



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

FIFTH SECTION

CASE OF ŠLAKU v. BOSNIA AND HERZEGOVINA

(Application no. 56666/12)

JUDGMENT

STRASBOURG

26 May 2016

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

In the case of Šlaku v. Bosnia and Herzegovina,

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

Khanlar Hajiyeu, *President*,

Faris Vehabović,

Carlo Ranzoni, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 3 May 2016,

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

PROCEDURE

1. The case originated in an application (no. 56666/12) 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 citizen of Bosnia and Herzegovina, Mr Samir Šlaku (“the applicant”), on 8 August 2012.

2. The applicant was granted leave by the President to represent himself (Rule 36 § 2 of the Rules of Court). The Government of Bosnia and Herzegovina (“the Government”) were represented by their Deputy Agent, Ms Z. Ibrahimović.

3. The applicant complained of his ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina because he does not belong to any of the “constituent people”. He relied on Article 3 of Protocol No. 1 to the Convention taken alone and in conjunction with Article 14 of the Convention, and on Article 1 of Protocol No. 12.

4. On 2 September 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1963 and lives in Sarajevo.

6. The applicant belongs to BiH’s Albanian ethnic minority. He actively participates in the social and political life of the country.

7. On 26 August 2010 the applicant obtained written confirmation by the Central Election Commission that in accordance with the Constitution of Bosnia and Herzegovina members of ethnic minorities were ineligible to

stand for election to the Presidency and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

II. RELEVANT DOMESTIC LAW AND PRACTICE

8. The relevant law and practice were outlined in *Sejdić and Finci v. Bosnia and Herzegovina* ([GC], nos. 27996/06 and 34836/06, ECHR 2009). Notably, the Constitution of Bosnia and Herzegovina makes a distinction between “constituent peoples” (persons who declare affiliation with Bosniacs¹, Croats² and Serbs³) and “others” (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood or other reasons).

9. In the former Yugoslavia, a person’s ethnic affiliation was decided solely by that person, through a system of self-classification. Thus, no objective criteria, such as knowledge of a certain language or belonging to a specific religion were required. Moreover, there was no requirement of acceptance by other members of the ethnic group in question. Since the Constitution contains no provisions regarding the determination of one’s ethnicity it appears that it was assumed that the traditional self-classification would suffice.

10. In accordance with the Constitution (Articles IV § 1 and V), only persons declaring affiliation with a “constituent people” are entitled to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina.

11. On 29 June 2010 the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) declared that it lacked jurisdiction to examine a discrimination complaint concerning the appellant’s ineligibility to stand for election to the Presidency on the ground of his ethnic origin (decision no. AP 1945/10). The appellant in that case directly relied on the *Sejdić and Finci* judgment.

¹ 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.

² 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 expression “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.

³ The Serbs are an ethnic group whose members may be natives of Serbia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression “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.

III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

12. The Committee of Ministers of the Council of Europe, in its supervisory function under the terms of Article 46 § 2 of the Convention, adopted three interim resolutions concerning the implementation of *Sejdić and Finci* judgment (see documents nos. CM/ResDH(2011)291, CM/ResDH(2012)233 and CM/ResDH(2013)259), the relevant parts of which were reproduced in *Zornić v. Bosnia and Herzegovina* (no. 3681/06, § 12, 15 July 2014). It urged the authorities of Bosnia and Herzegovina to take all the necessary steps for the full execution of that judgment by adopting required measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further delay.

13. On 4 December 2014, at its 1214th meeting, the Committee of Ministers examined again the state of implementation of *Sejdić and Finci* and adopted the following decision:

“The Deputies

1. noted with profound concern and disappointment that the elections which took place in Bosnia and Herzegovina on 12 October 2014 were held under the same regulatory framework which the European Court found to be discriminatory;

2. encouraged therefore the authorities and political leaders of Bosnia and Herzegovina to give a fresh impetus to their endeavours and in particular to intensify their efforts to reach rapidly a consensus on the content of the constitutional and legislative amendments aimed at eliminating discrimination based on ethnic affiliation in elections for the Presidency and the House of Peoples of Bosnia and Herzegovina and to ensure that the necessary amendments are adopted as a matter of priority;

