



DECISION ON ADMISSIBILITY AND MERITS

Cases nos. CH/03/12861 and CH/03/12862

J.I. and Cvjetko RISTIĆ

against

**BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA**

The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina, sitting in plenary session on 10 September 2004 with the following members present:

Mr. Jakob MÖLLER, President
Mr. Miodrag PAJIĆ, Vice-President
Mr. Želimir JUKA
Mr. Mehmed DEKOVIĆ
Mr. Andrew GROTRIAN

Mr. J. David YEAGER, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Meagan HRLE, Deputy Registrar

Having considered the aforementioned applications introduced to the Human Rights Chamber for Bosnia and Herzegovina pursuant to Article VIII(1) of the Human Rights Agreement (“the Agreement”) set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Noting that the Human Rights Chamber for Bosnia and Herzegovina (“the Chamber”) ceased to exist on 31 December 2003 and that the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina (“the Commission”) has been mandated under the Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina entered into on 22 and 25 September 2003 (“the 2003 Agreement”) to decide on cases received by the Chamber through 31 December 2003;

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement, Articles 5 and 9 of the 2003 Agreement and Rules 32, 50, 54, 56 and 57 of the Commission’s Rules of Procedure:

I. INTRODUCTION

1. The applicants are citizens of Bosnia and Herzegovina of Serb origin. Before the outbreak of the armed conflict in Bosnia and Herzegovina they were living on the territory of the Federation of Bosnia and Herzegovina. They acquired their pension rights with the former Social Fund of Pension and Disability Insurance of the Socialist Republic of Bosnia and Herzegovina ("the SRBiH Fund"). During the armed conflict pensions were paid to the applicants by the Public Fund of Pension and Disability Insurance of the Republika Srpska ("the RS Fund"). After the war, the applicants returned to their pre-war homes, and they now live on the territory of the Federation of Bosnia and Herzegovina. They still receive their pensions from the RS Fund, however, although for most of their working years they worked on what is now the territory of the Federation of Bosnia and Herzegovina. They seek to obtain their pension payments from the Federation PDI Institute ("the Federation Fund").

2. The applicants complain of the difference between the pensions they would receive from the Federation Fund and those they are receiving from the RS Fund because pensions are higher in the Federation of Bosnia and Herzegovina. The applications appear to raise issues under Article 1 of Protocol No. 1 to the European Convention on Human Rights ("the "Convention") and Article 9 of the International Covenant on Economic, Social and Cultural Rights ("the ICESCR").

3. Considering the similarity between the facts of the cases and the complaints of the applicants, the Commission decided to join the present applications in accordance with Rule 32 of its Rules of Procedure.

II. PROCEEDINGS BEFORE THE CHAMBER AND COMMISSION

4. The applications were introduced on 14 January 2003. The Commission considered the cases during its session on 9 March 2004 and decided to transmit the cases to the respondent Parties for their observations on the admissibility and merits under Articles 8 and 13 of the Convention, Article 1 of Protocol No. 1 to the Convention, and Article 9 of the ICESCR in relation to alleged discrimination.

5. On 17 March 2004 and 18 March 2004 the applications were transmitted to the respondent Parties.

6. The Federation of Bosnia and Herzegovina submitted its written observations on the admissibility and merits to the Commission on 19 April 2004. Bosnia and Herzegovina has not submitted its observations to the Commission.

7. On 7 May 2004 the applicant in case no. CH/03/12861, J.I., submitted a reply to the observations of the Federation of Bosnia and Herzegovina.

8. On 10 June 2004 the Federation of Bosnia and Herzegovina submitted additional information to the Commission.

9. The Commission deliberated on the admissibility and merits of the applications on 6 May 2004, 8 July 2004, 7 September 2004, and 10 September 2004. On the latter date it joined the applications and adopted the present decision.

III. FACTS

A. Facts relating to the pension system

10. The Commission recalls that the Chamber considered in detail the features of the pension system in Bosnia and Herzegovina in its decision in case no. CH/02/8923, *Kličković et al.* (decision on admissibility and merits, delivered on 10 January 2003, Decisions January-June 2003). The facts characterising the pension system of Bosnia and Herzegovina are set out therein as follows:

“8. In the former Socialist Federal Republic of Yugoslavia (hereinafter “SFRY”), civilian pensions were administered by the six Socialist Republics under their own respective laws and institutions. In addition, the state-level Law on Basic Rights of Pension and Disability Insurance (OG SFRY no. 23/82, 77/82, 75/85, 8/87, 65/87, 87/89, 54/90, and 84/90) granted equal minimum rights to every SFRY citizen and regulated the rights of persons who moved from one Republic to another.

