



DECISION ON REQUEST FOR REVIEW

Case no. CH/00/4889

THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA (JAKEŠ CEMETERY)

against

THE REPUBLIKA SRPSKA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 10 January 2002 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the applicant's request for review of the decision of the First Panel of the Chamber on the admissibility and merits of the aforementioned case;

Having considered the Second Panel's recommendation;

Adopts the following decision pursuant to Article X(2) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, as well as Rules 63-66 of the Chamber's Rules of Procedure:

I. FACTS AND COMPLAINTS

1. During the period of 1996 through 2000, the Institute for Treatment of Mentally Retarded Persons "Jakeš" ("the Institute") in Garevac in the Modriča Municipality buried the remains of eight deceased non-Muslim patients from the Institute in the Muslim Cemetery in Vukosavlje-Jakeš ("Jakeš Cemetery"), which is situated on land owned by the Islamic Community in Bosnia and Herzegovina. The Islamic Community alleged that the Institute also removed the remains of deceased Muslims previously buried in Jakeš Cemetery.
2. The Islamic Community claimed that the respondent Party violated its rights under Article 9 of the European Convention on Human Rights (the "Convention") and Article 1 of Protocol No. 1 to the Convention and discriminated against it in the enjoyment of the rights guaranteed by these provisions.

II. SUMMARY OF THE PROCEEDINGS BEFORE THE CHAMBER

3. Pursuant to Rule 60 of the Chamber's Rules of Procedure, on 12 October 2001, the First Panel delivered its decision on admissibility and merits in this case (adopted on 8 October 2001). In the decision on admissibility and merits, the First Panel found that the respondent Party had violated the Islamic Community's rights protected by Article 9 and Article 1 of Protocol No. 1 to the Convention, but that the Islamic Community had failed to substantiate its claims for discrimination in the enjoyment of these rights. With respect to remedies, the First Panel found that the findings of violations "constitute sufficient satisfaction". The First Panel declined to order compensation, in part as the Islamic Community had failed to substantiate its claim for pecuniary compensation. In addition, noting that the respondent Party had stated that it was willing to cure the actions of the Institute by exhuming the bodies of non-Muslims buried in the Jakeš Cemetery, the First Panel did "not find it necessary to rule on the request of the applicant to order such exhumation."
4. On 5 November 2001, the Islamic Community submitted its request for review of the decision on admissibility and merits.
5. In accordance with Rule 64(1) of the Chamber's Rules of Procedure, the Second Panel considered the request for review on 8 and 9 January 2002. In accordance with Rule 64(2), the plenary Chamber considered the request for review and the recommendation of the Second Panel on 10 January 2002, and adopted the present decision on that date.

III. THE REQUEST FOR REVIEW

6. In its request for review, the Islamic Community challenges the decision on admissibility and merits in three primary respects. Firstly, it disagrees with the First Panel's finding that its claims for discrimination were not substantiated. Secondly, it complains because the First Panel did not award any compensation for the established violations of Article 9 and Article 1 of Protocol No. 1 to the Convention. Thirdly, the Islamic Community complains because the First Panel "has not satisfied the applicant's request to order the respondent Party to exhume, in the presence of the applicant, and at its own expense, all persons of the Orthodox religion buried" in Jakeš Cemetery. The Islamic Community argues that the Chamber has inappropriately failed to sanction the respondent Party for the human rights violations it found.
7. Assuming the request for review is accepted, the Islamic Community proposes as follows:

"that the decision be modified to establish discrimination with respect to the violations of Article 1 of Protocol No. 1 and Article 9 of the Convention, that the respondent Party be obliged to pay the applicant pecuniary compensation in the amount of 50,000 KM and non-pecuniary compensation in the amount of 50,000 KM, and that the respondent Party be ordered to exhume, in the presence of the applicant, all deceased persons of Serb ethnic origin buried in the Jakeš Cemetery."

IV. OPINION OF THE SECOND PANEL

8. The Second Panel notes that the applicant's request for review has been lodged within the time-limit prescribed by Rule 63(3) of the Chamber's Rules of Procedure.

9. In accordance with Rule 64(2), the Chamber "shall not accept the request unless it considers (a) that the case raises a serious question affecting the interpretation or application of the Agreement or a serious issue of general importance and (b) that the whole circumstances justify reviewing the decision."

10. With respect to the Islamic Community's challenge of the conclusion that the discrimination claims were not substantiated, the Second Panel notes that the First Panel considered the evidence submitted in support of the application and properly rejected the discrimination claims as unsubstantiated. Thus, the Second Panel is of the opinion that in this respect, it cannot be said "that the whole circumstances justify reviewing the decision" as required by Rule 64(2)(b).