3. invited the authorities to take full advantage of the readiness of the Council of Europe to provide all necessary assistance and support both to them and to the political leaders of Bosnia and Herzegovina in their efforts to implement the present judgment;

4. decided to resume the consideration of this item at their 1229th meeting (June 2015) (DH) in light of the information to be provided by the authorities of Bosnia and Herzegovina.”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 14 OF THE CONVENTION, ARTICLE 3 OF PROTOCOL No. 1 AND ARTICLE 1 OF PROTOCOL No. 12

14. The applicant complained of his ineligibility to stand for election to the House of Peoples and the Presidency on the ground of his Albanian origin, which, in his view, amounted to racial discrimination. He relied on Article 14 of the Convention, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12.

Article 14 of the Convention provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention 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.”

Article 3 of Protocol No. 1 provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

Article 1 of Protocol No. 12 to the Convention provides:

“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 parties*

15. The Government submitted that the application was incompatible with the Convention *ratione personae*: Bosnia and Herzegovina could not be held responsible for the contested constitutional provisions because the Constitution of Bosnia and Herzegovina was part of an international treaty, the Dayton Agreement.

Furthermore, the Government argued that the applicant was not actively involved in the political life of the respondent State. Thus, he could not claim to be a “victim” of the violations which he alleged. Lastly, the Government submitted that the applicant had failed to use available domestic remedies for his complaints, in particular, a constitutional appeal.

16. The applicant disputed these arguments. He submitted, in particular, that through his family and professional life he had always been involved in

the promotion and preservation of the Albanian tradition, culture and language. Working for the Department for Protection and Cooperation with Ethnic Minorities of the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, he was actively involved in the promotion and improvement of the position of minorities. Furthermore, the applicant's father was one of the founders of the Association of Albanians in Bosnia and Herzegovina (*Klub Albanaca*).

2. *The Court's assessment*

(a) *Compatibility ratione personae*

17. In *Sejdić and Finci*, cited above, the Court held that, leaving aside the question whether the respondent State could be held responsible for putting in place contested constitutional provisions, it could nevertheless be held responsible for maintaining them (*ibid.*, § 30; see also *Zornić v. Bosnia and Herzegovina*, no. 3681/06, § 16, 15 July 2014). The Court therefore rejects the Government's preliminary objection under this head.

(b) *Victim status*

18. As regards the second objection, in *Sejdić and Finci* the Court examined the applicants' victim status and concluded that, given their active participation in public life, they might claim to be victims of the alleged discrimination (*ibid.*, § 29, and *Zornić*, cited above, § 17). The Court sees no reason to depart from this conclusion in the present case and therefore rejects the Government's second preliminary objection.

(c) *Exhaustion of domestic remedies*

19. As regards the Government's objection that the applicant had failed to lodge a constitutional appeal, the Court reiterates that in *Zornić*, § 21 cited above, it held that the constitutional appeal had not been an effective remedy for the applicant's complaints which she had to exhaust before lodging the application with the Court. It therefore concluded that the Government's objection on grounds of failure to exhaust domestic remedies could not be upheld. The Court sees no reason to depart from this conclusion in the present case and therefore rejects the Government's third preliminary objection.

3. *Conclusion*

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

B. Merits

1. The applicant's submissions

21. The applicant submitted that despite being citizen of Bosnia and Herzegovina he is denied by the Constitution any right to stand for election to the House of Peoples and the Presidency on the grounds of his race/ethnicity (ethnic discrimination has been held by the Court to be a form of racial discrimination in *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII). By failing to implement the *Sejdić and Finci* judgment Bosnia and Herzegovina continued with exclusion of ethnic minorities in political participation and representation at the highest level of State.