“9. Following changes brought about by the armed conflict, pensions in Bosnia and Herzegovina came to be administered by three separate funds: the Social Fund of Pension and Disability Insurance of Bosnia and Herzegovina (hereinafter the “Sarajevo Fund”), the Bureau of Pension and Disability Insurance Mostar (hereinafter the “Mostar Fund”), and the Public Fund of Pension and Disability Insurance of Republika Srpska (hereinafter the “RS Fund”). The Sarajevo Fund and Mostar Fund subsequently merged, following a November 2000 decision by the High Representative,¹ into the Federation PDI Institute (hereinafter the “Federation Fund”), which has been operational since 1 January 2002. Presently there is one pension fund in the Federation and one in the Republika Srpska, and all legislation directly concerning pension systems is made at the Entity level.

“10. The basic calculation schemes for determining rights to pension and disability insurance are different in each entity. One result of this has been significantly lower pensions in the Republika Srpska. In March 2002, the average pension in the Federation was 190 KM, and the average pension in the Republika Srpska was 120 KM. The minimum pension payment prescribed by law in the Federation of Bosnia and Herzegovina is 140 KM, while the minimum pension in the Republika Srpska is 80 KM.²

“11. The system of pension insurance in Bosnia and Herzegovina, as inherited from the former SFRY, has been based on the “pay/go” principle that salary contributions from current workers support the current pensioners. Thus, money that comes into the system as contributions is immediately paid out as pensions, rather than becoming interest-generating capital from which the interest is paid out as pensions. When the current workers retire, salary contributions from the future generation of workers will finance the current workers’ pensions. Therefore, the pension system as a whole has had the character of a general social insurance system. This is also the case with the current Federation and RS Funds.

“12. On 27 March 2000, the Mostar Fund, Sarajevo Fund, and RS Fund entered into the Agreement on Mutual Rights and Obligations in Execution of Pension and Disability Insurance (hereinafter the “Pension Agreement”) (OG RS, no. 15/00, 5 June 2000; OG FBiH, no 24/00, 30 June 2000), under which they agreed that the Fund that had made payments to pensioners before the Agreement came into force would continue to pay those pensions regardless of the pensioners’ place of temporary or permanent residence. The Pension Agreement entered into force on 18 May 2000. The enabling legislation for the Pension Agreement is listed in the preamble as Article 205, paragraph 2 of the Republika Srpska Law on Pension and Disability Insurance (OG RS nos. 27/93, 14/94, and 10/95) and Article 82, paragraph 4 of the Federation Law on Pension and Disability Insurance (OG FBiH no. 29/98).

¹ High Representative’s *Decision Imposing the Federation Law on Pension and Disability Insurance Organisation*, 12 November 2000 (OG FBiH no. 49/00, 27 November 2000).

² Office of the High Representative, *Economic Newsletter*, Vol. 5, No. 1, March 2002.

“13. The RS Fund, with the authorization of the Republika Srpska government,³ unilaterally terminated the Pension Agreement in March 2002 (OG RS, no. 10/02, 4 March 2002). According to a June 2002 report⁴ by the United Nations High Commissioner for Refugees (hereinafter “UNHCR”), despite its withdrawal from the Agreement, the RS Fund has continued to pay those pensioners already recognized as its beneficiaries. For its part, the Federation Fund has declared that it will continue to follow the Agreement and pay its beneficiaries now living in the Republika Srpska.⁵”

“14. According to the June 2002 UNHCR report, the absence of harmonized legislation between the two Entities and the lack of state-level legislation regulating pension and other social benefits causes problems for displaced pensioners and returnees. Specifically, these problems arise from the different pension calculation schemes and different pension amounts in each Entity.⁶”

“15. As a practical matter, a person who retired in Sarajevo and held a pension there before the armed conflict, but later began receiving pension payments from the RS Fund after displacement to the Republika Srpska, would continue, after returning to Sarajevo, to receive the lower pension payment from the RS Fund. Such a returnee, while receiving the smaller RS Fund pension, would also face a higher cost of living in Sarajevo than in Republika Srpska. Moreover, such a returnee would receive a pension much lower than a person who had made similar pension contributions during their working life but remained in the Federation throughout the armed conflict.

“16. Under various inter-state pension benefits agreements, some civil pensioners from the Federation of Bosnia and Herzegovina who moved to other countries during the armed conflict continue to enjoy their full pension rights from the Federation Fund. For example, under the Agreement on Social Insurance Between Bosnia and Herzegovina and the Republic of Croatia (OG BiH Supplement on International Agreements, No. 6/01, 11 October 2001), the responsible domestic insurer is obligated to pay full rights to a pension beneficiary, even if that person is residing in the other contracting state. According to UNHCR, no major problems are reported with regard to refugees from Bosnia and Herzegovina receiving their full pensions in Croatia.⁷ As of June 2002, similar agreements had been signed and implemented between Bosnia and Herzegovina and Austria and Turkey, while other such agreements were in the works.⁸ According to OHR, users of pensions from Bosnia and Herzegovina were receiving pensions in 23 countries (mostly in Croatia and Germany) in June 2002.⁹”

11. The Commission notes that this analysis also relates to the cases of the present applicants, and the Commission will rely upon it in this decision.

