



DECISION ON ADMISSIBILITY

in

Case No. CH/98/230 Adnan SULJANOVIĆ and

Case No. CH/98/231 Edita ČIŠIĆ and Asim LELIĆ

against

the State of Bosnia and Herzegovina

Republika Srpska

The Human Rights Chamber for Bosnia and Herzegovina, sitting on 14 May 1998, with the following members present:

Michèle PICARD, President
Manfred NOWAK, Vice-President
Dietrich RAUSCHNING
Hasan BALIĆ
Rona AYBAY
Vlatko MARKOTIĆ
Jacob MÖLLER
Želimir JUKA
Mehmed DEKOVIĆ
Giovanni GRASSO
Miodrag PAJIĆ
Vitomir POPOVIĆ
Viktor MASENKO-MAVI
Andrew GROTRIAN

Peter KEMPEES, Registrar
Olga KAPIĆ, Deputy Registrar

Having considered the admissibility of the applications by Adnan Suljanović against the State of Bosnia and Herzegovina and the Republika Srpska, registered under Case No. CH/98/230, and by Edita Čišić and Asim Lelić against the State of Bosnia and Herzegovina and the Republika Srpska, registered under Case No. CH/98/231, referred to it by the Human Rights Ombudsperson for Bosnia and Herzegovina in accordance with paragraph 1 of Article VIII of the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following Decision on the admissibility of the case under Article VIII of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina and Rule 49 of its Rules of Procedure.

I. INTRODUCTION

1. The applicants are citizens of Bosnia and Herzegovina currently resident in Trier in Germany. They had previously resided in an area now part of the Republika Srpska in Bosnia and Herzegovina. In accordance with the provisions of Annex 3 of the General Framework Agreement for Peace in Bosnia and Herzegovina (the "General Framework Agreement"), the applicants were entitled to vote in the elections for the National Assembly of the Republika Srpska ("the Elections") held in November 1997.

2. The Elections were held with the assistance of the Organisation for Security and Co-operation in Europe (the "OSCE"), who administered the Elections for out-of-country voters, including the applicants. Due to the failure of the procedures adopted by the OSCE in relation to the administration of out-of-country voting to comply with the Rules and Regulations of the Provisional Election Commission (the "PEC"), established under Article III of Annex 3 to the General Framework Agreement, the votes of the applicants were not counted as valid.

II. COMPLAINTS

3. The applicants complain in both cases that they were improperly excluded from the Elections as a result of a number of mistakes in the organisation of the out-of-country voting procedure. In particular, the exclusion of their votes was a result of a failure to inform them in proper time that their ballots had to be posted no later than 24 November 1997 and of a failure to provide them in a timely manner with the necessary voter registration receipt in accordance with the PEC Rules and Regulations.

III. PROCEEDINGS BEFORE THE HUMAN RIGHTS OMBUDSPERSON

4. The applicant in case no. CH/98/230, Adnan Suljanović, lodged an application with the Human Rights Ombudsperson for Bosnia and Herzegovina (the "Ombudsperson") on 11 December 1997 which was registered on 12 December 1997. The applicants in case no. CH/98/231, Edita Čišić and Asim Lelić, lodged an application with the Ombudsperson on 10 December 1997 which was registered on 12 December 1997. The proceedings outlined below apply equally to both applications.

5. On 11 December 1997, the Ombudsperson, in accordance with Rule 16 of her Rules of Procedure, indicated to the respondent Parties that it was desirable to secure that the ballots which were received in Vienna before 5 December 1997 but which were posted after 24 November 1997 were safeguarded pending the decision of the Ombudsperson on whether or not to open an investigation into the applications.

6. On 17 December 1997, the Ombudsperson decided, pursuant to Rule 20 of her Rules of Procedure, to open an investigation and to notify the respondent Parties of the applications. She further decided to invite the respondent Parties to submit written observations, arguments or proposed solutions, in the context of the complaints of the applicants under Article 3 of Protocol No. 1 to the European Convention on Human Rights (the "Convention").