2. The Government's submissions

22. The Government argued that the current constitutional structure in Bosnia and Herzegovina was established by a peace agreement following one of the most destructive conflicts in recent European history. Its ultimate goal was the establishment of peace and dialogue between the three main ethnic groups – the “constituent peoples”. The Government maintained that the contested constitutional provisions, excluding persons who did not declare affiliation with a “constituent people” from the House of Peoples and the Presidency, should be assessed against this background. They claimed that the time was still not ripe for a political system which would be a simple reflection of majority rule, given, in particular, the prominence of mono-ethnic political parties and the continued international administration of Bosnia and Herzegovina.

23. The Government further submitted that the “passive” electoral rights of a “constituent people” were also restricted as regards both the elections to the House of Peoples and the elections to the Presidency. The Bosniac and Croat members to the House of Peoples were selected by the Bosniac and Croat members of the House of Peoples of the Federal Parliament. The Serb members were selected by the National Assembly of the Republika Srpska. Therefore, there was no direct election to the House of Peoples. Furthermore, a restriction based on the territoriality principle applied in the election to the Presidency: a Bosniac and a Croat member of the Presidency were elected by the voters from the territory of the Federation of Bosnia and Herzegovina, while a Serb member of the Presidency was elected by the voters from the Republika Srpska.

3. The Court's assessment

24. Discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. “No objective and reasonable justification” means that the distinction in issue does not pursue

a “legitimate aim” or that there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see, among many authorities, *Hämäläinen v. Finland* [GC], no. 37359/09, § 108, ECHR 2014). The scope of a Contracting Party’s margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (*ibid.*, § 109).

25. The Court further reiterates that the same term “discrimination” from Article 14 was used in Article 1 of Protocol No. 12 as well. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court sees no reason to depart from the settled interpretation of “discrimination”, as developed in the jurisprudence concerning Article 14, in applying the same term under Article 1 of Protocol No. 12 (see *Sejdić and Finci*, § 55; *Ramaer and Van Willigen v. the Netherlands* (dec.), no. 34880/12, 23 October 2012, §§ 88-91; and *Zornić*, cited above, § 27).

(a) As regards the House of Peoples of Bosnia and Herzegovina

26. The applicant relied on Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone, and Article 1 of Protocol No. 12. The Court will first examine this complaint under Article 14 taken in conjunction with Article 3 of Protocol No. 1. Furthermore, the test for Article 14 and Article 1 of Protocol No. 12 being the same (see paragraph 25 above), the Court finds it appropriate to look at this complaint under Article 1 of Protocol No. 12 at the same time.

27. The Court has already held in *Sejdić and Finci* that elections to the House of Peoples of Bosnia and Herzegovina fall within the scope of Article 3 of Protocol No. 1 (*ibid.*, §§ 40 and 41). Accordingly, Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1 is applicable in the present case.

28. The Court observes that in accordance with the Constitution only persons declaring affiliation with a “constituent people” (Bosniacs, Croats and Serbs) are entitled to run for the House of Peoples of Bosnia and Herzegovina. The applicant, who belongs to Albanian ethnic minority and who does not wish to declare affiliation with a “constituent people”, is, as a result, excluded (see *Sejdić and Finci*, cited above, § 45).

29. The present case is, therefore, identical to *Sejdić and Finci* in which the Court concluded that these constitutional provisions amounted to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 (*ibid.*, § 50). Accordingly, and for the detailed reasons elaborated in *Sejdić and Finci* (§§ 47-49), the Court concludes that there has been a violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and a violation of Article 1 of

Protocol No. 12 resulting from the applicant's continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina.

30. Having regard to its finding in the preceding paragraphs, the Court considers that it is not necessary to examine separately whether there has also been a violation of Article 3 of Protocol No. 1 taken alone as regards the House of Peoples.

(b) As regards the Presidency of Bosnia and Herzegovina

31. The applicant relied on Article 1 of Protocol No. 12 only.

32. The Court has already found this Article to be applicable to elections to Presidency of Bosnia and Herzegovina in *Sejdić and Finci* (ibid., § 54).