B. The facts of individual cases

1. Case no. CH/02/12861, J.I.

12. The applicant was retired pursuant to a provisional procedural decision in Tuzla in 1994. The applicant left Tuzla during the war. During the war, the RS Fund paid him his monthly pension, and it continued to do so during the war. The applicant alleges that he returned to Tuzla in April 2000. He continues, after his return, to receive his pension from the RS Fund.

³ Under Article 34, paragraph 2 of the law on Government of Republika Srpska (OG RS nos. 3/97 and 3/98), the Government of Republika Srpska at its session on 13 February 2002 adopted a decision granting consent to cancellation of the Agreement.

⁴ *Update: Pension and Disability Insurance Within and Between Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia in the Context of the Return of Refugees and Displaced Persons*, United Nations High Commissioner for Refugees, June 2002, at 6 (hereinafter “UNHCR Report”).

⁵ *Id.* at 7 n.24.

⁶ *Id.* at 7.

⁷ UNHCR Report at 14-15.

⁸ Office of the High Representative, Human Rights and Rule of Law, *Access to Pensions: An Overview of the Current Situation in Bosnia and Herzegovina*, June 2002, at 2-3.

⁹ *Id.* at 3.

2. Case no. CH/03/12862, Cvjetko RISTIĆ

13. The applicant was retired pursuant to a procedural decision of the RS Fund Branch Office in Bijeljina on 11 February 2000. He alleges that he had worked in Tuzla during his entire working life on what is now the territory of the Federation of Bosnia and Herzegovina. He left Tuzla during the war and later returned. He is still, after his return, receiving his pension from the RS Fund.

IV. RELEVANT LEGAL PROVISIONS

14. Under Article III(3)(a) of the Constitution of Bosnia and Herzegovina, all governmental functions and powers not expressly assigned in the Constitution shall be those of the Entities. The Constitution does not address pension systems, therefore all relevant governing legislation is made at the Entity level. In the Federation, the main relevant legislation is the Law on Pension and Disability Insurance (OG FBiH no. 29/98, 23 July 1998), as amended by the High Representative's Decision Amending the Federation Law on Pension and Disability Insurance (OG FBiH no. 49/00, 27 November 2000) and the High Representative's Decision Imposing the Federation Law on Pension and Disability Insurance Organisation (OG FBiH no. 49/00, 27 November 2000).

15. Article 146 of the Federation Law on Pension and Disability Insurance provides as follows:

"Citizens of Bosnia and Herzegovina who are the beneficiaries of the rights to pension and disability insurance shall continue using these acquired rights with the insurance carrier on the territory of the Federation.

"The pensioners who acquired their pension in the republics of the former SFRY and who are citizens of the Federation with their place of residence within the territory of the Federation, are to be paid pension advances, if their pensions are not being disbursed by the insurance holder where the right to pension had been acquired."

16. Article 82, paragraph 4 of the Federation Law on Pension and Disability Insurance (OG FBiH 29/98, 49/00, 32/01) provides as follows:

"Years of service counted for pension of different insurers of pension and disability insurance both in the Federation of Bosnia and Herzegovina and in the Republika Srpska shall be recognized in accordance with the Agreement reached between the mentioned subjects."

17. The Agreement on Mutual Rights and Obligations in Execution of Pension and Disability Insurance ("the Pension Agreement") provides, in Article 2:

"The Insurer who was paying the pension to the pension beneficiary on the date this Agreement came into force shall continue paying the pension regardless of the pension beneficiary's place of temporary or permanent residence.

"For a pension beneficiary whose pension was being paid from April 1992 but stopped before the entry into force of this Agreement, the pension shall be paid by the insurer who paid the pension last."

The enabling legislation for the Pension Agreement is listed in the preamble as Article 205, paragraph 2 of the Republika Srpska Law on Pension and Disability Insurance (OG RS nos. 27/93, 14/94, 10/95 and 22/96) and Article 82, paragraph 4 of the Federation Law on Pension and Disability Insurance (OG FBiH no. 29/98).

V. COMPLAINTS

18. The applicants allege violations of their rights under Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention. They further complain that the Federation of Bosnia and Herzegovina, as a signatory to the Pension Agreement, agreed to the discriminatory effect thereof when it decided to accept this manner of pension payments. The applicants also complain that they are discriminated against in the enjoyment of their right to social security under Article 9 of the ICECSR.

