The Constitutional Court of the Republic of Croatia, in the Council of Five for deciding on constitutional complaints, composed of Judge Velimir Belajec, as the President of the Council, and Judges Marijan Hranjski, Ivan Mrkonjić, Jasna Omejec and Vice Vukojević, as Council Members, deciding on the constitutional complaint of D.M. from Z., represented by Č.P., attorney from Z., at the session of the Council held on 10 January 2001, unanimously reached the following

DECISION

I. The constitutional complaint is hereby accepted and the following are repealed:

- judgment of the Supreme Court of the Republic of Croatia, No: Rev-1381/1996 of 6 March 1997;
- judgment of the County Court in Z. No: Gž-9879/94 of 26 September 1995, and
- judgment of the Municipal Court in Z. No: Pr-1694/93 of 28 March 1994.

II. The matter is referred back to the Municipal Court in Z. for repeated proceedings.

Statement of Reasons

1. The constitutional complaint was lodged against the judgments cited in the dictum of this decision.

The disputed judgment of the Supreme Court of the Republic of Croatia, No: Rev-1381/1996 of 6 March 1997, rejected the application for revision lodged by the applicant against the judgment of the County Court in Z., No: Gž-9879/94 of 26 September 1995. The judgment of the second instance court rejected the appeal filed by the applicant against the judgment of the Municipal Court in Z., No: Pr-1694/93 of 28 March 1994. This judgment rejected the applicant's claim requesting annulment of the decision of the Ministry of the Interior of the Republic of Croatia, No: 511-01-55-23467/20-91 of 16 November 1991, whereby the applicant's employment had terminated on 16 December 1991, as well as annulment of the decision of the same ministry, No: 511-01-55-29026/1-

91 of 29 November 1991, whereby applicant's appeal was rejected and the first instance decision confirmed.

2. The applicant deems that the disputed judgments infringe the provisions of Article 14, Article 15, Article 17 paragraphs 2 and 3, Article 18 paragraph 1, Article 38 paragraphs 1 and 2, Article 44, Article 54 and Article 118 of the Constitution, as well as the provisions of Article 2, Article 14, Article 18, Article 19, Article 25 and Article 26 of the International Pact on Civil and Political Rights (point 28 of the Decision on the Publication of Multilateral International Treaties of which the Republic of Croatia is Signatory based on the Notifications on Succession, *Narodne novine* – International Treaties, No 12/1993; hereinafter: International Pact), and the provisions of Article 6, Article 9, Article 10, Article 13 and Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms – consolidated text (*Narodne novine* – International Treaties, No. 6/1999; hereinafter: European Convention).

The applicant finds that the foregoing provisions of the Constitution and the international treaties have been infringed because the disputed judgments do not contain reasons concerning essential facts (i.e., concerning the applicant's breach of employment obligations), which has infringed applicant's right to lodge an effective appeal. The applicant further deems that the disputed judgments were issued because of opinions that he had stated, which infringes the right to freedom of thought and expression. Therefore, the applicant connects the disputed judgments with the fact of his Serb nationality, which he deems is in breach both of provisions of the Constitution and of international treaties on equality, national equality and freedom of religion.

3. During constitutional-court proceedings, the Constitutional Court obtained the file of the matter from the Municipal Court in Z, No: Pr-1664/93. After inspecting the file, the Court found the following:

a) that the applicant had been permanently employed with the Ministry of the Interior from 1984 to 1991, as a driver of a motor vehicle at the General Affairs Department;

b) that decision No: 511-01-55-23467/20-91 of 16 November 1991 terminated the applicant's employment upon expiration of the notice period of one month, namely on 16 December 1991. This decision was issued pursuant to Article 377 of the Public Administration Act (*Narodne novine*, Nos. 16/78, 50/78, 29/85, 48/85, 41/90, 47/90 and 53/91). It establishes that the preconditions for termination of employment have been met, in accordance with Article 379 paragraph 1 of the Public Administration Act, because the opinion of the applicant's immediate superior, secured on 14 November 1991 – in which he evaluated the applicant's capacity to work as operative-technical staff, motor vehicle driver - shows that the applicant does not have the capacities necessary to perform the tasks delegated to him;

c) the decision of the second-instance body, No: 511-01-55-29026/1-91 of 29 November 1991, rejected the applicant's appeal and confirmed as legal the decision cited under 3b) of this Decision, with the explanation that "after the democratic changes the tasks of the

worker's post at the Ministry of the Interior require higher personal initiative, engagement and creativity, due to their complexity, which the abovementioned does not display and does not fulfill the basic function of his workplace, which has an adverse effect on the work of the service as a whole";

