



## **DECISION ON ADMISSIBILITY**

**Case no. CH/02/11259**

**Nusreta MULAOSMANOVIĆ, Halima AGANOVIĆ and Fahrudin AGANOVIĆ**

**against**

**THE REPUBLIKA SRPSKA**

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the First Panel on 5 December 2002 with the following members present:

Ms. Michèle PICARD, President  
Mr. Rona AYBAY, Vice-President  
Mr. Dietrich RAUSCHNING  
Mr. Hasan BALIĆ  
Mr. Želimir JUKA  
Mr. Miodrag PAJIĆ  
Mr. Andrew GROTRIAN

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

Having considered the aforementioned application introduced 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;

Adopts the following decision pursuant to Article VIII(2)(c) of the Agreement and Rules 49(2) and 52 of the Chamber's Rules of Procedure:

## I. INTRODUCTION

1. The applicants are citizens of Bosnia and Herzegovina of Bosniak origin.
2. The applicants complain of their inability to continue visiting their late father's grave, which was located close to the Divič mosque in the Zvornik Municipality in the Republika Srpska. The Divič mosque site, including the nearby cemetery, was destroyed by Serb paramilitary forces in 1992 at the beginning of the armed conflict. The applicants are the children of the deceased Sabit Aganović (designated in the application as a victim), who was a teacher (*Muderiz*) at the School of Theology (*Medresa*) in Zvornik. It is unknown when the applicants' father died and when he was buried, but considering that he was born in 1888, it is presumed that he died a long time ago.
3. The applicants state that other sacred objects and facilities were destroyed at the time when the Divič mosque was pulled down, such as their father's grave, which was marked by a monument. The applicants further state that by the destruction of the monument, the last vestiges of the existence of their father's grave were removed, and they can no longer visit it, which constitutes a violation of their right to freedom of religion and destroys their religious identity and their lifestyle. The applicants state that the monument was destroyed before the entry into force of the General Framework Agreement for Peace in Bosnia and Herzegovina. In previous decisions by the Chamber it was established that the Divič mosque had been destroyed during 1992.

## II. COMPLAINTS

4. The application was introduced with the Chamber on 4 July 2002.
5. The applicants allege that, due to their inability to visit their father's grave, Article 9 of the Convention has been violated in conjunction with discrimination under Articles II(2)(a) and II(2)(b) of the Agreement. They submit that all the actions by the respondent Party were directed at strengthening the discrimination against Bosniaks, which was confirmed by the destruction of the Divič mosque and their father's monument—a sacred Muslim object. The applicants contend that Article 28 of the Constitution of the Republika Srpska discriminates against other religions on ethnic grounds and constitutes a violation of Article 9 of the European Convention on Human Rights (the "Convention") and Article II(2)(b) of the Agreement.
6. The applicants further state that on 14 December 1995, the site of the Divič mosque was owned by the Islamic Community, thus falling within the scope of the property rights guaranteed by Article 1 of Protocol No. 1 to the Convention. The applicants also allege a violation of their right to a fair hearing by an independent and impartial tribunal as guaranteed by Article 6(1) of the Convention.
7. The applicants claim compensation for the destroyed grave and monument in the amount of 60,000 KM and compensation for non-pecuniary damages for mental pain and suffering in the amount of 20,000 KM for each applicant, respectively.

## III. OPINION OF THE CHAMBER

8. In accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept.... In so doing, the Chamber shall take into account the following criteria: (c) The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

### 1. Incompatible *ratione temporis*

9. The Chamber will first address the question of whether the Chamber is competent, *ratione temporis*, to consider the application, bearing in mind that the applicants' complaint concerning the destruction of their father's grave and adjoining monument refers to events that occurred before the entry into force of the Agreement on 14 December 1995. In accordance with generally accepted

principles of law, the Agreement cannot be applied retroactively (see case no. CH/96/1, *Matanović*, decision on admissibility of 13 September 1996, Decisions on Admissibility and Merits 1996-1997). Accordingly, the Chamber is not competent to find violations with regard to events that took place prior to 14 December 1995, unless there is a continuing violation. However, the Chamber finds that there is nothing in the case file to suggest that the destruction of the grave and adjoining monument constitutes a continuing violation, and as such, it follows that the application in this respect is incompatible *ratione temporis* with the provisions of the Agreement, within the meaning of Article VIII(2)(c). The Chamber therefore decides to declare this part of the application inadmissible.