19. The applicants request the Commission to order the Federation of Bosnia and Herzegovina to continue payment of their pensions. They also request the Commission to oblige the Federation of Bosnia and Herzegovina to pay them compensation for the difference in the amount of pensions they received from the RS Fund and the pensions they would have received from the Federation Fund.

VI. SUBMISSIONS OF THE PARTIES

A. The Federation of Bosnia and Herzegovina

20. The Federation of Bosnia and Herzegovina states that the Pension Agreement should be applied until a final solution is found at the level of the State of Bosnia and Herzegovina for the reason of legal security because, at the time the Agreement was reached and signed, all the problems concerning the way to divide obligations between the insurance carriers (the Federation Fund and the RS Fund) were taken into account. The Federation of Bosnia and Herzegovina points out that the Entity Ministries, the State Ministry of Civil Affairs and Communications, the Ombudsmen of Bosnia and Herzegovina, and the World Bank are dealing with the issue of finding a solution at the state level to replace the Pension Agreement. Furthermore, the Federation of Bosnia and Herzegovina notes that the World Bank has drafted a Memorandum of Understanding with respect to inter-entity relations referring to pension rights, which represents the agreed positions of the Entity Governments that will sign this Memorandum. The Federation further states that, in the revised Memorandum, representatives of both Entities reached an agreement on funding pensions acquired prior to 30 April 1992, i.e. on financing those pensions after the actual return of pension beneficiaries to their previous place of residence.

21. The Federation of Bosnia and Herzegovina claims it is disputable whether the applicants in cases like these actually returned to the territory of the Federation of Bosnia and Herzegovina to live there because in most cases, in the procedural decisions of 1 October 2002 issued by the RS Fund calculating the applicants' pensions, their addresses are within the territory of Republika Srpska or even in The State Union Serbia and Montenegro.

22. The Federation of Bosnia and Herzegovina further states that the Federation Fund and the RS Fund pay different amounts of pension than the legally prescribed amounts, depending on the financial capability of their respective insurance carriers. The Federation notes that the contribution rate for pension and disability insurance, according to which the funds for payment of pensions are provided, is different in each Entity. In the Federation the net contribution rate is 35.2% and in the Republika Srpska it is 24%. The respondent Party further points out that in the period between January 2002 and August 2003 the Federation Fund paid pensions based on a calculation coefficient of 1.00, and from September 2003 based on a coefficient of 1.06, and at the same time the financial capability of the insurance carrier in the Republika Srpska allowed only for payment of pensions based on a coefficient of less than 1.00.

23. At the end of its statement on the facts, the Federation of Bosnia and Herzegovina asserts that the amount of pension disbursed in accordance with financial capability, i.e. according to the available funds of the insurance carrier each month, cannot be the criterion for deciding to change the insurance carrier who pays the pension. The Federation points out that if it were up to the

pension beneficiary to determine or choose according to the current situation, i.e. the amount of pension to be paid by each Entity's fund for a certain month, it would result in legal uncertainty in the exercise of acquired rights in pension and disability insurance and a constant "crossing over" of beneficiaries between funds.

1. As to the admissibility

24. The Federation of Bosnia and Herzegovina considers that the Commission should declare the applications inadmissible under Article VIII(2)(c) of the Agreement as manifestly ill-founded. The Federation points out that the applicants are not entitled to a pension from the Federation Fund because, pursuant to the Pension Agreement, the applicants should continue receiving their pensions from the pension fund that paid them their pensions before it came into force, which means the RS Fund. The Federation points out that it is not the only one responsible for payment of pensions established by the former SRBiH Fund, because the successors of the SRBiH Fund are both the Federation Fund and the RS Fund, and the Pension Agreement only deals with the issue of division of obligations between those two funds that were formed after April 1992.

25. The Federation of Bosnia and Herzegovina also considers the applications inadmissible *ratione personae* because the applicants acquired their pension rights from the RS Fund and were not pensioners before the armed conflict.

2. As to the merits

a. Article 8 of the Convention

26. The Federation of Bosnia and Herzegovina states that the signing of the Pension Agreement was a necessary measure to prevent a chaotic situation, i.e. to prevent misuse by persons receiving pensions from two funds. Because the steps for finding a solution at the state level were taken in order to replace the Pension Agreement, the respondent Party asserts that it has not violated Article 8, taking into account the restrictive clauses of paragraph 2 of that Article.

b. Article 13 of the Convention

27. The Federation of Bosnia and Herzegovina asserts that for a violation of Article 13 to be found, another Article of the Convention must actually have been violated, which is not the case with the present applicants. Thus, the respondent Party argues that Article 13 has not been violated.

