



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PINKAS AND OTHERS v. BOSNIA AND HERZEGOVINA

(Application no. 8701/21)

JUDGMENT

Art 6 § 1 (civil) • Conflicting domestic court judgments concerning period of entitlement to work-related allowances to judges and the applicant judicial clerks respectively • No “profound and long-standing” differences in the domestic case-law • Absence of claim of arbitrary interpretation and application of procedural rules by Constitutional Court, leading to non-examination of decision granting judges allowances for a longer period in the context of applicants’ constitutional appeal

Art 1 P12 • Prohibition of discrimination • Unjustified difference in treatment by domestic courts, on the basis of “other status”, of judicial clerks *vis-à-vis* judges, concerning period of entitlement to work-related allowances

STRASBOURG

4 October 2022

FINAL

30/01/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Pinkas and Others v. Bosnia and Herzegovina,

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

Gabriele Kucsko-Stadlmayer, *President*,

Faris Vehabović,

Iulia Antoanella Motoc,

Yonko Grozev,

Pere Pastor Vilanova,

Jolien Schukking,

Ana Maria Guerra Martins, *Judges*,

and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the application (no. 8701/21) 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 fifty-one citizens of Bosnia and Herzegovina (“the applicants”) on 17 December 2020 (see the appendix);

the decision to give notice to the Government of Bosnia and Herzegovina (“the Government”) of the complaints about the outcome of the applicants’ civil case under Articles 6 § 1 and 14 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article 1 of Protocol No. 12 to the Convention and to declare inadmissible the remainder of the application; and the parties’ observations.

Having deliberated in private on 7 June and 6 September 2022,

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

INTRODUCTION

1. The application concerns the issue of meal, travel and family separation allowances for the judges and the judicial clerks at the State level. Although the same legislation applies to both categories, the national courts decided that the judicial clerks had been entitled to those allowances only from January 2013, but that the judges had been entitled to them also for the period before January 2013. The applicants were, or still are, judicial clerks at the Court of Bosnia and Herzegovina (“the State Court”). They invoke Articles 6 and 14 of the Convention, Article 1 of Protocol No. 1 and Article 1 of Protocol No. 12.

THE FACTS

2. The applicants’ personal details are set out in the appendix. One of the applicants, Ms S. Hota Čatović, a lawyer practising in Sarajevo, represented the others.

3. The Government were represented by their Acting Agent, Ms H. Bačvić.

4. The facts of the case may be summarised as follows.

5. In February 2012 ninety-seven judges and judicial clerks at the State Court brought a civil action before that court seeking meal, travel and family separation allowances starting from 2009. They relied on the Prohibition of Discrimination Act 2009 because the legislation regulating their salaries (the Judicial and Prosecutorial Institutions Salaries Act 2006), unlike the legislation regulating the salaries of all other public servants at the State level, did not provide for those allowances at that time.

6. In April 2012 the State Court stayed those civil proceedings and lodged an application for abstract constitutionality review.

7. In January 2013 the Constitutional Court, on the application for abstract constitutionality review lodged by the State Court, declared the Judicial and Prosecutorial Institutions Salaries Act 2006 unconstitutional (that is, contrary to the prohibition of discrimination and the principle of the independence of the judiciary) in so far as it did not provide for meal, travel and family separation allowances. It ordered the Parliamentary Assembly of Bosnia and Herzegovina to harmonise that Act with the Constitution within six months. The Parliamentary Assembly did so only in 2020 (see paragraph 17 below).

8. In view of a conflict of interest, the State Court could not deal with this civil case itself. It had to apply to the Supreme Court of the Federation of Bosnia and Herzegovina to refer it to another court. Given that legislative amendments were required to allow the State Court to do so in respect of its judges while it had the power to do so in respect of the judicial clerks, in September 2013 it decided to sever the case into two cases on the grounds of the status of the claimants (all the judges in one case and all the judicial clerks in the other case). Shortly thereafter, it applied to the Supreme Court of the Federation of Bosnia and Herzegovina to refer the case of the judicial clerks to another court. In March 2014, following the adoption of the required legislative amendment, it did the same with regard to the case of the judges. On 8 October 2013 and 3 April 2014, respectively, the Supreme Court referred both cases to the Municipal Court in Sarajevo (“the Municipal Court”).

9. On 27 November 2015 the Municipal Court rendered a judgment in the case involving the judicial clerks (including the late wife of one of the present applicants and all other present applicants), granting their claim. Thus it awarded them meal, travel and family separation allowances starting from 2009. During the proceedings, the defendant (the State) argued that the claim could be granted only in respect of the period after the Constitutional Court’s decision of January 2013 (see paragraph 7 above) because decisions declaring legislation unconstitutional did not have retroactive effect. The court rejected that argument on the grounds that the applicants’ claim for damages had been clearly based on the discriminatory nature of the impugned legislation, rather

than on its unconstitutionality. In this connection, it held that while it was true that the impugned legislation had been unconstitutional since January 2013, it had been discriminatory even before January 2013 (that is, from the outset). The State lodged an appeal against that judgment.

