International Covenant on Economic, Social and Cultural Rights, the Constitutional Court observes that the appellant failed to mention time and again any conduct on the part of the employer suggesting that the appellant was treated differently from other laid-off employees of the same employer, that is when compared to persons who were in the same situation as the appellant. Although he failed to state it in the appeal, it follows on the basis of the attachment to the appeal that the appellant holds that his employer was obliged to devise criteria before issuing rulings on the termination of employment of the laid-off employees. However, the Constitutional Court recalls that no provision of Article 143 of the Labor Law provides for the obligation of the employer to adopt criteria according to which employees' employment will be terminated unless they are invited back to work within six months from the day of entry into force of the Labor Law. Instead it prescribes that if within a maximum of six months from the day of entry into force of the Labor Law those employees are not invited back to work by the employer, their employment ceases *ex lege*, with the sole constitution that the employer may not employ within one year another person with the same qualifications or educational background as the appellant. So, the Constitutional Court concludes that the appellant failed to offer evidence that he was treated differently in an identical situation when compared to other persons in the same situation.

54. In view of the aforementioned, the Constitutional Court concludes that the appellant's allegations about the violation of the right to prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with the right to labor under Article 5(e) and (i) of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 6 and 7(a) and (i) of the International Covenant on Economic, Social and Cultural Rights are ill-founded.

VIII. Conclusion

55. The Constitutional Court concludes that there is no violation 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, in a situation where the competent Commissions for the Implementation of Article 143 of the Labor Law failed to decide on the appellant's appeal, and the ordinary courts, by acting upon the appellant's lawsuit, based their jurisdiction and decided on the appellant's request for the reinstatement of the employment status as a laid-off employee, and thereby secured his rights as guaranteed by Article 143 of the Labor Law.

56. Also, there is no violation of the right to prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with the right to labor under Article 5(e) and (i) of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 6 and 7(a) and (i) of the International Covenant on Economic, Social and Cultural Rights, whereby the appellant solely arbitrarily referred to discrimination without stating a single fact on which he based his allegations on discrimination.

57. Pursuant to Article 59(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court has decided as stated in the enacting clause of this decision.

58. Pursuant to Article 43 of the Rules of the Constitutional Court a Separate Dissenting Opinion of the Vice-President Tudor Pantiru, joined by Judges Constance Grewe and Margarita Tsatsa-Nikolovska, has been annexed to this decision.

59. According 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 Vice-President Tudor Pantiru, joined by Judges Constance Grewe and Margarita Tsatsa-Nikolovska

By its Decision of 25 September 2014, the Constitutional Court dismissed the appeal of Dragan Kovacevic and concluded that "…there is no violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and under Article 6(1) of the European Convention, in a situation where the competent Commissions for the Implementation of Article 143 of the Labor Law failed to decide on the appellant's appeal, and the ordinary courts, by acting upon the appellant's lawsuit, based their jurisdiction and decided on the appellant's request for the reinstatement of the employment status as a laid-off employee, and thereby secured his rights as guaranteed by Article 143 of the Labor Law.

It also decided that "… there is no violation of the right to prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with the right to labor under Article 5(e) and (i) of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 6 and 7(a) and (i) of the International Covenant on Economic, Social and Cultural Rights, whereby the appellant solely arbitrarily referred to discrimination without stating a single fact on which he based his allegations on discrimination"

I respectfully disagree with the conclusion reached by the majority on the following grounds.

As appears from the materials of the case, that Dragan Kovaevic as a laid-off employee was seeking to be reinstated at the previous or similar job under article 143 of the Labor Law. His request was dismissed as untimely by Municipal and Cantonal Courts. The Supreme Court of the Federation of Bosnia and Herzegovina found that lower courts wrongly applied substantive law but because "…erroneous application of the substantive law is not less favorable for the person lodging revision-appeal than the decision which was adopted…." it decided to "…not modify the second instance judgment".

While dismissing the request as untimely, all instances of ordinary courts examined the merits of the case and dismissed as ill-founded the applicant's allegation of discrimination under Article 5 of the Labor law "…as a person of Serb ethnicity.." who was put "…into a less favorable position when compared to other employees of the employer".

In dismissing the request of the appellant about discrimination, ordinary courts indicated that the appellant had failed to prove that he had been discriminated against. So the Municipal Court indicated in its judgment that "…plaintiff did not prove that he had been discriminated against by the defendant..." and "In regard of the aforementioned action claim, the court also dismissed as ill-founded by applying the rule on burden of proof (Article 126 in conjunction with Article7/1 and 123/1 of the Civil Procedure Code of FBiH)." The Cantonal and Supreme Courts supported this conclusion of Municipal Court.

Unfortunately, the Constitutional Court also found that the appellant indeed was unable to prove his allegation on discrimination.

In paragraph 53 of its judgment the Constitutional Court found **"that the appellant failed to offer evidence that he was treated differently in an identical situation when compared to other persons in the same situation".**

So the majority of the Constitutional Court failed to observe an obvious contradiction in the decisions of ordinary courts which on one hand dismissed the appellants request on reinstatement into the previous job as untimely and at the same time examined and dismissed in substance the allegation on discrimination on the ground that the appellant was unable to prove this allegation. Moreover, the majority, in disregard of the previous case law of the Constitutional Court also put the burden of proving the allegation of discrimination on the appellant.

In this sense it is to be mentioned that in its judgment in case AP 1093/02 of 25 September 2009 the Constitutional Court observed that "…in assessing the facts in the present case, the ordinary courts failed to take into account the facts presented to the court by the appellant, whereby she corroborated her allegations of discrimination against her by the defendant as to the application of Article 143 of the Labor Law compared to other employees, so that the violations could be deemed probable. However, the ordinary courts dismissed the appellant's claim stating that she failed to prove the facts of discrimination referred to in her civil action. Thus, the ordinary courts acted contrary to international standards which provide that in case where a plaintiff files a discrimination claim and shows that the claim may be deemed probable, the burden of proof is on the respondent to prove the contrary. In this context, it is necessary to mention the Directive 2000/78/EC of 27 November 2000 (*the Official Journal of the European Communities* No. 303, dated 2 December 2000) ("the Directive") establishing a general framework for equal treatment in employment and occupation. Article 10 of the Directive defines "burden of proof" and stipulates that member States shall take such measures as are

necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. Paragraph 2 of Article 10 stipulates that Member States shall not be prevented from introducing rules of evidence which are more favorable to plaintiffs. In view of the quoted provisions, it follows that the appellant, who complains of discrimination, has to present the facts before the court from which it may be presumed that she has been discriminated against and, as of that moment, it is on the respondent to prove the contrary".

Contrary to the above quoted case law of the Constitutional Court, the majority of judges decided in the case at hand that the ordinary courts were right in putting on the appellant the burden of proof and in obliging him to adduce evidence that he had been subjected to discriminatory treatment although the appellant showed *prima facie* that he could have been discriminated against on ethnic grounds. In a post conflict environment where the Serbs and Bosniaks were fighting each other, discrimination on ethnic grounds is probable indeed.

Therefore I conclude that there is a violation of 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 because the ordinary courts while dismissing the appellants request as untimely at the same time entered the merits of the case but failed to secure the appellant's procedural rights by putting on him an excessive burden of proving the allegation of discriminatory treatment with evidence which were in the possession of the defendant. This amounts to an arbitrary application of the law.