c. Article 1 of Protocol No. 1 to the Convention

28. The Federation of Bosnia and Herzegovina recalls that pension and disability insurance in Bosnia and Herzegovina before 1992 was and remains based on the principles of "the current coverage of insurance", i.e. inter-generation solidarity. Thus, the pension system has the character of general social insurance. The Federation further reminds the Commission that the Chamber has established that contributions paid into the fund for age pensions may be rightfully considered as a right to property in a portion of such fund, but there is no right to social welfare benefits in a specific amount (case no. CH/99/1554, *Pezer*, decision on admissibility of 7 June 2000, paragraph 5, Decisions January-July 2000). The Federation underlines that the Chamber applied the same analysis in the case of Vidosava Mičić (case no. CH/03/12994, *Mičić*, decision on admissibility and merits of 4 November 2003, Decisions July-December 2003) and concluded that although the applicant received a smaller pension than expected, her smaller pension does not create an interference with her rights under Article 1 of Protocol No. 1 to the Convention. The respondent Party stresses that these are similar cases, and it proposes that the Commission apply the practice of the Chamber. Following this reasoning, the respondent Party points out that Article 1 of Protocol no.1 to the Convention has not been violated in the present cases.

d. Article 9 of the ICESCR in relation to Article II(2)(b) of the Human Rights Agreement

29. The Federation of Bosnia and Herzegovina points out that, after the issuance of the Chamber's aforementioned *Đoko Kličković et al.* decision, the Federation Fund received around 15,000 requests for payment of pensions from beneficiaries whose pensions are now being paid by the RS Fund. The Federation notes, however, that no beneficiary from the territory of the Federation of Bosnia and Herzegovina has submitted a request for the payment of pension from the RS Fund. The Federation alleges that the main reason for such a big number of requests submitted to the Federation Fund, as well as lack of submission of requests to the RS Fund, is the difference in the amount of paid pensions.

30. The Federation provides some statistical indicators regarding the payment of pensions. According to those indicators, the total number of paid pension beneficiaries is 287,224 beneficiaries with the Federation Fund and 183,220 beneficiaries with the RS Fund. On the other hand, the rate of contributions for pension and disability insurance is 35.249% in the FBiH, and 24.00% in the RS. The Federation argues that it is obvious from these statistics that, of the total number of beneficiaries, the Federation Fund pays 61.1% of them and the RS Fund pays 38.9%. The respondent Party further asserts that it can be seen from these statistics that the rate of contributions to pension and disability insurance in the Federation is 46.9% higher than in the Republika Srpska.

31. The Federation of Bosnia and Herzegovina argues that these indicators justify further application of the Pension Agreement, and that this is also needed to ensure security in the realization of rights to pension and disability insurance.

32. The Federation of Bosnia and Herzegovina asserts that the only acceptable alternative to the Pension Agreement is passage of a law on pension and disability insurance at the level of the State of Bosnia and Herzegovina to establish unique instruments for financing pension and disability insurance and institutions for implementation of pension and disability insurance at the state level. The Federation argues that it has provided justification, through facts and evidence, for the signing and application of the Pension Agreement until the final resolution of this issue at the state level. For these reasons, the Federation concludes that the Pension Agreement does not have a discriminatory character, having been concluded as a necessity to provide a measure of protection for the beneficiaries. The Federation argues that it is not an instrument of discrimination as claimed by the applicants. For these reasons the Federation points out that there has not been any discrimination against the applicants under Article 9 of the ICESCR in conjunction with Article II(2)(b) of the Human Rights Agreement.

B. The applicants

33. In his observations of 7 May 2004, the applicant in case no. CH/03/12861, J.I., mainly repeats the allegations contained in his application. He asserts that the allegations of the respondent Party are ill-founded because the Pension Agreement was concluded to his detriment and has a discriminatory character. The applicant repeats that he wishes to receive his pension from the fund in the place where he acquired his right to pension, which is, according to his allegations, the Federation Fund. He proposes that the Commission should follow the Chamber's aforementioned *Đoko Kličković et al.* decision and issue a decision finding discrimination in relation to Article 9 of the ICESCR in conjunction with Article II(2)(b) of the Agreement.

VII. OPINION OF THE COMMISSION

34. The Commission recalls that the application was introduced to the Human Rights Chamber under the Agreement. As the Chamber had not decided on the application by 31 December 2003, in accordance with Article 5 of the 2003 Agreement, the Commission is now competent to decide on the application. In doing so, the Commission shall apply the admissibility requirements set forth in Article VIII(2) of the Agreement. Moreover, the Commission notes that the Rules of Procedure governing its proceedings do not differ, insofar as relevant for the applicant's case, from those of the Chamber, except for the composition of the Commission.