33. The applicant's ethnic origin and lack of affiliation with a "constituent people" also render him ineligible to stand for election to the Presidency. An identical constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 as regards the House of Peoples (see paragraph 29 above) and, moreover, the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner (see paragraph 25 above). In *Sejdić and Finci* (ibid., § 56) the Court has already found that the constitutional provisions which rendered the applicants ineligible for election to the Presidency were discriminatory and in breach of Article 1 of Protocol No. 12. The Court does not see any reason to depart from that jurisprudence in the present case.

34. There has accordingly been a violation of Article 1 of Protocol No. 12 as regards the present applicant's ineligibility to stand for election to the Presidency.

II. APPLICATION OF ARTICLE 46 OF THE CONVENTION

35. The Court finds it appropriate to consider the present case under Article 46 of the Convention, as it did in *Zornić* (cited above, §§ 38-43). Article 46, in so far as relevant, provides:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution ..."

36. The Court recalls that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by

solving the problems that have led to the Court's findings (see, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000 VIII; *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II; *Karanović v. Bosnia and Herzegovina*, no. 39462/03, § 28, 20 November 2007; *Čolić and Others v. Bosnia and Herzegovina*, nos. 1218/07 et al., § 17, 10 November 2009; and *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 106, ECHR 2010 (extracts)).

37. The Court further recalls its finding in *Sejdić and Finci* that constitutional provisions which rendered the applicants ineligible to stand for elections to the House of Peoples and to the Presidency of Bosnia and Herzegovina amounted to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12. It emphasises that the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*. The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery (see *Greens and M.T.*, cited above, § 111).

38. Pursuant to Article 46 § 2, *Sejdić and Finci* is currently under the supervision of the Committee of Ministers, which has regularly examined domestic developments and sought a speedy end to the prevailing situation of non-compliance. It has always considered that a number of amendments to the Constitution of Bosnia and Herzegovina and its electoral legislation should be adopted for the execution of this judgment. The Committee of Ministers adopted three interim resolutions and one decision urging the authorities of Bosnia and Herzegovina to take all the necessary steps for the full execution of that judgment by adopting necessary measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further delay (see paragraphs 12 and 13 above; see also Resolutions nos. 1701(2010), 1725(2010) and 1855(2012) and Recommendation no. 2025(2013) of the Parliamentary Assembly of the Council of Europe).

39. In light of the lengthy delay which has already occurred, the Court, like the Committee of Ministers, is anxious to encourage the speediest and most effective resolution of the situation in a manner which complies with

the Convention's guarantees (compare, *Greens and M.T.*, cited above, § 112).

40. In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing" (see *ibid.*, § 45). The nature of the conflict was such that the approval of the "constituent peoples" was necessary to ensure peace (*ibid.*). However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed 128,250.72 euros (EUR) in respect of pecuniary damage (a difference in a monthly salary of a member of the House of Peoples and the applicant's current monthly salary, for the past four years). He also sought EUR 20,000 in respect of non-pecuniary damage.

43. The Government maintained that the claims were unjustified.

44. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. With regard to non-pecuniary damage, the Court considers, in the light of all the circumstances of the case, that the finding of a violation is sufficient to remedy any harm that the applicant's inability to stand for elections to the House of Peoples and to the Presidency of Bosnia and Herzegovina may have caused him (see *Sejdić and Finci*, cited above, § 63).

B. Costs and expenses

45. The applicant claimed EUR 1,414 for his costs and expenses. However, he submitted this claim outside the set time-limit. In view of this and the fact that the applicant was granted leave for self-representation, the Court considers that there is no ground to make an award under this head (see *Brincat v. Italy*, 26 November 1992, § 29, Series A no. 249-A, and *Stamoulakatos v. Greece (no. 2)*, 26 November 1997, § 53, *Reports of Judgments and Decisions* 1997-VII).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 as regards the applicant's ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 12 as regards the applicant's ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina;
4. *Holds* that there is no need to examine the same complaint under Article 3 of Protocol No. 1 taken alone;
5. *Holds* that there has been a violation of Article 1 of Protocol No. 12 as regards the applicant's ineligibility to stand for election to the Presidency of Bosnia and Herzegovina;
6. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 May 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Khanlar Hajiyev
President