10. On 11 July 2017 the Cantonal Court in Sarajevo amended the first-instance judgment of 27 November 2015. Unlike the Municipal Court (see paragraph 9 above), it agreed with the defendant that the applicants' claim could be granted in respect of the period after January 2013 only given that Constitutional Court decisions declaring legislation unconstitutional did not have retroactive effect. As a result, the total award was reduced from around 750,000 convertible marks (BAM)¹ to around BAM 250,000 in respect of pecuniary damage and from around BAM 8,000 to around BAM 1,000 in respect of legal costs.

11. On 17 April 2018 the Supreme Court of the Federation of Bosnia and Herzegovina upheld the second-instance judgment of 11 July 2017. That decision was served on the applicants on 16 May 2018.

12. On 12 June 2018 fifty of the present applicants lodged a constitutional appeal. They complained that although the Constitutional Court had held that the impugned legislation had been discriminatory from the outset, the second- and third-instance judgments mentioned in paragraphs 10 and 11 above had awarded them meal, travel and family separation allowances for the period after January 2013 only. Those judgments had thus totally disregarded the finding of the Constitutional Court and had failed to fully remedy the consequences of the discrimination established by that court. In their opinion, the judgments in question were therefore discriminatory and arbitrary.

13. On 13 July 2018 the Municipal Court rendered a judgment in the case of the judges. Like in the case of the judicial clerks (see paragraph 9 above), it awarded them meal, travel and family separation allowances starting from 2009. The State lodged an appeal against that judgment.

14. On 27 February 2019 the Cantonal Court in Sarajevo, in a different formation than in the case concerning the judicial clerks (see paragraph 10 above), upheld the first-instance judgment of 13 July 2018. This time, without providing any reasons for this reversal of case-law, it dismissed the State's argument that the applicants' claim could be granted in respect of the period after January 2013 only. The State failed to lodge either an appeal on points of law or a constitutional appeal in that case.

15. On 15 April 2019, since their case before the Constitutional Court was still pending (see paragraph 12 above), the applicants submitted to that court the final decision concerning the judges at the State Court (see paragraph 14 above) and asserted that it proved their claim that they should have been awarded meal, travel and family separation allowances starting from 2009.

¹ The convertible mark uses the same fixed exchange rate to the euro that the German mark has (1 convertible mark = 0.51129 euros).

They also submitted that the opposite outcome in an almost identical case amounted to discrimination.

16. On 20 May 2020 the Constitutional Court rendered its decision in the case of the present applicants. It held that it could not take into consideration the decision concerning the judges at the State Court because the applicants had notified it of that decision more than sixty days from the delivery of the last decision in their own case (see paragraph 11 above). In that regard, the Constitutional Court relied on Rule 22 § 3 of its Rules (see paragraph 21 below). In view of the fact that the decisions given in the applicants' case were in line with the general rule according to which decisions declaring legislation unconstitutional did not have retroactive effect (see paragraph 22 below) and in the absence of any other indication of arbitrariness or discrimination, it dismissed the present applicants' case. That decision was served on the applicants on 23 June 2020.

RELEVANT LEGAL FRAMEWORK

I. JUDICIAL AND PROSECUTORIAL INSTITUTIONS SALARIES ACT 2006

17. In accordance with its emergency powers² and in consultation with domestic authorities, on 1 January 2006 the Office of the High Representative imposed the Judicial and Prosecutorial Institutions Salaries Act 2006 (*Zakon o plaćama i drugim naknadama u sudskim i tužilačkim institucijama na nivou Bosne i Hercegovine*, Official Gazette of Bosnia and Herzegovina nos. 90/05, 32/07 and 77/20). The Parliamentary Assembly of Bosnia and Herzegovina endorsed that Act on 30 March 2007. Under that Act, the judges, prosecutors and judicial clerks at the State level, unlike other public servants at the State level, had not been entitled to meal, travel and family separation allowances until 2020 when the Act was amended.

II. PROHIBITION OF DISCRIMINATION ACT 2009

18. The Prohibition of Discrimination Act 2009 (*Zakon o zabrani diskriminacije*, Official Gazette of Bosnia and Herzegovina nos. 59/09 and 66/16) entered into force on 5 August 2009. Section 12 § 1 of that Act entitles any person or group of persons to bring a civil claim seeking, *inter alia*, to establish discrimination, end discrimination and its consequences, and obtain compensation for pecuniary and/or non-pecuniary damage.

²For more information about those powers, also known as the "Bonn powers", see the Venice Commission's Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (document CDL-AD(2005)004 of 11 March 2005).