A. Admissibility

35. Before considering the merits of the case the Commission must decide whether to accept the case, taking into account the admissibility criteria set out in Article VIII of the Agreement. In accordance with Article VIII(2) of the Agreement, "the [Commission] shall decide which applications to accept... In so doing, the [Commission] shall take into account the following criteria: ... (c) The [Commission] shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

1. Responsibility of Bosnia and Herzegovina

36. The Commission notes that Bosnia and Herzegovina has submitted no observations whatsoever on the admissibility and merits of these applications. The Commission, therefore, considers that Bosnia and Herzegovina has raised no objections to the admissibility of the applications.

37. The Commission further notes that Bosnia and Herzegovina is the likely successor to the rights and obligations of the former BiH Fund toward the present applicants (see the aforementioned *Kličković et al.* decision). Moreover, as pointed out in the factual part of this decision, the present cases raise important issues of state-level concern. For these reasons, the Commission finds the applications admissible against Bosnia and Herzegovina.

2. Responsibility of the Federation of Bosnia and Herzegovina

a. Whether the applications are manifestly ill-founded

38. The Federation of Bosnia and Herzegovina asserts in its observations that the applications should be declared inadmissible as manifestly ill-founded. The Federation argues that the applicants have no right to a pension from the Federation Fund because they were pensioners in the RS Fund when the Pension Agreement came into force.

39. The Commission notes that, in the *Kličković et al.* decision, the Chamber considered that applications like the present ones raised legitimate issues regarding the Pension Agreement that are compatible with the Agreement and within the Chamber's (and now the Commission's) competence. Moreover, the Commission notes the importance of this issue to an entire group of citizens, pensioners who are returnees to the Federation. Accordingly, the Commission rejects the suggestion of the Federation that the applications must be dismissed as manifestly ill-founded.

b. Whether the applications are admissible *ratione personae*

40. The Federation of Bosnia and Herzegovina asserts in its observations that the applications should be declared inadmissible *ratione personae*, claiming that the applicants acquired their right to pension from the RS Fund and that they were not pensioners before the armed conflict. Therefore, the Federation argues that the applications should be declared inadmissible under Article VIII(2)(c) of the Agreement.

41. The Commission notes that the applicants' complaints relate to issues arising directly from the application of the Pension Agreement by the Federation. The Federation asserts that the applicants are not pre-war pensioners and that they acquired their pension rights from the RS Fund. The applicant in case no. CH/03/12861, J.I., however, obtained a provisional procedural decision on retirement in Tuzla in 1994. Further, the applicants spent the largest part of their working years working on what is now the territory of the Federation, and they returned to live in the Federation. The Commission considers that the Pension Agreement has detrimental consequences for the applicants. The Federation, as a party to that Agreement, must bear some responsibility for the situation in which the applicants find themselves. Thus, the Commission decides to reject the proposal of the Federation to declare these applications incompatible *ratione personae* with the Agreement.

3. Conclusion as to admissibility

42. As no other grounds for inadmissibility appear, the Commission declares the applications admissible in all respects against both Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina.

B. Merits

43. Under Article XI of the Agreement, the Commission must next address the question of whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article I of the Agreement, the parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms", including the rights and freedoms provided for in the Convention.

1. Article 1 of Protocol No. 1 to the Convention

44. The applicants complain that their property rights under Article 1 of Protocol No. 1 to the Convention have been violated. This provision reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

45. The Commission notes that the European Commission of Human Rights has held that where a person has contributed to an old age pension fund, this may give rise to a property right in a portion of such a fund, and a modification of the pension rights under such a system could in principle raise an issue under Article 1 of Protocol No. 1 to the Convention. The European Commission has, however, also held that the Convention does not guarantee a right to a specific social welfare benefit (see, e.g., *Müller v. Austria*, decision of 1 October 1975, application no. 5849/72, D.R. 3, p. 31; and *Tricković v. Slovenia*, application no. 39914/98, decision of 27 May 1998). In particular, the European Commission has stressed that there is no right to receive social welfare benefits in a specific amount. The European Court of Human Rights has stated that the right to a certain social security benefit—insofar as it is provided for in the applicable legislation—is a pecuniary right for the purposes of Article 1 of Protocol No. 1 (ECHR, *Gaygusuz v. Austria*, judgment of 31 August 1996, Reports of Judgments and Decisions 1996-IV, paragraph 41).

46. The Commission recalls that the Chamber considered the pension insurance system in Bosnia and Herzegovina on a number of occasions. As the Chamber established, the system of pension insurance in Bosnia and Herzegovina has been based on the "pay/go" principle and has had the character of a general social insurance system (see the aforementioned *Kličković et al.* decision, paragraph 80).

