FOURTH SECTION

CASE OF PUDARIĆ v. BOSNIA AND HERZEGOVINA

(Application no. 55799/18)

JUDGMENT

STRASBOURG

8 December 2020

*This judgment is final but it may be subject to editorial revision.*

In the case of Pudarić v. Bosnia and Herzegovina,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

 Tim Eicke, *President,* Faris Vehabović, Pere Pastor Vilanova, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a national of Bosnia and Herzegovina, Mr Svetozar Pudarić (“the applicant”), on 25 October 2018;

the decision to give notice to the Government of Bosnia and Herzegovina (“the Government”) of the complaint concerning Article 1 of Protocol No. 12 to the Convention;

the parties’ observations;

Having deliberated in private on 17 November 2020,

Delivers the following judgment, which was adopted on that date:

1. INTRODUCTION

1.  The application concerns the applicant’s ineligibility, as a politician residing in the Federation of Bosnia and Herzegovina[[1]](#footnote-1) who declares himself as Serb[[2]](#footnote-2), to stand for election to the Presidency of Bosnia and Herzegovina. The applicant relied on Article 1 of Protocol No. 12 to the Convention.

1. THE FACTS

2.  The applicant was born in 1959 and at the time of his death in 2020 he was living in Sarajevo. He was represented by Mr N. Ademović, a lawyer practising in Sarajevo.

3.  The Government were represented by their Acting Agent, Ms B. Skalonjić.

4.  The facts of the case, as submitted by the parties, may be summarised as follows.

5.  The applicant declares himself as Serb (one of the country’s “constituent peoples”). He actively participated in the social and political life of the country.

6.  On 25 May 2018 the applicant submitted his candidacy, as an independent candidate, to the Central Election Commission of Bosnia and Herzegovina (“CEC”) for the 2018 elections to the Presidency of Bosnia and Herzegovina as a Serb member.

7.  On 31 May 2018 the CEC rejected his candidacy. It explained that the applicant could not be elected as a Serb member of the Presidency of Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina. It held that, contrary to sections 4.2(1) and 8.1(2) of the Elections Act 2001 (see paragraph 12 below), the applicant was not registered in the Central Voters Register in the Republika Srpska.

8.  On 6 June 2018 the Court of Bosnia and Herzegovina rejected an appeal by the applicant.

9.  On 17 July 2018 the Constitutional Court of Bosnia and Herzegovina dismissed an appeal by the applicant as inadmissible. The relevant part of the decision reads as follows.

“[T]he Constitutional Court notes that the appellant is a Serb who lives on the territory of the Federation of Bosnia and Herzegovina, and it is for this reason that his request to be a candidate for the elections to the Presidency of Bosnia and Herzegovina was rejected. Thus, this is essentially the same situation as the one in the case of *Pilav*, in which, after the decision of the Constitutional Court, the European Court gave a final and binding judgment. The Constitutional Court considers that in such a situation, when the European Court has in three judgments in relation to Bosnia and Herzegovina – of which the judgment in *Pilav* relates to the same situation as that of the appellant – unambiguously ruled that it is necessary to amend the Constitution of Bosnia and Herzegovina, there is no basis to decide again on the same issue.

In this regard, the Constitutional Court notes that the decisions being challenged and the appellant’s inability as a Serb residing in the Federation of Bosnia and Herzegovina to be a candidate for the elections to the Presidency of Bosnia and Herzegovina are also a result of the omission by the competent authorities to take the necessary measures for the purpose of enforcement of the judgments in the cases of *Pilav*, *Sejdić and Finci* and *Zornić*, which would end the incompatibility of the Constitution and the Elections Act with the requirements of Article 1 of Protocol No. 12, as determined by those judgments. Thus, Bosnia and Herzegovina, namely its competent authorities, has the obligation to harmonise the Constitution of Bosnia and Herzegovina and the Elections Act pursuant to three judgments of the European Court, and the Constitutional Court, in line with its conclusion in Decision no. U‑14/12, still cannot foresee the scope of those changes. The Constitutional Court particularly emphasises that it does not have either constitution-making or legislative competence, and thus cannot act in place of other institutions, most notably the Parliamentary Assembly of Bosnia and Herzegovina, which has the competence, by means of a prescribed procedure, to amend the Constitution of Bosnia and Herzegovina, or to take the place of those institutions that have the obligation to take the relevant measures for the purpose of the enforcement of the judgments of the European Court in the cited cases.