III. RULES OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

19. The current Rules of the Constitutional Court have been in force since 1 April 2014 (a consolidated version thereof was published in the Official Gazette of Bosnia and Herzegovina no. 94/14).

20. Rule 21 § 6 of the Rules reads as follows:

“Appellants shall keep the Constitutional Court informed of any change of address and of all legal and factual developments relevant to the case which have occurred after they lodged their appeal. Otherwise, the Constitutional Court shall decide on the basis of the case file.”

21. Rule 22 § 3 of the Rules provides:

“The appeal may not be supplemented beyond the time-limit set in Rule 18 § 1 above [that is, sixty days from the delivery of the last domestic decision in that case] without a request of the Constitutional Court.”

The Constitutional Court has consistently held that this rule applies to new complaints lodged within the context of a pending case and not to factual and legal developments relating to original complaints (see, for example, decision no. AP-2785/19 of 21 January 2021, in which the appellant first complained about the fairness of disciplinary proceedings against him and then, more than a year later, introduced a discrimination complaint; decision no. AP-3410/19 of 7 April 2021, in which the appellant introduced a totally new complaint about the fairness of a war crimes trial – that his conviction had been based on statements of witnesses, whom he had been unable to question – more than five months after the introduction of his constitutional appeal; and decision no. AP-4566/19 of 19 May 2021, in which the appellant initially complained about the deficiencies of the investigation into his allegations of ill-treatment and then, more than a year later, introduced a complaint about the fairness of criminal proceedings against him).

22. Rule 61 of the Rules provides:

“(1) The Constitutional Court shall, in the decision granting a request, decide on its legal effect (*ex tunc, ex nunc*).

(2) In a decision establishing the incompatibility under Article VI § 3 (a) or (c) of the Constitution, the Constitutional Court may quash the general act or some of its provisions, in full or partly.

(3) The quashed general act, or its quashed provisions, shall be rendered ineffective on the next day following the date of the publication of the decision in the Official Gazette of Bosnia and Herzegovina.

(4) Exceptionally, the Constitutional Court may, by its decision finding the incompatibility under Article VI § 3 (a) or (c) of the Constitution, grant a time-limit for harmonisation, which may not exceed six months.

(5) If the established incompatibility is not removed within the time-limit referred to in paragraph 4 of this Article, the Constitutional Court shall, by its decision, establish that the incompatible provisions are rendered ineffective.

(6) The incompatible provisions shall be rendered ineffective on the first day following the date of publication of the decision referred to in paragraph 4 of this Article in the Official Gazette of Bosnia and Herzegovina.”

The Constitutional Court has consistently held (see, for example, decision no. AP-2656/09 of 5 November 2013), that decisions declaring legislation unconstitutional do not have retroactive effect, unless it decides otherwise in accordance with Rule 61 § 1 of the Rules.

23. Pursuant to Rule 62 § 1 of the Rules, in a decision granting an appeal, the Constitutional Court will quash the challenged decision and refer the case back to the court or to the body which rendered that decision, for renewed proceedings, unless the consequences of a breach of constitutional rights may be removed in some other manner.

IV. CIVIL PROCEDURE ACT 2003

24. The Civil Procedure Act 2003 (*Zakon o parničnom postupku*, Official Gazette of the Federation of Bosnia and Herzegovina nos. 53/03, 73/05, 19/06 and 98/15) has been in force since 5 November 2003. Section 264a of that Act reads as follows:

“(1) When the European Court of Human Rights has found a violation of a human right or fundamental freedom guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms or additional protocols thereto ratified by Bosnia and Herzegovina, a party may, within ninety days of the judgment of the European Court of Human Rights becoming final, file an application with the first-instance court which originally adjudicated the proceedings resulting in the decision violating the human right or fundamental freedom, to set aside the decision by which the human right or fundamental freedom was violated.

(2) The proceedings referred to in paragraph 1 of this section shall be conducted by applying, *mutatis mutandis*, the provisions in relation to reopening proceedings.

(3) In the reopened proceedings the courts are required to respect the legal opinions expressed in the final judgment of the European Court of Human Rights finding a violation of a fundamental human right or freedom.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

25. The applicants complained under Article 6 § 1 about the outcome of the civil proceedings outlined above. The relevant part of that Article reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. Admissibility

1. *As regards Ms Vahida Jevtić*

26. The Government maintained that the application was inadmissible for non-exhaustion of domestic remedies in respect of Ms Vahida Jevtić because, unlike the other applicants, she had failed to pursue the constitutional appeal.

27. The applicants did not comment on this particular point.

28. The Court reiterates that States are exempted from answering before an international body for their acts until they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 70, 25 March 2014). The Court has, however, also frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (*ibid.*, § 76, and the authorities cited therein). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 286, ECHR 2012 (extracts)).