47. The Commission notes that the Chamber held that contributions to an old age pension fund may give rise to a property right in a portion of such a fund, but that there is no right to receive social welfare benefits in a certain amount (see case no. CH/99/1554, *Pezer*, decision on admissibility of 7 June 2000, paragraph 5, Decisions January-June 2000). Given the nature of Bosnia and Herzegovina's pension system, the same analysis applies to the present cases.

48. The Commission therefore finds, on the basis of the evidence presented to it, that the fact that the applicants receive smaller pensions than persons paid by the Federation Fund does not interfere with their rights under Article 1 of Protocol No. 1 to the Convention. Thus, the Commission concludes that Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina have not violated the applicants' right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the Convention.

2. Discrimination in the enjoyment of the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights

49. The Commission notes that the Chamber considered that the complaints concern the applicants' rights to social security and therefore fall within the scope of the rights protected by Article 9 of the International Covenant on Economic, Social and Cultural Rights (see the aforementioned *Kličković et al.* decision, paragraph 84). Pursuant to Article II(2)(b), the Commission can consider alleged violations of such rights only in conjunction with discrimination "on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status". The applicants allege discrimination, and the Commission has therefore considered their applications in light of Article 9 of the ICESCR, which reads:

"The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance."

50. In order to determine whether the applicants have been discriminated against in the enjoyment of their social security rights, the Commission must first determine whether the applicants were treated differently from others in the same or relevantly similar situations. The Commission recalls that the Chamber considered that any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see case no. CH/97/67, *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, paragraph 120, Decisions January-July 1999). In accordance with the approach outlined above, the Commission has considered whether other categories of pensioners constitute "others in the same or relevantly similar situations" in relation to the applicants.

51. The Commission notes that the applicants are not pre-war pensioners. In 1994, J.I., the applicant in case no. CH/03/12861, obtained a provisional procedural decision on retirement in Tuzla. The Commission recalls, however, that the applicants paid the largest portion of their lifetime contributions into the SRBiH Fund and that they are among those pensioners who returned to live on the territory of the Federation. The situation of the current applicants can be compared to those of SRBiH Fund pensioners whose pension rights matured before the armed conflict broke out in 1992 and who remained in what is now the Federation of Bosnia and Herzegovina (see the aforementioned *Kličković et al.* decision, paragraph 86). The Commission notes that the present applicants, however, are not in a position to realize their pension rights from the Federation Fund due to the application of the Pension Agreement.

52. Under current practice, the pension of a pensioner who is now paid by the RS Fund because he or she was displaced to the Republika Srpska during the armed conflict is significantly lower than the average pension of a similarly situated SRBiH Fund pensioner who remained in

what is now the Federation. It appears that the applicants would receive greater pensions if they were paid by the Federation Fund and that they have an interest in being paid by that fund. The Federation of Bosnia and Herzegovina, however, maintains that the applicants would receive lower pensions if they were paid by the Federation Fund. The Federation submits a tabular presentation according to which the applicants would allegedly receive lower pensions if they were paid by the Federation Fund. The Commission notes that the Federation does not show the method used to determine the pension amounts. The Commission further notes that these arguments of the Federation are contrary to the analyses of facts regarding the pension system established by the Chamber (see the aforementioned *Kličković et al.* decision, paragraphs 8-16). Moreover, the Commission notes that the Federation does not substantiate its present allegations and it cannot regard such a tabular presentation as a fact showing the actual amount of pension that the applicants would receive if paid by the Federation Fund. Notwithstanding the objections of the Federation, the applicants proved that they returned to live on the territory of the Federation of Bosnia and Herzegovina. These applicants now receive smaller pensions simply because they left the Federation for a period of time (during the hostilities in Bosnia and Herzegovina), out of necessity, to live in what is now the Republika Srpska.

53. The Commission recalls that the Chamber found that these pensioners find themselves living in the Federation, where living costs are higher than in the Republika Srpska, while receiving their pensions from the RS Fund, and that this imposes a serious obstacle to the return of refugees and displaced persons and the implementation of Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina, one of the most important goals of resolving the conflict in Bosnia and Herzegovina (see the aforementioned *Kličković et al.* decision, paragraph 89). The Chamber also established that displaced person status was a status relevant for the purposes of Article II(2)(b) of the Agreement:

“The only reason put forward for the different treatment is the Pension Agreement, which, by its terms, makes displaced person status the basis for different treatment. But displaced person status cannot serve as a justification for disparate treatment, especially where, as here, it carries with it a connotation of discrimination on ethnic grounds. Under the circumstances, the Chamber concludes that the different, poorer treatment of the applicants with regard to their pension payments has no objective justification.”

54. The Commission finds that this conclusion fully applies to the situation of the present applicants. In light of these considerations, the Commission concludes that the present applicants have been treated differently with no objective justification and have therefore been discriminated against in their enjoyment of their rights to social security guaranteed by Article 9 of the ICESCR.