d) based on the applicant's claim, the Municipal Court in Z., in decision No: Pr-5323/91 of 26 May 1992, annulled the decisions cited under points 3.b) and 3.c) of this Decision and ordered the applicant's reinstatement to the workplace of a driver. The reasons of the judgment state that the disputed decisions "do not show the facts on the basis of which they were issued, i.e. the facts that show the plaintiff is not capable of performing the job of a driver". Furthermore, the reasons of the judgment indicate that the applicant's immediate superior, in his opinion that the applicant does not display the necessary capacities to perform the work to which he was posted, "does not specify what this incapacity consists of". On the contrary, the evidence given by the witness P.T. shows that he, as immediate superior, had no objections to the plaintiff's work and conduct the, nor did the persons he drove object to his work – driving a motor vehicle." The reasons of the judgment also establish that "the witness P.T. stated that he had given his opinion because the persons the plaintiff had driven in the official vehicle objected to his conduct of commenting on conversations made during the drive, but the witness did not wish to name these persons, nor to state what the comments referred to". Finally, the reasons of the judgment, whereby the decisions were annulled and the applicant reinstated, include the evaluations of the applicant's performance in the previous years (1988 and 1989), when his work was evaluated as "excels" (no evaluation was conducted in 1990);

e) based on the appeal of the State (then Public) Attorney's Office of the Republic of Croatia, the County (then District) Court in Z., in judgment No: Gž-8364/92-2 of 2 February 1993, quashed the judgment of the Municipal Court in Z. in point 3.d) of this Decision and returned the case to the same first-instance court for repeated proceedings, due to a material breach of the provisions of civil procedure in Article 354 paragraph 2 point 13 of the Civil Procedure Act (*Narodne novine*, Nos. 53/91, 91/92), which consisted of a "contradiction between what the reasons of the judgment give about the contents of this witness's statement (the immediate superior - note) and the statement itself. Namely, although the witness did state that he personally had no objections to the work and conduct of the plaintiff, he also stated that he had given his written opinion in September last year, that the objections to the plaintiff's conduct had been made in the summer of last year, and that he, as immediate superior, had waited until November to see whether the plaintiff's conduct would change". This judgment also maintains that "the plaintiff's work and tasks consisted not only of performing the work of a driver, but also that of an operative worker – a policeman in a specific institution, such as the defendant's", which was made by the applicant's immediate superior, who testified at the hearing of 26 May 1992. This was why the first-instance judgment was quashed and the case returned for repeated proceedings;

f) in the repeated proceedings, the first-instance court rejected the applicant's claim, and passed the judgment against which this constitutional complaint was lodged.

4. *The constitutional complaint is well-founded.*

After considering the disputed judgments, the Constitutional Court found that they infringe the applicant's rights in the Constitution and in international treaties, guaranteeing him equality before the law and the courts, the right to effective legal protection, the right to a fair trail, the right to work and the freedom of work, as well as the right to freedom of thought and expression of opinions.

5. Concerning the specifications in the judgments cited under point 3 of this Decision, the disputed judgment of the Municipal Court in Z., No: Pr-1694/93 of 28 March 1994, indicates only that the applicant's immediate superior, who appeared as a witness at the hearing of 28 March 1994, "has kept to his earlier statement and pointed out that the high-ranked officials whom the plaintiff drove to the field objected to his conduct as a policeman, to his engagement as an official person". And further: "As the summer of 1991 was the time of the fiercest aggression against Croatia, all official persons, in particular policemen, were expected to act with special engagement in the performance of their work and tasks, and since the objections to the plaintiff's engagement and conduct did not cease, he therefore gave a negative written evaluation about the plaintiff because the objections against the plaintiff had been made to him as immediate superior, but he had not heard of such objections being made before other persons."

Furthermore, the reasons of the disputed judgment of the County Court in Z., No: Gž-9879/94-2 of 26 September 1995, rejecting as unfounded the applicant's appeal against the disputed judgment of the first-instance court, state that the first-instance court had determined all the facts important for reaching a decision, and that the first-instance court had properly applied substantive law when it had rejected the claim, and that "it had given valid reasons for its decision, which this court also accepts". In the reasons of this judgment, the second-instance court also stated the following: "If the plaintiff assumed the right – which does not belong to his job description – of participating in, or less, of commenting on the conversations of official persons that he was driving to their work assignments, then the least that could have been expected was for him to behave in accordance with the rules of this sensitive service, and if he was commenting on the conversations, it could have been expected that he would do so in accordance with reality (second half of 1991) at the time of the fiercest aggression against the Republic of Croatia, which the plaintiff had obviously not done, and which had led to the disputed decisions being issued."