29. While it is true that one of the present applicants did not pursue the constitutional appeal, the fifty other present applicants did so, but their appeal was dismissed (see paragraph 16 above). The Court considers that in this way the domestic authorities were afforded the opportunity to remedy the breach alleged. The Court sees no reason to believe that the Constitutional Court would have decided otherwise if the remaining applicant had joined the constitutional appeal pursued by the fifty other applicants (see *Vasilkoski and Others v. the former Yugoslav Republic of Macedonia*, no. 28169/08, § 46, 28 October 2010). Therefore, this Government's objection must be rejected.

2. *As regards Mr Dženan Pušina*

30. The Government submitted that Mr Dženan Pušina could not claim to be a "victim" within the meaning of Article 34 of the Convention and that the application was therefore incompatible *ratione personae* with the provisions of the Convention for the purposes of Article 35 § 3 (a) of the Convention in his respect because he had not been a party to the impugned civil proceedings.

31. The applicants clarified that Mr Dženan Pušina was a legal heir of the late Jasmina Pušina who had been a party to the impugned civil proceedings. They provided a copy of the relevant inheritance decision.

32. In order to lodge an application in accordance with Article 34 of the Convention, an individual must be able to show that he or she was "directly affected" by the measure complained of (see *İlhan v. Turkey* [GC],

no. 22277/93, § 52, ECHR 2000-VII; *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 96, ECHR 2014). Moreover, in accordance with the Court's practice and with Article 34 of the Convention, applications can only be lodged by, or in the name of, individuals who are alive (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 111, ECHR 2009, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 96).

33. In cases in which the direct victim of an alleged violation of the Convention has died, the Court has differentiated between applications where that victim died after he or she had lodged an application with the Court and those where he or she had already died beforehand.

34. Where the direct victim died before the application was lodged with the Court, the Court's approach has generally been restrictive. It has usually declined to grant standing to any other person unless that person was able to either demonstrate a direct effect on his or her own rights or where the complaint raised an issue of general interest pertaining to "respect for human rights" and the applicant(s) as heir(s) had a legitimate interest in pursuing the application (see *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, §§ 21-31, 5 July 2005; *Micallef v. Malta* [GC], no. 17056/06, § 48, ECHR 2009; and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 98).

35. In the present case, the Court notes that the late Jasmina Pušina, who was a party to the impugned civil proceedings, died on 24 January 2018. The Court further observes that Mr Dženan Pušina lodged a constitutional appeal in his capacity as husband and heir of the late Jasmina Pušina (see paragraph 12 above) and that the Constitutional Court did not reject his appeal but dealt with the merits of his case (see *Micallef*, cited above, § 49). Lastly, it is clear that Mr Dženan Pušina has a material interest in the outcome of the present case, as he stands to inherit any pecuniary award that may have resulted from the impugned civil proceedings (see *Stoimenovikj and Miloshevikj v. North Macedonia*, no. 59842/14, § 25, 25 March 2021). In these circumstances, this Government's objection must also be rejected.

3. *The Court's jurisdiction ratione materiae*

36. The Court notes that while the crux of the applicants' complaint under Article 6 § 1 is the outcome of their civil proceedings, they also complain, although indirectly, about the outcome of their Constitutional Court proceedings (see paragraph 41 below). Although the Government did not raise an objection as to the applicability of this Article to the proceedings before the Constitutional Court, the Court considers that it has to address this issue of its own motion (see, *mutatis mutandis*, *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III).

37. The Court is aware of the special role and status of a Constitutional Court, whose task is to ensure that the legislative, executive and judicial authorities comply with the Constitution and which, in those States that have made provision for a right of individual petition, affords additional legal protection to citizens at national level in respect of their fundamental rights guaranteed by the Constitution (see *Süßmann v. Germany*, 16 September 1996, § 41, *Reports of Judgments and Decisions* 1996-IV). At the same time, the Court has consistently held that Constitutional Court proceedings do not in principle fall outside the scope of Article 6 § 1 (see *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, § 188, 7 May 2021, and the authorities cited therein). When there is a genuine and serious dispute relating to a civil right, like in the present case, Constitutional Court proceedings come within the scope of Article 6 § 1 of the Convention if their outcome is directly decisive for the right in question (*ibid.*, § 191).

38. In this connection, the Court notes that in the event of a successful appeal, the Constitutional Court of Bosnia and Herzegovina does not confine itself to identifying the provision of the Constitution that has been breached and indicating the public authority responsible, but has the power to quash the impugned decision (see Rule 62 § 1 of its Rules in paragraph 23 above). It is therefore clear that the Constitutional Court proceedings were directly decisive for a dispute over the applicants' civil right (see *Avdić and Others v. Bosnia and Herzegovina*, nos. 28357/11 and 2 others, §§ 33-39, 19 November 2013, in which the Court also applied Article 6 § 1 to proceedings before the Constitutional Court of Bosnia and Herzegovina, although in another context).