Thus, for the courts and other competent bodies to apply the European Convention directly to this matter, as the appellant requests, it is necessary to end the current incompatibility of the Constitution of Bosnia and Herzegovina with the European Convention as found by the European Court in the judgments of *Sejdić and Finci*, *Zornić* and *Pilav*. As already noted, that can only be done by the competent institutions and the prescribed procedure, which is the basic requirement of the rule of law as set out in Article I § 2 of the Constitution of Bosnia and Herzegovina, but also the principle on which the European Convention itself is based. Otherwise, the Constitutional Court, but also the Court of Bosnia and Herzegovina and the Central Election Commission of Bosnia and Herzegovina, would be acting outside their prescribed competences, namely they would assume the role of constitution-makers and legislators despite the fact that this is within the exclusive competence of other institutions of government.”

1. RELEVANT LEGAL FRAMEWORK
	1. RELEVANT DOMESTIC LAW

10.  The relevant domestic law was outlined in *Sejdić and Finci v. Bosnia and Herzegovina* ([GC], nos. 27996/06 and 34836/06, §§ 11-18, ECHR 2009). In particular, the Constitution of Bosnia and Herzegovina makes a distinction between “constituent peoples” (persons who declare affiliation with Bosniacs[[3]](#footnote-3), Croats[[4]](#footnote-4) and Serbs) and “others” (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood or for other reasons).

11.  The following are the relevant provisions of the Constitution.

**Article II**

“...

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

**Article V**

“The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.

1.  **Election and Term**

(a)  Members of the Presidency shall be directly elected in each Entity (with each voter voting to fill one seat on the Presidency) in accordance with an election law adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. Any vacancy in the Presidency shall be filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly.

...”

12.  The relevant provisions of the Election Act 2001 (Official Gazette of Bosnia and Herzegovina nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16), which came into force on 27 September 2001, read as follows.

**Section 4.2**

“In order to be certified for the elections for all bodies of authority at all levels in Bosnia and Herzegovina, an independent candidate or a candidate on a political party, independent candidates or coalition list shall meet the following requirements:

(1)  the candidate must be recorded in the Central Voters Register in the municipality in which he or she is standing for office or in the municipality found within the boundaries of the electoral unit if he or she is standing for office at the higher levels of authority, no later than by the day when the elections are announced; and

(2)  the candidate may only run for office in one electoral unit at any level of authority and may appear on only one political party, coalition or independent candidates list.”

**Section 8.1**

“(1)  The members of the Presidency of Bosnia and Herzegovina directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosniac and one Croat – shall be elected by voters registered to vote in the Federation of Bosnia and Herzegovina. A voter registered in the Central Voters Register to vote in the Federation may vote for either the Bosniac or Croat member of the Presidency, but not for both. The Bosniac and Croat member who receives the highest number of votes among candidates from the same constituent people shall be elected.

(2)  The member of the Presidency of Bosnia and Herzegovina who is directly elected from the territory of the Republika Srpska – a Serb – shall be elected by voters registered to vote in the Republika Srpska. The candidate who receives the highest number of votes shall be elected.

...”

* 1. RELEVANT INTERNATIONAL DOCUMENTS

13.  The relevant international documents were outlined in *Sejdić and Finci* (cited above, §§ 19-25), and *Pilav v. Bosnia and Herzegovina* (no. 41939/07, §§ 19-20, 9 June 2016).

14.  The relevant part of the 53rd Report of the High Representative to the Security Council of the United Nations, delivered on 8 May 2018, reads as follows:

“Reflecting an overall disregard for the rule of law, authorities have persistently failed to implement European Court of Human Rights’ rulings in the ‘Sejdić & Finci’ and related cases, leaving in place discrimination against the right of certain persons to stand for public office.”

15.  The relevant part of the European Parliament resolution of 13 February 2019 on the 2018 Commission Report on Bosnia and Herzegovina (2018/2148(INI)) reads as follows.

“*The European Parliament,*

...

7.  Regrets that the issue of democratic and legitimate representation of three constituent peoples and of all citizens remains unresolved; urges all parties to find a timely compromise as this issue should be addressed as soon as possible by the new legislators, including through the operationalisation of the decisions of the European Court of Human Rights in the *Sejdić-Finci* and related cases; reiterates the need to proceed with constitutional, political and electoral reforms that would transform BiH into a fully effective, inclusive and functional state based on the rule of law;

...”

16.  The relevant part of the Opinion of the European Commission on Bosnia and Herzegovina’s application for membership of the European Union, delivered on 29 May 2019 (COM(2019) 261 final), reads as follows.

“The Constitution contains ethnic and residence-based provisions which are not in line with the European Convention on Human Rights. These concern the appointment, composition and decision-making procedures of the head of state and the executive and legislative bodies, as certain electoral rights are reserved for citizens who affiliate to the ‘constituent peoples’ – Bosniaks, Croats and Serbs. Significant incremental reforms are therefore needed to ensure that all citizens can effectively exercise their political rights, in compliance with the *Sejdić-Finci* case law of the European Court of Human Rights (ECtHR).