7. Neither respondent Party submitted observations on the admissibility and merits of the applications. The respondent Parties submitted replies to the Ombudsperson's request under Rule 16 of her Rules of Procedure on 17 December 1997 in the case of the State of Bosnia and Herzegovina and on 18 December 1997 in the case of the Republika Srpska.

8. The Ombudsperson sought, in accordance with Rule 21 of her Rules of Procedure, to mediate between the Parties with a view to facilitating an amicable resolution. These attempts were stated by the Ombudsperson not to have had any prospect of success.

9. On 20 February 1998, the Ombudsperson adopted reports in accordance with Rule 25 of her Rules of Procedure and paragraph 4 of Article V of Annex 6 to the General Framework Agreement. The Ombudsperson concluded that there had been a violation of Article 3 of Protocol No. 1 to the Convention and that the respondent Parties, “although not directly involved in the organisation of the elections at issue ... (were) responsible therefor under Annex 3 to the (General Framework Agreement).” The Ombudsperson found that the respondent Parties had accordingly failed to comply with their obligations under Article I of Annex 6 to the General Framework Agreement.

10. The Ombudsperson recommended that the respondent Parties should, within four weeks of the publication of her report, “publicly acknowledge that the applicant’s rights under Article 3 of Protocol 1 to the Convention have been violated and express recognition of the wrong done” and pay to each applicant the symbolic sum of 1 German Mark (DEM) “as compensation for ... moral damage suffered” by them.

11. The Ombudsperson initiated proceedings before the Chamber on 12 March 1998 on the basis of her reports, in accordance with paragraph 7 of Article V of Annex 6 to the General Framework Agreement. She stated in her letter informing the Registrar of the Chamber that she had given the respondent Parties until 6 March 1998 to respond to her recommendations contained in her report of 20 February 1998.

IV. PROCEEDINGS BEFORE THE CHAMBER

12. The applications were registered by the Chamber on 16 March 1998. On the same day, the President of the Chamber, in accordance with her powers under paragraph 1 of Article X of Annex 6 to the General Framework Agreement, ordered both respondent Parties to “secure that all ballot papers for the 1997 Elections to the National Assembly of the Republika Srpska received in Vienna before 5 December 1997 but posted after 24 November 1997 be safeguarded.” The President determined that the above order should “remain in force until the Chamber (had) given its final decision in the case, unless the Chamber (withdrew) it before then.” The Order also directed the Registrar of the Chamber to transmit copies of it to the Office of the High Representative and the OSCE, which was done on 17 March 1998.

13. The Chamber considered the applications at its plenary session on Saturday 4 April 1998 and decided, under Rule 34 of its Rules of Procedure (the “Rules”), to join them.

V. FACTS

14. The facts, as they appear from the applications and the report of the Ombudsperson, are set out below. The respondent Parties did not challenge the facts as set out by the applicants in the proceedings before the Ombudsperson.

15. On 24 October 1997 the OSCE sent letters to all registered out-of-country voters from Bosnia and Herzegovina, informing them that they were entitled to vote in any election that would take place in the Republika Srpska in 1997. This was due to the fact of their registration to vote in the 1997 Municipal Elections in Bosnia and Herzegovina. They were also informed that, in the event that an election should be called, a ballot paper would be mailed to them automatically, together with an instruction sheet. The letter stated that it was to be retained by the voter, as it constituted a “Voter Registration Receipt” and should be returned with any ballot paper in order for such ballot to be counted as valid.

16. In accordance with Article 140(b) of the Rules and Regulations of the PEC, the OSCE established an “Out-of-Country Voting Steering Board” (“OCV”) to be responsible for the administration of voting by out-of-country voters registered to take part in the Elections. Between 5 and 9 November 1997, the OCV sent to registered out-of-country voters a package containing an

explanatory letter, a ballot paper, a ballot envelope and a return envelope bearing the address of the OCV in Vienna, Austria. The explanatory letter set out the procedure to be followed by voters. This procedure included enclosing the letter dated 24 October 1997 (see paragraph 15 above). The explanatory letter also stated that failure to enclose the letter of 24 October 1997 would render the ballot paper invalid. Voters were also warned as follows: "Please note that in order to be counted, your ballot must be received at the OCV Vienna by 5 December 1997 at the latest. Therefore, you should return your ballot immediately."