39. Accordingly, Article 6 § 1 was applicable to the Constitutional Court proceedings in the present case.

4. Conclusion

40. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

41. The applicants submitted that the domestic decisions rendered in their case were manifestly arbitrary. In support of their claim, they provided a final decision given by the Cantonal Court in Sarajevo in an almost identical case reaching the opposite conclusion (see paragraph 14 above). The fact that the State did not challenge that decision was, in their view, an indication that the decision rendered in that case was correct and that the decision rendered in their case was wrong. As a matter of pure logic, when domestic courts render opposite decisions in virtually identical situations, both those decisions could

not be correct. The applicants also submitted that this had not been remedied by the Constitutional Court.

42. The Government maintained that the Court was not a court of fourth instance. That being so, save in the event of evident arbitrariness, it was not the Court's role to question the interpretation of the domestic law by the national courts. Likewise, it was not in principle the Court's function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts. In this regard, the Government referred to *Nejdet Şahin and Perihan Şahin v. Turkey* ([GC], no. 13279/05, § 50, 20 October 2011). In their view, the reasons given by the domestic courts in the impugned civil proceedings were not arbitrary, despite the existence of conflicting court decisions regarding the same legal question.

43. The Court agrees with the Government that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. Its role is to verify whether the effects of such interpretation are compatible with the Convention (see *Nejdet Şahin and Perihan Şahin*, cited above, § 49, and the authorities cited therein).

44. In the present case, the Court observes that judges and judicial clerks at the State Court brought a joint civil action under the Prohibition of Discrimination Act 2009 seeking some work-related benefits (see paragraph 5 above). The civil courts eventually severed their case into two cases on the grounds of the status of the claimants for reasons of judicial economy (see paragraph 8 above) and reached opposite conclusions regarding one of the key legal issues raised in those cases – that is, whether the benefits at issue could be granted also for the period before January 2013 (see paragraphs 10 and 14 above).

45. As concerns the decisions given in the applicants' civil case, the Court sees no reason to disagree with the Constitutional Court that they were clearly in line with the general rule of domestic constitutional law according to which decisions declaring legislation unconstitutional did not have retroactive effect and that they were therefore not arbitrary (see paragraphs 16 and 22 above). The Court finds it appropriate to underline in this regard the importance of the principles of subsidiarity and shared responsibility. Protocol No. 15 to the Convention has inserted the principle of subsidiarity into the Preamble to the Convention (see *Grzęda v. Poland* [GC], no. 43572/18, § 324, 15 March 2022, and the authorities cited therein).

46. The Court is mindful of the fact that an opposite decision was rendered in an almost identical case (see paragraph 14 above), namely in the case of the judges at the State Court, but this happened many months after the decision in the applicants' case had become final. Moreover, the Court has already acknowledged that the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and

appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see *Nejdet Şahin and Perihan Şahin*, cited above, § 51). The Court has set out the conditions in which conflicting decisions of domestic courts are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention. One of these is the existence of “profound and long-standing” differences in domestic case-law (ibid., §§ 52-54), which is clearly not the situation here.

47. Before the Constitutional Court, the applicants claimed that they should have been awarded the allowances in question starting from 2009. The second- and third-instance judgments rendered in their case, awarding them those allowances starting from 2013, were, in their opinion, discriminatory and arbitrary (see paragraph 12 above). When the Cantonal Court in Sarajevo awarded those allowances to the judges starting from 2009, the applicants submitted that decision to the Constitutional Court and asserted that it proved their claim (see paragraph 15 above). However, relying on Rule 22 § 3 of its Rules (for the text of the Rule and the relevant case-law, see paragraph 21 above), the Constitutional Court decided that it could not take it into consideration because the applicants had notified it of that decision more than sixty days from the delivery of the last decision in their own case (see paragraph 16 above). The Constitutional Court thus treated the submission by the applicants of the decision rendered in the case of the judges as a new complaint under Rule 22 § 3 of its Rules, rather than a legal and factual development relevant to the case under Rule 21 § 6 of its Rules (see paragraph 20 above).

48. In this regard, the Court has held that the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are clearly aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty (see *Cañete de Goñi v. Spain*, no. 55782/00, § 36, ECHR 2002-VIII, and *Nakov v. the Former Yugoslav Republic of Macedonia* (dec.), no. 68286/01, 24 October 2002). The Court has also recognised that, in view of the special role played by the Constitutional Court as the court of last resort for the protection of fundamental rights, proceedings before it may be more formal (see *Arribas Antón v. Spain*, no. 16563/11, § 50, 20 January 2015). While it is true that the Constitutional Court did not elaborate as to why it decided to treat the submission by the applicants of the decision rendered in the case of the judges as a new complaint under Rule 22 § 3 of its Rules, rather than a legal and factual development relevant to the case under Rule 21 § 6 of its Rules, the applicants did not complain before this Court that the way in which the Constitutional Court had interpreted and applied its procedural rules in their case was in itself arbitrary (see *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, §§ 83-85, 11 July 2017, and *Lazarević v. Bosnia and Herzegovina*, no. 29422/17, § 30, 14 January 2020).