...

The Commission considers that negotiations for accession to the European Union should be opened with Bosnia and Herzegovina once the country has achieved the necessary degree of compliance with the membership criteria and in particular the Copenhagen political criteria requiring the stability of institutions guaranteeing notably democracy and the rule of law. Bosnia and Herzegovina will need to fundamentally improve its legislative and institutional framework to ensure it meets the following key priorities:

*Democracy/Functionality*

...

4.  Fundamentally improve the institutional framework, including at constitutional level, in order to:

...

f)  Ensure equality and non-discrimination of citizens, notably by addressing the *Sejdić-Finci* ECtHR case law;

...”

* 1. RELEVANT COUNCIL OF EUROPE DOCUMENTS

17.  The relevant Council of Europe documents were outlined in *Zornić v. Bosnia and Herzegovina* (no. 3681/06, § 12, 15 July 2014).

18.  On 6 June 2019, at its 1348th meeting, the Committee of Ministers carried out a further examination of the state of implementation of the judgment in *Sejdić and Finci* and adopted the following decision:

“The Deputies

1.   recalled their decision of September 2018 holding that the retention of the present discriminatory election system notwithstanding the judgment of the Court in the *Sejdić and Finci* case of 2009 and the other judgments in the present group is in clear violation of the requirements of the European Convention on Human Rights and constitutes a manifest breach of Bosnia and Herzegovina’s unconditional obligations under Article 46 of the Convention, and thus also of its undertakings as a member State of the Council of Europe;

2.   stressed in this context anew that the Constitution itself requires that all persons on the territory of Bosnia and Herzegovina shall enjoy the rights and freedoms set forth in the Convention ‘which shall apply directly and have priority over all other law’ and that all authorities have the unconditional obligation to find ways and means, within the scope of their competences, to put an end to the present violations so that all persons within the jurisdiction of the State have the right to stand for all elections to the legislature, including those to the House of the Peoples and the Presidency;

3.   albeit noting the present practical difficulties resulting from the problems in forming a new government following the 2018 elections, stressed the utmost importance of relaunching the reform work without further delay and to give this work the highest priority in order to eradicate the current discriminations in its electoral system;

4.  urged thus the political leaders and all relevant authorities to pursue, as soon as possible, all consultations necessary, and to take all actions required, in order to ensure that the present continuing and long-standing violation of Bosnia and Herzegovina’s obligations under the Convention, and in particular of Article 46, is brought to an end before the next elections in 2022;

5.   noted, in this context with interest the high level preparatory discussions recently engaged with the Secretariat under a Human Rights Trust Fund project with a view to facilitating the reform process and urged the political leaders and competent authorities to speedily follow up on this initiative and, in so doing, to reinforce their cooperation with Council of Europe and take advantage of all the expertise available within the Organisation, in particular that of the Venice Commission;

6.   decided to renew their invitation to the competent Minister of Bosnia and Herzegovina to hold an exchange of views with the Committee at their 1362nd meeting (December 2019) (DH) on the progress made in developing and implementing the strategy necessary to ensure that constitutional and legislative arrangements are in place before October 2021 i.e. one year before the next elections.”

1. THE LAW
	1. PRELIMINARY REMARKS

19.  The Court notes at the outset that the applicant died on 9 March 2020, while the case was pending before the Court. The applicant’s widow, Mrs Sanda Pudarić, who is his heir, informed the Court that she wished to pursue the application lodged by him. The Court points out that it has accepted on numerous occasions that close relatives of a deceased applicant who have a legitimate interest in pursuing the application, are entitled to take his or her place in the proceedings, if they express their wish to do so (see, among other authorities, *Dalban v. Romania*[GC], no. 28114/95, §§ 38-39, ECHR 1999-VI; *Murray v. the Netherlands* [GC], no. 10511/10, § 79, 26 April 2016;and *Ergezen v. Turkey*, no. 73359/10, §§ 29-30, 8 April 2014).

20.  The Court does not see any special circumstances in the present case to depart from its established case-law and is prepared to accept that the applicant’s heir has a legitimate interest to pursue the application initially brought by Mr Svetozar Pudarić.

* 1. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 12 TO THE CONVENTION

21.  The applicant complained of his ineligibility, as a Serb residing in the Federation of Bosnia and Herzegovina, to stand for election to the Presidency of Bosnia and Herzegovina. He relied on Article 1 of Protocol No. 12 to the Convention, which reads as follows:

“1.  The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2.  No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

* + 1. Admissibility

22.  The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

* + 1. Merits
			1. The parties’ submissions

23.  The applicant did not submit observations.

24.  The Government submitted that the domestic authorities and political leaders had been continuously making exceptional efforts to reach a consensus on the necessary changes to be made to the Constitution of Bosnia and Herzegovina and the election legislation so as to remove the requirements concerning ethnic affiliation and place of residence as conditions for candidacy in elections to the Presidency of Bosnia and Herzegovina, in line with the well-established case-law of the Court. Nevertheless, according to the Government, the political environment in the respondent State was not yet conducive for such changes to be adopted.