17. The applicants in both cases allege that they had never received the letter of 24 October 1997. Accordingly, they wrote to the OCV in Vienna, requesting guidance on how to proceed without it. On 24 November 1997, the applicants received a copy of a press announcement released by the OCV and carrying the logos of the OSCE and the International Organization for Migration (the "IOM"). This press release stated that "apparently, some eligible voters have not received the registration receipt". Such voters were instructed to return the instruction leaflet they received with their ballot papers, as this carried sufficient information to identify the voter. The press release concluded by stating as follows: "It is reminded that ballots should be returned immediately. Only ballots that will be received at the OCV in Vienna by closure of December 5 will count valid." (sic)

18. In reliance on the above press release, the applicants posted their ballots after 24 November 1997. The Elections had taken place on 22 and 23 November 1997.

19. On 28 November 1997, the PEC decided that all ballots received up to 5 December 1997 and bearing a postmark of 24 November 1997 or earlier would be counted as valid. This decision was based upon the PEC's interpretation of Rule 86 of its Rules and Regulations, which states that in-country, in-person and absentee voting will take place on the same day. In view of the fact that 23 November 1997 was a Sunday, 24 November 1997 was deemed to be the final day for absentee voting. Accordingly, the ballots of the applicants were not counted as valid.

20. A complaint was lodged with the Election Appeals Sub-Commission (the "EASC") on an unspecified date. A Judgment was given on 6 December 1997, by the Chairman of the EASC, Judge Finn Lynghjem. After recounting the relevant facts, Judge Lynghjem stated that:

"Given the obvious inconsistency between the instructions to voters (from the OCV) and the decision of the PEC, the EASC must determine which instructions prevail. If the original instructions to the voters prevail, all absentee ballots received at OCV Vienna on or before 5 December 1997 would be counted regardless of the date they were mailed. If the PEC decision prevails, all absentee ballots postmarked after 24 November 1997 would be eliminated from the count, even though they may have been received at OCV Vienna by the 5 December deadline established in the instructions.

In analyzing these questions, the first issue to be addressed is whether the PEC's decision is a correct interpretation of the PEC *Rules and Regulations*.

Article 140 of the PEC *Rules and Regulations* is entitled *Out-of-Country Voting* and states in paragraph (a): *The Rules and Regulations of the Provisional Election Commission apply to the 1997 Elections to the National Assembly of the Republika Srpska outside Bosnia and Herzegovina*. Article 86 states: *In country, in-person voting and absentee voting will take place on the same day* (emphasis added). As this language makes clear, it was never the intent of the PEC to allow an absentee ballot cast after the actual election to be counted. Accordingly, it is the decision of the EASC that Article 86 prohibits the receipt of any absentee ballot that is postmarked after the last day of elections. (...)

Having concluded that the PEC's decision correctly interprets Article 86 of the PEC *Rules and Regulations*, the matter of the voter instructions will be addressed.

First of all, there is little doubt that had the instructions to the voters accurately informed them of the requirements of Article 86, the complaint in this case would be dismissed out of hand for reasons explained in the foregoing paragraphs.

Unfortunately, the EASC is faced with a situation in which an office of the OSCE, a body tasked by Annex 3, Article II of the General Framework Agreement for Peace in Bosnia and Herzegovina with implementing these elections, has misinformed out-of-country, by-mail voters of the correct procedure for submitting an absentee ballot. Such an error is a tragedy of the first order and now forces this Sub-Commission to choose between the misinformation disseminated by the OSCE, and the legally correct decision of the PEC. For reasons explained below, the EASC concurs with the decision of the PEC and concludes that all ballots postmarked after 24 November 1997 must be rejected.