## **2. Incompatible *ratione personae***

10. The applicants complain that Article 28 of the Constitution of the Republika Srpska constitutes a violation of their rights. Article 28 provides, insofar as is relevant, as follows:

“The Serbian Orthodox Church shall be the church of the Serb people and other people of Orthodox religion.

“The State shall materially support the Orthodox church and it shall co-operate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values.”

However, the Chamber notes that, by the partial Decision of the Constitutional Court of Bosnia and Herzegovina no. U/98 IV of 19 August 2000 (Official Gazette of Bosnia and Herzegovina no. 36/00), it was assessed that Article 28 paragraph 4 of the Constitution of the Republika Srpska was unconstitutional and it ceased to be in force on 31 December 2000, when the partial Decision was published in the Official Gazette of Bosnia and Herzegovina. The Constitutional Court held, firstly in relation to Article 28 paragraph 3, that a “state church” system cannot be regarded as a violation of Article 9 of the Convention, and secondly, specifically related to the applicants’ complaints in the present case, that:

“...the Court finds that the authorities of Republika Srpska failed to fulfil their positive obligation to create all necessary requirements for every person to be able to freely manifest his or her religion. The contested provision of Article 28 paragraph 4 which gives the Orthodox Church an important influence on the creation of value and belief-systems has to be seen thus as the constitutional basis which allows the authorities “to create a public atmosphere which prevents the free manifestation of religion”.

“As far as the material support of the Orthodox Church is concerned, the Orthodox Church is clearly given a privilege by this constitutional provision, which cannot be legitimised in constitutional terms and is therefore inherently discriminatory.

“Article 28 paragraph 4 of the RS Constitution is therefore unconstitutional.”

11. The Chamber notes that the Decision of the Constitutional Court repealing Article 28 paragraph 4 of the Constitution of the Republika Srpska entered into force on 31 December 2000 and that the applicants submitted their application to the Chamber on 4 July 2002. Accordingly, the Chamber finds that the applicants are not directly affected by any alleged violation of the Agreement as a result of Article 28 paragraph 4 of the Constitution of the Republika Srpska, since that provision is no longer operative. They cannot therefore claim to be victims of such violation, as required by Article VIII(1) of the Agreement. It follows that the application, in this respect, is incompatible *ratione personae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c). The Chamber therefore decides to declare this part of the application inadmissible.

## **3. Manifestly ill-founded**

12. The applicants complain of a violation of their right to a fair trial by an independent and impartial tribunal as guaranteed under Article 6 of the Convention. The Chamber notes that no proceedings have been initiated by the applicants and that the alleged violation concerns complete distrust in the judicial system of the Republika Srpska to deal with their complaints fairly. On examination of the application, it appears that the applicants consider that the Chamber should ensure them a fair trial. The applicants have not addressed domestic authorities for the protection of

their rights because, as they state, they question the efficiency of the respondent Party's domestic remedies, pointing out case no. CH/96/29 *Islamic Community in Bosnia and Herzegovina*, decision on admissibility and merits of 11 May 1999, Decisions January-June 1999. However, due to the fact that no proceedings have been initiated, the Chamber cannot rule on the fairness of possible future proceedings. Therefore, the Chamber finds that the application does not disclose any appearance of a violation of the rights and freedoms guaranteed under the Agreement. It follows that the application is manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement. The Chamber therefore decides to declare this part of the application inadmissible as well.

**4. Discrimination in the enjoyment of the applicants' right to freedom of religion**

13. The applicants have alleged that they been discriminated against because of their Bosniak origin in the enjoyment of their rights guaranteed under Article 9 of the Convention. However, the Chamber finds that the facts of this case do not indicate that the applicants have been the victims of discrimination with respect to their right to freedom of religion on any of the grounds set forth in Article II(2)(b) of the Agreement. It follows that the application in respect of discrimination is also inadmissible as manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement.

**V. CONCLUSION**

14. For these reasons, the Chamber, unanimously,

**DECLARES THE APPLICATION INADMISSIBLE.**

(signed)  
Ulrich GARMS  
Registrar of the Chamber

(signed)  
Michèle PICARD  
President of the First Panel