* + - 1. The Court’s assessment

25.  The Court has already found in *Sejdić and Finci* (cited above, § 54) that Article 1 of Protocol No. 12 is applicable to elections to the Presidency of Bosnia and Herzegovina.

26.  The Court observes that a similar constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 1 of Protocol No. 12 in *Pilav* (cited above), which concerned the inability of the applicant, a Bosniac residing in Republika Srpska, to stand for election to the Presidency. The Court held in particular (ibid., § 48):

“The present applicant, although he belongs to one of the ‘constituent peoples’, is excluded from election to the Presidency as a result of the impugned residence requirement. Notwithstanding the differences with *Sejdić and Finci*, the Court considers that this exclusion is based on a combination of ethnic origin and place of residence, both serving grounds of distinction falling within the scope of Article 1 of Protocol No. 12 (see, *mutatis mutandis*, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 70 and 71, ECHR 2010), and as such amounts to a discriminatory treatment in breach of Article 1 of Protocol No. 12.”

27.  By way of observation, the Court notes that the Constitution itself does not expressly make the exercise of passive electoral rights conditional on residency requirements (see paragraph 11 above), and that such a condition was introduced by the Elections Act 2001 (see paragraph 12 above). With regard to this, it reiterates that no legal provision of domestic law should be interpreted and applied in a manner incompatible with States’ obligations under the Convention (see *Tsalkitzis v. Greece (no. 2)*, no. 72624/10, § 54, 19 October 2017), particularly if that would be inconsistent with the prohibition of discrimination and more broadly with the principles underlying the Convention (see, *mutatis mutandis*, *Fabris v. France* [GC], no. 16574/08, § 60, ECHR 2013 (extracts)). This is certainly true for the respondent State, whose own Constitution accords the Convention “priority over all other law” (see paragraph 11 above).

28.  Having examined all the material submitted to it, the Court has not found any fact or argument capable of persuading it to reach a different conclusion on the merits of this complaint. Having regard to its case-law on the subject, the Court considers that in the instant case the applicant was discriminated against on account of his ineligibility to stand for election to the Presidency.

29.  There has accordingly been a violation of Article 1 of Protocol No. 12 to the Convention.

* 1. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30.  Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

31.  The applicant claimed 190,000 euros (EUR) in respect of pecuniary damage, this being the amount he would have received had he been elected to the Presidency for the election cycle 2018-20. He also claimed EUR 20,000 in respect of non-pecuniary damage, and 10,000 convertible marks for costs and expenses, this being the cost of the stamp duty that he had paid the CEC for checking his candidacy for participation in the elections.

32.  The Court notes that the applicant’s just satisfaction claims were set out on the application form but were only resubmitted on 2 January 2020, more than two months after the expiry of the allotted time-limit. This time-limit began to run upon the Court’s transmission of the Government’s initial observations. The applicant has therefore failed to comply with Rule 60 §§ 2 and 3 of the Rules of Court and paragraph 5 of the Practice Direction on Just Satisfaction Claims, which, in so far as relevant, provides that the Court “will also reject claims set out on the application form but not resubmitted at the appropriate stage of the proceedings and claims lodged out of time”, of which the applicant was duly informed in a letter of 13 September 2019. The applicant’s just satisfaction claims must therefore be dismissed.

1. FOR THESE REASONS, THE COURT, UNANIMOUSLY,
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 12 to the Convention;
4. *Dismisses* the applicant’s claims for just satisfaction.

Done in English, and notified in writing on 8 December 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

 Ilse Freiwirth Tim Eicke
 Deputy Registrar President

1. Bosnia and Herzegovina consists of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, and Brčko District, which is under local government administration. [↑](#footnote-ref-1)
2. The Serbs are an ethnic group whose members may be natives of Serbia or of other former component republics of the Socialist Federal Republic of Yugoslavia (SFRY), including Bosnia and Herzegovina. The term “Serb” is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with “Serbian”, which normally refers to nationals of Serbia. [↑](#footnote-ref-2)
3. Bosniacs were known as Muslims until the 1992-95 war. The term “Bosniacs” (*Bošnjaci*) should not be confused with the term “Bosnians” (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin. [↑](#footnote-ref-3)
4. The Croats are an ethnic group whose members may be natives of Croatia or of other former component republics of the SFRY, including Bosnia and Herzegovina. The term “Croat” is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with “Croatian”, which normally refers to nationals of Croatia. [↑](#footnote-ref-4)