While the inaccurate instructions sent to absentee voters by the OSCE is unfortunate, they in no manner modify or waive the provisions of Article 86. Only the PEC has authority to modify or waive its own regulations. The voter instructions in this case were issued by the Elections branch of the OSCE, not the PEC. If the OSCE has no authority to modify the rules directly, they should not be allowed to do so indirectly by disseminating erroneous information. In the opinion of the EASC, to allow these erroneous instructions to now become binding upon the PEC would violate the most fundamental principle underlying not only these elections, but any democratic institution - the Rule of Law. The law in this case is not in question as it is clear from the above discussion that the law requires in-country and out-of-country voting to take place on the same day. What is in question is whether the mistake of a single office, or perhaps a single individual, should be the basis upon which the law is modified. In this case, the complainant is asking the EASC to modify the provisions of Article 86 because the OSCE was derelict in its obligation to fully, and accurately, inform the voters. This the EASC is unwilling to do and, for that reason, endorses the 28 November decision of the PEC.

The disenfranchisement of voters, through no fault of their own, is a serious matter and contrary to the goals of a free and fair election as envisaged by the General Framework Agreement for Peace in Bosnia and Herzegovina. Nevertheless, Article 86 unambiguously states that absentee voting must occur on the same day as in-country voting and the EASC is compelled to enforce this article as it is written. The EASC again stresses, however, that confusion regarding ballot completion must be avoided and recommends that the PEC take all necessary steps to avoid such confusion in future elections. (...)

Decision

For reasons set forth in the foregoing Opinion, it is the decision of the EASC that all absentee ballots postmarked after 24 November 1997 are invalid and shall not be counted in the 1997 Elections to the National Assembly of the Republika Srpska.

Judge Finn Lynghjem”

21. The results of the Elections were certified by the PEC as definitive on 12 December 1997.

A. Relevant legislative provisions

Article IV of the General Framework Agreement

22. Article IV of the General Framework Agreement states:

“The Parties welcome and endorse the elections program for Bosnia and Herzegovina as set forth in Annex 3. The Parties shall fully respect and promote fulfilment of that program.”

Annex 3 to the General Framework Agreement

23. Annex 3 to the General Framework Agreement, entitled "Agreement on Elections", sets out the programme for the holding of elections throughout Bosnia and Herzegovina. Article II of Annex 3, entitled "The OSCE Role" states:

"1. OSCE. The Parties request the OSCE to adopt and put in place an elections program for Bosnia and Herzegovina as set forth in this Agreement.

2. Elections. The Parties request the OSCE to supervise, in a manner to be determined by the OSCE and in cooperation with other international organisations the OSCE deems necessary, the preparation and conduct of elections for ... the National Assembly of the Republika Srpska"

3. The Commission. To this end, the Parties request the OSCE to establish a Provisional Election Commission ("the Commission").

4. (...)"

24. Article III of Annex 3 is entitled "The Provisional Election Commission". Paragraphs 1 and 2 of Article II read as follows:

"1. Rules and Regulations. The Commission shall adopt electoral rules and regulations regarding: ... the eligibility of candidates and voters, ... and the establishment, publication and certification of definitive election results. The Parties shall comply fully with the electoral rules and regulations, any internal laws and regulations notwithstanding."

2. Mandate of the Commission. The responsibilities of the Commission, as provided in the electoral rules and regulations, shall include:

(a) (...)

(b) determining voter registration provisions;

(c) ensuring compliance with the electoral rules and regulations established pursuant to this Agreement"

Rules and Regulations of the PEC

25. The Rules and Regulations of the PEC were published in English in the Official Gazette of Bosnia and Herzegovina, Special Edition of 30 October 1997 and in the national languages in the Official Gazette of Bosnia and Herzegovina of 12 November 1997, distributed on 19 November 1997.

26. Article 86 of the Rules and Regulations states as follows: "In-country, in-person and absentee voting will take place on the same day."