49. There has accordingly been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 12

50. The applicants further complained under Article 1 of Protocol No. 12 because they had been granted certain work-related allowances for the period after January 2013 only, while an analogous category of public servants had been granted those allowances also for the period before 2013. That provision 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.”

A. Admissibility

1. *The Court's jurisdiction ratione materiae*

51. While the Government did not raise an objection as to the applicability of this Article, the Court considers that it has to address this issue of its own motion (see, *mutatis mutandis*, *Blečić*, cited above, § 67).

52. The Court notes that the applicants in the present case were entitled to meal, travel and family separation allowances under domestic law at least in respect of the period after the Constitutional Court decision of January 2013 (see paragraph 7 above). Although it is not clear whether the applicants were entitled to those allowances also in respect of the period before January 2013 (see, for example, the domestic decision mentioned in paragraph 14 above), Article 1 of Protocol No. 12 extends the scope of protection not only to “any right set forth by law”, as the text of paragraph 1 might suggest, but beyond that. This follows in particular from paragraph 2, which further provides that no one may be discriminated against by a public authority (see *Savez crkava “Riječ života” and Others v. Croatia*, no. 7798/08, § 104, 9 December 2010). According to paragraph 30 of the Explanatory Report to the Protocol No. 12, the term “public authority” covers the courts.

53. Article 1 of Protocol No. 12 therefore applies to the facts of the present case.

2. *Other grounds for inadmissibility*

54. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

55. The applicants argued that pursuant to the Judicial and Prosecutorial Institutions Salaries Act 2006, read together with the Constitutional Court decision mentioned in paragraph 7 above, the judicial clerks at the State Court and the judges at that court were entitled to the same work-related allowances. Nevertheless, the applicants had been granted those allowances in respect of the period after January 2013 only, whereas the judges had been granted those allowances also for the period before 2013 (see paragraphs 10 and 14 above). Since neither the domestic courts nor the Government had indicated reasons, let alone provided objective and reasonable justification, for this differential treatment, the applicants maintained that they had been discriminated against.

56. The Government disagreed, but failed to submit any arguments in that connection. They only referred to their arguments concerning Article 6 § 1 of the Convention set out in paragraph 42 above.

57. Notwithstanding the difference in scope between the two Articles, the meaning of the notion of “discrimination” in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 of the Convention (see paragraph 18 of the Explanatory Report to the Protocol No. 12). Therefore, in applying the same term under Article 1 of Protocol No. 12, the Court sees no reason to depart from the established interpretation of “discrimination” (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 55, ECHR 2009, and *Napotnik v. Romania*, no. 33139/13, § 70, 20 October 2020).

58. In this vein the Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment of individuals in analogous, or relevantly similar, situations. For the purposes of Article 14, a difference in treatment is discriminatory if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised (see *Advisory opinion on the difference in treatment between landowners’ associations “having a recognised existence on the date of the creation of an approved municipal hunters’ association” and landowners’ associations set up after that date* [GC], request no. P16-2021-002, French *Conseil d’État*, § 72, 13 July 2022). The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Biao v. Denmark* [GC], no. 38590/10, § 90, 24 May 2016).

59. The Court has also established in its case-law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017). However, the list

set out in Article 14 is illustrative and not exhaustive (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 70, ECHR 2010). The words “other status” (and *a fortiori* the French equivalent *toute autre situation*) have been given a wide meaning and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift v. the United Kingdom*, no. 7205/07, §§ 55-59, 13 July 2010). The Court has thus held that the holding, or otherwise, of high office (see *Valkov and Others v. Bulgaria*, nos. 2033/04 and 8 others, § 115, 25 October 2011), police rank (see *Beeckman and Others v. Belgium* (dec.), no. 34952/07, § 24, 18 September 2018), or, in some circumstances, military rank (see *Engel and Others v. the Netherlands*, 8 June 1976, § 72, Series A no. 22) can be regarded as “other status” for the purposes of Article 14.