55. For the reasons stated above the Commission will consider which respondent Party is responsible for this discrimination against the applicants.

a. Responsibility of the Federation of Bosnia and Herzegovina

56. The Commission notes that the Federation of Bosnia and Herzegovina is a party to the Pension Agreement and concludes that, as a direct result of the Pension Agreement, the applicants have been discriminated against (see the aforementioned *Kličković et al.* decision, paragraph 91). Moreover, in its observations, the Federation asserts that application of the Pension Agreement is justified. In these circumstances, it does not appear to the Commission that the Federation would intend to give up the application of the Pension Agreement. In accordance with the established case law of the Chamber, the Commission concludes that the Federation of Bosnia and Herzegovina is responsible for discrimination against the applicants in the enjoyment of their rights protected by Article 9 of the ICESCR.

b. Responsibility of Bosnia and Herzegovina

57. Having regard to the above, the Chamber considers that, because Bosnia and Herzegovina is not a party to the Pension Agreement and because all legislation directly concerning pension systems is made at the Entity level, Bosnia and Herzegovina is not responsible for the discrimination against the applicants in the enjoyment of their rights protected by Article 9 of the ICESCR.

3. Articles 8 and 13 of the Convention

58. Having regard to its finding of discrimination against the applicants in the enjoyment of the rights protected by Article 9 of the ICESCR, the Commission concludes that it is not necessary to consider the applications under Articles 8 and 13 of the Convention.

VIII. REMEDIES

59. Under Article XI(1)(b) of the Agreement, the Commission must next address the question of what steps shall be taken by the respondent Party to remedy the established breaches of the Agreement. In this connection the Commission shall consider issuing orders to cease and desist, monetary relief as well as provisional measures. The Commission is not necessarily bound by the claims of the applicants.

60. The Commission notes that it has found the Federation of Bosnia and Herzegovina responsible for the discrimination against the applicants in the enjoyment of their rights protected by Article 9 of the ICESCR.

61. The applicants request the Commission to oblige the Federation of Bosnia and Herzegovina to pay them compensation for the difference in the pension amount they received from the RS Fund and the amount they would have received from the Federation Fund. They also request the Commission to order the Federation of Bosnia and Herzegovina to continue payment of their pensions.

62. In these circumstances, bearing in mind the established discrimination, the Commission finds it appropriate to order the Federation of Bosnia and Herzegovina to take all necessary legislative and administrative actions within two months of its receipt of this decision to ensure that the applicants are no longer discriminated against in their enjoyment of the pension rights guaranteed by Article 9 of the ICESCR, particularly in comparison to those pensioners who remained in what is now the Federation of Bosnia and Herzegovina during the armed conflict.

63. The Commission will further order the Federation of Bosnia and Herzegovina to compensate each applicant for the difference between the pension that would be due to them under the Pension Agreement between the pension funds and the amount the applicant would have received from the Federation Fund, from the date of their application to the Human Rights Chamber (14 January 2003, see paragraph 4 above) until the date of the Federation's compliance with the remedy ordered in paragraph 62 above.

IX. CONCLUSIONS

64. For the above reasons, the Commission decides:

1. unanimously, to declare the applications admissible in their entirety against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina;
2. unanimously, that there has been no violation of the applicants' right to peacefully enjoy

their possessions under Article 1 of Protocol No. 1 to the European Convention on Human Rights by Bosnia and Herzegovina or the Federation of Bosnia and Herzegovina;

3. unanimously, that the Federation of Bosnia and Herzegovina has discriminated against the applicants in the enjoyment of their right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

4. unanimously, that Bosnia and Herzegovina has not discriminated against the applicants in the enjoyment of their right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights;

5. unanimously, that it is not necessary to separately examine the applications under Articles 8 and 13 of the European Convention on Human Rights;

6. unanimously, to order the Federation of Bosnia and Herzegovina to take all necessary legislative and administrative actions, within two months of its receipt of this decision, to ensure that the applicants are no longer discriminated against in their enjoyment of pension rights guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights, particularly in comparison to those pensioners who remained in what is now the Federation during the armed conflict;

7. unanimously, to order the Federation of Bosnia and Herzegovina to compensate each applicant for the difference between the pension that he or she received under the Pension Agreement between the pension funds and the amount the applicant would have received from the Federation Fund, from the date of his or her application to the Human Rights Chamber (14 January 2003, see paragraph 4 above) until the date of the Federation's compliance with the remedy ordered in conclusion no. 6 above; and

8. unanimously, to order the Federation of Bosnia and Herzegovina to report to the Commission or its successor institution within three months of its receipt of this decision on the steps taken to comply with the above orders.

(signed)
J. David YEAGER
Registrar of the Commission

(signed)
Jakob MÖLLER
President of the Commission