27. Article 113 establishes the EASC and states that it "will be a juridical body whose four members are appointed by the Chairman of the (PEC) in consultation with its members. It shall have its powers delegated therein by the PEC"

28. Article 114, entitled "Function", states as follows:

"The function of the (EASC) will be to ensure compliance with the electoral Rules and Regulations established by the (PEC) and adjudicate complaints with regard to the electoral process referred to it by the (PEC), the Media Experts Commission, political parties, candidates, individuals or other entities.

The (EASC) will adjudicate complaints regarding the following matters:

1) violations of provisions on elections in the (General Framework Agreement);

and

2) violations of the *Rules and Regulations* of the (PEC):

(...)

(vi) Any other procedures or rules, including applications, polling and counting procedures established by the (PEC) “

29. Article 118, entitled “Decisions” states:

“In the event that a consensus cannot be reached by the (EASC), the Chairman will make the final and binding decision.

(...)

The decision of the (EASC) shall be binding and may not be appealed.”

30. Article 140, entitled “Out-of-country voting”, states, insofar as relevant:

“(a) The Rules and Regulations of the Provisional Election Commission apply to the 1997 Elections to the National Assembly of the Republika Srpska outside Bosnia and Herzegovina.

(b) The administration of the elections outside Bosnia and Herzegovina will be overseen by the Out-of-Country Voting Steering Board, appointed by the OSCE Head of Mission.

(c) In each country the elections will be supervised by OSCE supervisors.

(d) A Memorandum of Understanding between each host Country and the OSCE will be drawn up

(e) The Memorandum of Understanding will set out the procedures to be used for registrations and voting and will ensure that all procedures are in accordance with the Rules and Regulations of the (PEC)....

(f) (...)

(g) Voter education and information materials will be disseminated by the host countries, refugee organisations, UNHCR, IOM, participating NGO’s and the embassies of Bosnia and Herzegovina.”

VI. OPINION OF THE CHAMBER

31. Paragraph 2 of Article II of Annex 6 to the General Framework Agreement states as follows:

“The Office of the Ombudsman and the Human Rights Chamber shall consider, as subsequently described:

(a) alleged or apparent violations of human rights as provided in the (Convention) and the Protocols thereto, or

(b) alleged or apparent discrimination on any ground ... arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex, where such violation is alleged or appears to have been

committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ.”

32. During the procedure before the Ombudsperson, the Government of the Republika Srpska and one Co-Chair of the Council of Ministers of Bosnia and Herzegovina denied any responsibility of the respective respondent Parties in regard to the issue, on the ground that the OSCE and the PEC had full competence over the organisation and supervision of the Elections (paragraph 37 of the reports of the Ombudsperson). In paragraph 38 of each of her Reports on the two cases, the Ombudsperson stated, however, that she considered “that, under Article II of Annex 3 to the Dayton Agreement, both respondent Parties are directly responsible for the conduct of the OSCE and of any other body or organization acting on their behalf in organizing the elections.”

33. Before considering the case on its merits, the Chamber must decide whether to accept the case taking into account the admissibility criteria set out in Article VIII(2) of Annex 6 to the General Framework Agreement, which, insofar as is relevant, provides as follows:

“1. The Chamber shall receive by referral from the Ombudsman on behalf of an applicant ... for resolution or decision applications concerning alleged or apparent violations of human rights within the scope of paragraph 2 of Article II.

2. The Chamber shall decide which applications to accept and in what priority to address them. In so doing, the Chamber shall take into account the following criteria:

(a) (...)

(b) (...)

(c) The Chamber shall ... dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right to petition.”

As to whether the respondent Parties are responsible for the impugned acts

34. Since the case concerns the actions of the OSCE, the EASC and PEC, the Chamber has considered whether or not the case is within the competence of the Chamber *ratione personae*.

35. The Ombudsperson was of the opinion that the responsibility of Bosnia and Herzegovina and the Republika Srpska followed from Article II of Annex 3 to the General Framework Agreement.