60. Turning to the present case, the Court considers that the judicial clerks (a category of public servants to which the applicants belong) and the judges at the State Court were in a relevantly similar situation for the purposes of this complaint, because the same legal regime applied to both categories of public servants in respect of meal, travel and family separation allowances (contrast *Gellérthegeyi and Others v. Hungary* (dec.), nos. 78135/13 and 429/14, §§ 34-41, 6 March 2018). The fact that their legal status was different in many other respects is irrelevant. Indeed, the Court has held that the elements which characterise different situations, and determine their comparability, must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question (see *Fábián*, cited above, § 121). The analysis of the question of whether or not two persons or groups are in a comparable situation for the purposes of an analysis of differential treatment and discrimination is thus both specific and contextual (see *Advisory opinion on the difference in treatment between landowners’ associations “having a recognised existence on the date of the creation of an approved municipal hunters’ association” and landowners’ associations set up after that date*, cited above, § 67).

61. It is not in dispute that the judicial clerks – including the applicants in the present case – were granted the work-related allowances at issue in respect of the period after January 2013 only, whereas the judges were granted those allowances also for the period before January 2013 (see paragraphs 10 and 14 above). The two categories of public servants were thus treated differently. The Court has noted that the reasoning of the domestic courts was not directly based on an identifiable characteristic, or “status”, of the litigants, but it was couched in neutral terms (see paragraphs 10 and 14 above; contrast *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, § 53, 25 July 2017). There is also no reason to believe that the domestic courts had discriminatory intent.

62. However, the Court has held that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group. Such a

situation may amount to “indirect discrimination”, which does not necessarily require a discriminatory intent (see *Biao*, cited above, § 103).

63. The special feature of the instant case is that the judges and the judicial clerks at the State Court brought a joint civil action relying on the same legal provisions, that the civil courts then severed their case into two cases on the grounds of their status (see paragraph 8 above) and reached opposite conclusions regarding one of the key legal issues raised in those cases. As a result of that special set of circumstances, all of the judicial clerks at the State Court were granted meal, travel and family separation allowances in respect of the period after January 2013 only, whereas all of the judges were granted those benefits also for the period before January 2013. Accordingly, the Court finds that this difference in treatment was based on “other status” within the meaning of Article 1 of Protocol No. 12.

64. It remains to be established whether that difference in treatment of individuals in analogous or relevantly similar situations was objectively justified (see paragraph 58 above).

65. In this regard, the Court reiterates that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 57, ECHR 2005-XII). The Government did not offer any justification for this difference in treatment (see paragraph 56 above). The same is true in respect of the domestic courts (see paragraph 14 above). That being the case, the Court cannot but conclude that this difference in treatment had no objective and reasonable justification.

66. While the Court has already acknowledged that the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction (see paragraph 46 above), having regard to the very particular circumstances of the present case set out above and where no justification whatsoever was submitted, the Court considers that there has been a violation of Article 1 of Protocol No. 12.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

67. The applicants further maintained that the outcome of the proceedings complained of was contrary to Article 14 of the Convention and Article 1 of Protocol No. 1.

68. The Government contested that argument.

69. The Court notes that these complaints are linked to those examined above and must therefore likewise be declared admissible.

70. Having regard to its finding under Article 1 of Protocol No. 12 in paragraph 66 above, the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 14 of the Convention or Article 1 of Protocol No. 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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.”

A. Damage

72. The applicants claimed different sums in respect of pecuniary damage, corresponding to the part of their civil claim rejected by the Cantonal Court in Sarajevo (see paragraph 10 above). They also claimed 1,000 euros (EUR) each in respect of non-pecuniary damage.

73. The Government contested the applicants’ claims as unfounded.

74. The Court notes that the finding of a violation in paragraph 66 above allows the applicants to seek re-examination of their case (see paragraph 24 above). Consequently, the Court considers that there is no call to award the applicants any sum on account of pecuniary damage. However, it awards the applicants the full amount claimed in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

75. The applicants claimed EUR 80,000 for the costs and expenses incurred before the domestic courts and EUR 9,000 for those incurred before the Court.

76. The Government considered that claim to be unsubstantiated.

77. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the breaches found or to obtain redress. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met (see *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 158, ECHR 2014). Simple reference to the tariff fixed by the local bar associations, for example, is insufficient in this regard. In the present case, the Court notes that the applicants have not submitted any evidence (bills or invoices) about the costs and expenses incurred. Therefore, their claim is rejected for lack of substantiation.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 12 to the Convention;
4. *Holds* that there is no need to examine the complaints under Article 14 of the Convention and Article 1 of Protocol No. 1 to the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 4 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Deputy Registrar

Gabriele Kucsko-Stadlmayer
President

APPENDIX

List of applicants (application no. 8701/21)