Finally, the disputed judgment of the Supreme Court of the Republic of Croatia, No: Rev-1381/1996-2 of 6 March 1997, rejecting as unfounded the application for revision lodged by the applicant, in essence accepted the stand "that the plaintiff was also performing the work tasks of an operative-technical worker – a policeman, for the defendant", and "that it was in this sphere that the plaintiff had not met the job requirements, starting from the summer of 1991 when the fiercest aggression against the Republic of Croatia began, and when people employed with the Ministry of the Interior, as a service of particular state interest, were especially required to show a higher level of personal engagement, initiative and creativity in work, which the plaintiff did not display".

6. The Constitutional Court started the constitutional-court proceedings by determining that the applicant's employment had ceased on the grounds of Article 379 paragraph 1 of the Public Administration Act, whereby a worker's employment may be terminated if it has been established that he does not have the capacity to perform the tasks required by the workplace to which he was posted, or if it has been established that he is permanently not achieving the usual work results. The Court also determined that the tasks of the applicant's workplace were defined in decision, No: IV/3-22515/1-1984 of 13 December 1984, according to which the applicant was posted to the job of a motor vehicle driver at the General Affairs Department. Therefore, the opinion of the Head of the General Affairs Department (the applicant's immediate superior), of 14 November 1991, which served as the basis for issuing the decision about the termination of employment, could relate only to the evaluation of "his capability to perform the work of an operative-technical worker – a motor vehicle driver, to which the applicant was posted".

Furthermore, the Constitutional Court found that the stand in the second-instance decision on the termination of the applicant's employment, according to which the applicant "....neither has nor displays the capacity to perform the job at the workplace to which he was posted, because this work due to its complexity requires higher personal initiative, engagement and creativity, which the plaintiff does not display and does not fulfill the basic function of his workplace, which has an adverse effect on the work of the service as a whole", was accepted in all the disputed judgments, although they do not clearly show:

- which evidence served as the basis for determining that the applicant does not have the capacity to perform the tasks of his workplace, i.e. that of an operative-technical worker – motor vehicle driver;
- what did the applicant omit to do, within the complexity of the tasks at that workplace, and when, and based on what were the applicant's alleged omissions determined;
- which function of his workplace did the applicant fail to realise;
- what was it that adversely affected the work of the service in whole.

Furthermore, the opinion on the applicant's work given on 14 November 1991 does not contain a single line about his possible posting as an operative worker – policeman, to which this opinion might then relate. The statement that the applicant's tasks at his workplace included the work of an operative worker – policeman, were only mentioned in the evidence given by the applicant's immediate superior at the hearing of 26 May 1992, which the first-instance court accepted as a proven fact in the disputed judgment. Although the first-instance court found, in the same judgment, that at the hearing held on 28 March 1994 the witness (the applicant's immediate superior) "had kept to his earlier statement" about the applicant's conduct during driving, in the sense of commenting on conversations, the second-instance court gave that statement a different qualification, evaluating it as "a statement with a supplement", because at that hearing the witness had pointed out that "the officials the plaintiff drove to the field had objected to his conduct as a policeman, his engagement as an official person", and not to his work as an operative-technical worker – a motor vehicle driver. Finally, even if the Constitutional Court

accepted the stand of the competent courts that the applicant had indeed performed the work of an official person, an operative worker – policeman, there is not a single fact in the disputed judgments showing what the applicant's work as an operative worker - policeman consisted of, and how he had infringed this work and tasks, which may have led to the termination of the applicant's employment in compliance with Article 379 paragraph 1 of the Public Administration Act.

In this sense, the claim of the second-instance court "that this was required by the special needs of the service in Article 383-a of the Public Administration Act" are not acceptable. The finding of the court of revision is also not acceptable, i.e. that the second-instance court's reference to Article 383-a. of the Public Administration Act "does not result in the misapplication of substantive law in the present case", because the court of revision did not either clarify this finding or explained it in detail.

7. The Constitutional Court points out that no person's employment may be terminated due to an expressed personal opinion, and thus also not the applicant's in his capacity of an employee of the Ministry of the Interior. The right to the freedom of expression is guaranteed in Article 38 paragraph 1 of the Constitution, Article 10 of the European Convention and Article 19 of the International Pact, and it may be restricted only in exceptional cases (in the interest of state security, territorial unity, public order and peace, preventing disorder or crime and similar), and these were not the basis for the termination of the applicant's employment in the present case, nor were they discussed or determined in court.