36. The Chamber is of the view that any actions taken by the OSCE are, as such, outside the competence of the Chamber *ratione personae*. It must be seen whether the same applies to the OSCE's actions in pursuance of its role under Annex 3.

37. In Article IV of the General Framework Agreement, the Parties “welcome and endorse the elections program for Bosnia and Herzegovina as set forth in Annex 3” (see paragraph 22 above). In Article II(1) of Annex 3 to the General Framework Agreement, the Parties request the OSCE “to adopt and put into place an elections program for Bosnia and Herzegovina....”. In addition, the OSCE is requested to supervise the preparation and conduct of elections for various legislatures in Bosnia and Herzegovina, including the Republika Srpska, “in a manner to be determined by the OSCE and in cooperation with other international organizations the OSCE deems necessary....”.

38. The above language is redolent of language used throughout the Annexes to the General Framework Agreement. In particular, in Article I(2) of Annex 10 to the General Framework Agreement, entitled “Agreement on Civilian Implementation of the Peace Settlement”, the Parties request “the designation of a High Representative ... to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement” and in Article I(2) of Annex 11, entitled “Agreement on International Police Force”, the Parties “request that the United Nations establish by a decision of the Security Council ... a U.N. International Police Task Force (IPTF)”.

39. It is beyond doubt that the actions of neither the High Representative nor the IPTF are subject to any review in relation to the carrying out of their functions under the General Framework Agreement. For this to be the case, the General Framework Agreement would have to provide specifically for any such review.

40. The Rules and Regulations of the PEC derive their authority from powers and responsibilities delegated to the OSCE under Annex 3 to the General Framework Agreement. Accordingly, the EASC's jurisdiction also derives from the General Framework Agreement. It is the sole review mechanism of a judicial nature provided for under Annex 3.

41. In concluding the General Framework Agreement, the Parties, with the assistance of the international community, have created a number of offices and institutions, either directly (such as the Chamber) or through existing international bodies (such as the OSCE), to assist them in achieving the objectives set out therein. The Parties are required to comply with the decisions of such offices and institutions, as provided for in the General Framework Agreement. Thus, the nature of the functions carried out by the OSCE under Annex 3, which in substance is the management of elections in Bosnia and Herzegovina, is not such as to be subject to review, except as specifically provided for in Annex 3. The PEC, established by the OSCE in accordance with Annex 3 to the General Framework Agreement, passed a set of Rules and Regulations regulating the conduct of the Elections (see paragraphs 25-30 above). Chapter VIII of the Rules and Regulations establishes the EASC. Article 114 sets out the functions of the EASC. Article 114(1) states that the EASC may adjudicate complaints regarding, inter alia, "violations of provisions on elections in the (General Framework Agreement)" as well as complaints regarding violations of the PEC Rules and Regulations. Article 118 clearly indicates that decisions of the EASC are to be binding and without appeal.

42. The actions complained of were carried out exclusively by the OSCE, PEC and EASC within the scope of them carrying out their responsibilities under Annex 3 to the General Framework Agreement. The General Framework Agreement does not provide for the intervention of either respondent Party in the conduct of the elections. Accordingly, these actions are not such as are within the responsibility of either respondent Party.

43. In conclusion, while it is possible that a breach of the rights of the applicants as guaranteed by Article 3 of Protocol No. 1 to the European Convention on Human Rights may have occurred, the impugned acts do not come within the responsibility of the respondent Parties and are therefore outside the competence of the Chamber under Article II and VIII(I) of Annex 6 to the General Framework Agreement. Accordingly the application is inadmissible under Article VIII(2)(c) of Annex 6 to that Agreement.

Order for provisional measures

44. The Chamber considers that the order for provisional measures made by its President is no longer appropriate and that it should be withdrawn.

VII. CONCLUSIONS

45. For the reasons given above the Chamber unanimously:

1. **Declares** the applications inadmissible;
2. **Withdraws** the order for provisional measures made by its President on 16 March 1998.

(signed) Peter KEMPEES
Registrar of the Chamber

(signed) Michèle PICARD
President of the Chamber