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1.	Emil PINKAS	1984	Bosnia and Herzegovina	Sarajevo
2.	Dženita AGIĆ	1976	Bosnia and Herzegovina	Sarajevo
3.	Sanela AVDIBEGOVIĆ	1969	Bosnia and Herzegovina	Sarajevo
4.	Lamija AVDIĆ	1983	Bosnia and Herzegovina	Sarajevo
5.	Bojan AVRAMOVIĆ	1976	Bosnia and Herzegovina	Sarajevo
6.	Selma BEGIĆ	1976	Bosnia and Herzegovina	Sarajevo
7.	Gordana BOŽIĆ	1953	Bosnia and Herzegovina	Banja Luka
8.	Feda BULJEVIĆ	1980	Bosnia and Herzegovina	Mostar
9.	Belma ČANO SEJFOVIĆ	1982	Bosnia and Herzegovina	Sarajevo
10.	Davor CILENŠEK	1983	Bosnia and Herzegovina	Kiseljak
11.	Elma ČORBADŽIĆ	1981	Bosnia and Herzegovina	Sarajevo
12.	Muhamed ČUČAK	1982	Bosnia and Herzegovina	Sarajevo
13.	Tanja CUROVIĆ	1979	Bosnia and Herzegovina	Istočno Sarajevo
14.	Ana CVJETANOVIĆ	1984	Bosnia and Herzegovina	Pale
15.	Dženana DELJKIĆ BLAGOJEVIĆ	1977	Bosnia and Herzegovina	Sarajevo
16.	Igor DUBAK	1982	Bosnia and Herzegovina	Sarajevo
17.	Lejla DŽAFERBEGOVIĆ	1979	Bosnia and Herzegovina	Sarajevo
18.	Medina DŽERAHOVIĆ	1981	Bosnia and Herzegovina	Sarajevo
19.	Amir DŽONLIĆ	1959	Bosnia and Herzegovina	Sarajevo
20.	Zlata EKERT	1954	Bosnia and Herzegovina	Sarajevo
21.	Šaćir HADŽIĆ	1960	Bosnia and Herzegovina	Bugojno
22.	Manuela HODŽIĆ	1977	Bosnia and Herzegovina	Sarajevo
23.	Erna HODŽIĆ ČUČAK	1985	Bosnia and Herzegovina	Sarajevo
24.	Amra HODŽIĆ ZEĆO	1977	Bosnia and Herzegovina	Vogošća
25.	Sabina HOTA ČATOVIĆ	1981	Bosnia and Herzegovina	Ilidža
26.	Krunoslav JELIĆ	1954	Bosnia and Herzegovina + Croatia	Sarajevo
27.	Vahida JEVTIĆ	1962	Bosnia and Herzegovina	Sarajevo

PINKAS AND OTHERS v. BOSNIA AND HERZEGOVINA JUDGMENT

No.	Applicant's Name	Year of birth	Nationality	Place of residence
28.	Maja KAPETANOVIĆ	1981	Bosnia and Herzegovina	Sarajevo
29.	Mirela KAROVIĆ	1982	Bosnia and Herzegovina	Sarajevo
30.	Snježana KOMADAN	1972	Bosnia and Herzegovina	Pale
31.	Zijada KONJHODŽIĆ	1970	Bosnia and Herzegovina + Norway	Sarajevo
32.	Lejla KURTANOVIĆ	1982	Bosnia and Herzegovina	Sarajevo
33.	Srđan MARKOVIĆ	1985	Bosnia and Herzegovina	Sarajevo
34.	Bojan MESIĆ	1983	Bosnia and Herzegovina	Sarajevo
35.	Amila MILANOV	1977	Bosnia and Herzegovina	Sarajevo
36.	Melika MURTEZIĆ	1980	Bosnia and Herzegovina	Sarajevo
37.	Danijela NOVAK	1974	Bosnia and Herzegovina	Sarajevo
38.	Ivana PETKOVIĆ	1982	Bosnia and Herzegovina	Istočno Sarajevo
39.	Amir PJANO	1973	Bosnia and Herzegovina	Sarajevo
40.	Denis PODŽIĆ	1981	Bosnia and Herzegovina	Sarajevo
41.	Milica PRANJIĆ	1982	Bosnia and Herzegovina	Konjic
42.	Dženan PUŠINA	1972	Bosnia and Herzegovina	Sarajevo
43.	Stanislava RADIVOJEVIĆ	1982	Bosnia and Herzegovina + Croatia	Sarajevo
44.	Sanida RAMIĆ-VAHIDA	1982	Bosnia and Herzegovina	Sarajevo
45.	Nermina ŠAKOVIĆ	1967	Bosnia and Herzegovina	Sarajevo
46.	Anida SARAČEVIĆ	1985	Bosnia and Herzegovina	Sarajevo
47.	Amela SMAILAGIĆ ČAMDŽIĆ	1981	Bosnia and Herzegovina	Sarajevo
48.	Berina SMAJIĆ	1971	Bosnia and Herzegovina	Sarajevo
49.	Neira TATLIĆ	1981	Bosnia and Herzegovina	Sarajevo
50.	Mirela ZUKA	1977	Bosnia and Herzegovina	Sarajevo
51.	Dražen ZUPANC	1975	Bosnia and Herzegovina	Sarajevo