8. Pursuant to the above, the disputed judgments do not contain reasons on the essential facts underpinning the finding that the applicant is not capable of performing the job at his workplace (a motor vehicle driver), on which the decision about the termination of his employment was based.

Therefore the disputed judgments have infringed the applicant's constitutional rights guaranteed in Article 14 paragraph 2 of the Constitution (guarantees equality of all before the law), Article 18 paragraph 1 of the Constitution (guarantees the right to appeal), Article 26 of the Constitution (guarantees equality of all before the courts and other state and similar bodies vested with public authority), Article 29 of the Constitution (guarantees the right to a fair trial), Article 38 paragraph 1 of the Constitution (guarantees the freedom of thought and expression of opinions), and Article 54 paragraph 1 of the Constitution (guarantees the right to work and the freedom of work).

Article 14 paragraph 2 of the Constitution, guaranteeing equality before the law, and Article 26 of the Constitution, guaranteeing equality before the courts, other state and similar bodies vested with public authority, are the elaboration and application of the general principle of equality in judicial and other legal protection, whose purpose is to guaranteed everybody equal protection of rights in proceedings before courts and other state and similar bodies vested with public authority. This principle of equality is infringed if a party to the proceedings is not allowed to be heard and to participate in the proceedings, pursuant to law, in such a way as to present facts and submit evidence; if

the competent body does not state its opinions about the party's claims important for the decision; if a separate enactment does not contain reasons, which is contrary to the law; or if a fair trial before a competent body established by law is not made possible in some other way. The right guaranteed in Article 29 paragraph 1 subparagraph 1 of the Constitution does not only cover the right to a fair trail for persons suspected or accused of a crime. This provision is a constitutional guarantee to citizens for fair proceedings before courts and all bodies of state administration, i.e. bodies vested with public authority. The violation of the constitutional guarantee to a fair trail in the proceedings concerning the applicant's employment-related issues at the Ministry of the Interior also led to the violation of his constitutional right to work and freedom of work, guaranteed in the provision of Article 54 of the Constitution. Since the applicant's employment was terminated, and he was not allowed to find out about the reasons for the termination and thus to realise his right to institute an effective legal remedy, the applicant's constitutional right, guaranteed in the provision of Article 18 paragraph 1 of the Constitution, was also infringed

On the grounds of the same reasons that serve as the basis for the infringement of the cited constitutional provisions, the disputed judgments are also in breach of the relevant provisions of the International Pact on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

9. The data in the file do not show the infringement of the other provisions of the Constitution that the applicant alleged. In the constitutional-court proceedings the Court was not acquainted or presented with legally relevant facts on which to base an indisputable conclusion about termination of employment due to discrimination against the applicant because of his ethnicity or religion. Therefore, there has been no breach of the applicant's constitutional rights to equality regardless of nationality or religion, contained in Article 14 paragraph 1, Article 15 and Article 17 paragraph 2 of the Constitution, in Article 18 of the International Pact, and in Article 9 of the European Convention, guaranteeing the freedom of conscience and religion, as well as the freedom to change and the freedom to express religious beliefs.

10. In the complaint the applicant also claims breach of Article 118 of the Constitution, which prescribes the exercise of judicial power by courts, the independence of judicial power, and that courts shall pass judgments in accordance with the Constitution and the law. Since the cited provision determines the independence of the courts, i.e. the principle of constitutionality and legality as the basic principle in the exercise of judicial power, it is not aimed at the direct protection of constitutional rights and freedoms serve as a basis for a constitutional complaint, pursuant to Article 59 paragraph 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, No. 99/99 - hereinafter: the Constitutional Act).

11. The Constitutional Court has decided as in the dictum, pursuant to the provisions of Article 69 and Article 72 of the Constitutional Act.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

No: U-III-727/1997
Zagreb, 10 January 2000

PRESIDENT OF THE COUNCIL

Velimir Belajec, m.p.

CORRECTION
OF THE DECISION OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF CROATIA
NO.: U-III-727/1997

In the statement of reasons, in point 10, row 7, the word “freedoms” should be followed by “of man and citizen (the constitutional right of an individual), and it may not”; and at the end of the Decision, “Zagreb, 10 January 2000” should be replaced by “Zagreb, 10 January 2001”.
No. Su-15/2001-3
Zagreb, 1 February 2001

Head of the Court Records Office
Vladimira Vodanović, m.p.