11. With respect to the Islamic Community's challenges to the remedies, the Second Panel notes that Article XI(1)(b) of the Agreement states that decisions of the Chamber shall address what steps shall be taken by the respondent Party to remedy breaches of the Agreement. The Second Panel considers that the First Panel failed to specify what actions the respondent Party should take to remedy the breaches found by the First Panel. The First Panel's stated reliance on the good faith willingness of the respondent Party to cure the actions of the Institute that gave rise to violations of the Convention (decision on admissibility and merits at paragraph 58), does not, in the opinion of the Second Panel, satisfy the minimum requirements of Article XI(1)(b) of the Agreement. For this reason, the Second Panel concludes that the lack of sufficient remedies in the decision raises "a serious question affecting the ... application of the Agreement", as required by Rule 64(2)(a), and that "the whole circumstances justify reviewing the decision", as required by Rule 64(2)(b).

12. Being of the opinion that the request for review, insofar as it is directed against the conclusion on discrimination, does not meet the conditions set out in Rule 64(2), the Second Panel by 4 votes to 3, recommends that the plenary Chamber reject the applicant's request for review in this respect.

13. Being of the opinion that the request for review, insofar as it concerns the question of remedies, meets the conditions set out in Rule 64(2), the Second Panel by 4 votes to 3, recommends that the plenary Chamber accept the applicant's request for review only with respect to the remedies for the established violations of Article 9 and Article 1 of Protocol No. 1 to the Convention.

V. OPINION OF THE PLENARY CHAMBER

14. The plenary Chamber agrees with the Second Panel that the applicant's request for review, insofar as it is directed against the rejection of its discrimination claims as unsubstantiated, does not meet the conditions of Rule 64(2) and therefore does not warrant review.

15. However, the plenary Chamber disagrees with the Second Panel that the applicant's request for review, insofar as it concerns the question of remedies for the established violations of Article 9 and Article 1 of Protocol No. 1 of the Convention, meets the two conditions required for the Chamber to accept such a request pursuant to Rule 64(2). To the contrary, the question of the remedies ordered by the First Panel does not raise "a serious issue of general importance" as required by Rule 64(2)(a). The First Panel found in the decision on admissibility and merits that the finding of violations "constitute sufficient satisfaction". The First Panel did address the question of remedies for the violations found. Whether, as the applicant submits, there should additionally have been an award of compensation and an order for exhumation, in this specific case, does not warrant review.

VI. CONCLUSION

16. For these reasons, the Chamber,

1. by 10 votes to 4, decides to reject the applicant's request for review insofar as it is directed against the rejection of the claims for discrimination; and

2. by 7 votes to 7, with the casting vote of the President, decides to reject the applicant's request for review insofar as it concerns the question of remedies for the established violations of Article 9 and Article 1 of Protocol No. 1 of the Convention.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Dissenting opinion of Messrs. Nowak and Grasso

ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Messrs. Manfred Nowak and Giovanni Grasso.

DISSENTING OPINION OF MESSRS. MANFRED NOWAK AND GIOVANNI GRASSO

This case concerns a particularly humiliating kind of behaviour by a governmental institution of the Republika Srpska. For a period of almost five years after the war, the Institute for Treatment of Mentally Retarded Persons "Jakes" disposed of the mortal remains of mentally retarded patients of non-Muslim faith in a Muslim cemetery, without any kind of permission by either governmental or religious authorities. In other words, an institution which has been established to take care of persons with mental disabilities seems to have just dumped its deceased patients, without any proper procedure, in a Muslim cemetery. This is not only an insult to the Islamic Community who owns this cemetery, but also extremely humiliating behaviour towards the persons with disabilities for whom the Institute was responsible for providing care. It is difficult to imagine that this practice was carried out for more than four years without intention. On the contrary, it constitutes a deliberate assault on the dignity and religious feelings of both the Islamic Community and the deceased individuals concerned. Without any kind of evidence to the contrary, such a deliberate assault constitutes a serious form of discrimination, both towards the Islamic Community and the patients of the Institute.

For these reasons, the Chamber should have accepted the request for review, further investigated the facts, found discrimination in respect of freedom of religion and possibly other human rights, and finally ordered appropriate remedies. We can very well understand that exhumation might not be the most appropriate remedy and that one should leave the ashes of these unfortunate human beings in peace. But there would certainly have been other appropriate remedies available. In fact, the Petty Offense Court in Modriča had refused the request of the Public Utility Inspector to initiate petty offense proceedings against the Institute (decision on admissibility and merits of adopted on 8 October 2001, paragraph 18). In our opinion, the practice of the Institute was of such a serious and discriminatory nature that the Chamber, in addition to possible other remedies, should have ordered the Republika Srpska to carry out a full criminal investigation into these events and to take criminal (not just petty offense) as well as disciplinary action against the persons responsible. In any case, the issues of discrimination in these circumstances and appropriate remedies certainly constitute a sufficiently serious question of interpretation and application of the Agreement to justify accepting the request for review.

(signed)
Manfred Nowak

(signed)
Giovanni Grasso