



DECISION ON ADMISSIBILITY AND TO STRIKE OUT

Case no. CH/98/438

Ibro PELJA

against

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

The Human Rights Chamber for Bosnia and Herzegovina, sitting as the Second Panel on 7 October 2002 with the following members present:

Mr. Giovanni GRASSO, President
Mr. Viktor MASENKO-MAVI, Vice-President
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Vitomir POPOVIĆ
Mr. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIC, 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)(a) and Article VIII(3)(b) of the Agreement and Rules 49(2) and 52 of the Chamber’s Rules of Procedure:

I. INTRODUCTION

1. On 29 June 1990, after 40 years of service, the applicant retired at the age of 60. On 1 July 1990 he received his first pension check from the Pension and Disability Insurance Fund of Bosnia and Herzegovina (the "Fund"). In 1993 the applicant, his wife, and her invalid son were expelled from Stolac in the Federation of Bosnia and Herzegovina. In March 1996 the applicant moved to Canada to join his wife and son, who had moved to Canada two years earlier on the advice of doctors so that the son could receive necessary medical care.

2. The applicant complains about his inability to receive his pension payments abroad because, upon his move to Canada in March 1996, his pension payments ceased. The applicant immediately commenced proceedings to receive his pension payments in Canada. On 21 October 2001, the payment of the applicant's pension in Canada was approved by the Fund retroactively as from 1 July 1998.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was received on 11 March 1998 and registered on 10 April 1998.

4. On 17 December 1998 the case was transmitted to the State of Bosnia and Herzegovina. No reply has been received from the State.

5. On 2 August 2001 the Chamber transmitted the case to the Federation of Bosnia and Herzegovina (the "Federation") under Article 6 of the European Convention on Human Rights (the "Convention"), Article 1 of Protocol No. 1 to the Convention, and Article 2 of Protocol No. 4 to the Convention. On 3 September 2001 the Federation submitted its observations on the admissibility and merits of the application. The applicant replied to these observations on 8 October 2001.

6. In response to a request from the Chamber, the Federation submitted new information about the situation of the applicant on 16 April 2002. On 11 June 2002 the Chamber received the applicant's observations regarding the new information submitted by the Federation.

III. ESTABLISHMENT OF THE FACTS AND COMPLAINTS

7. On 29 June 1990, after 40 years of service, the applicant retired at the age of 60. On 1 July 1990 he received his first pension check.

8. In 1993 the applicant and his wife and her invalid son were expelled from Stolac in the Federation of Bosnia and Herzegovina. In March 1994 the applicant's wife and her son moved to Canada on the advice of the son's doctors in Mostar because of the lack of medication required for his care. The applicant stayed in Bosnia and Herzegovina until March 1996, and then he moved to Canada to join his family. He now resides there as a citizen of Bosnia and Herzegovina with a permanent residence permit for Canada.

9. Before moving to Canada, the applicant was orally informed by an employee of the Fund in Mostar that, on the basis of an internal instruction from Sarajevo, pension payments to citizens who left the country had been suspended.

10. In April 1996 the applicant arrived in Canada. He sent a complaint to the Director of the Fund's branch office in Mostar; however, he did not receive a reply.

11. The applicant then petitioned the Director of the Fund in Sarajevo.

12. On 29 April 1997, the applicant received a reply, stating that under Article 80(2) of the Law on Pension and Disability Insurance of the Republic of Bosnia and Herzegovina, pension payments should be paid to citizens of the former Socialist Federal Republic of Yugoslavia living abroad,

provided that obligation existed pursuant to an international agreement. If such an agreement did not exist with the country where the pensioner had moved to, exceptions could be made if the pensioner had left Bosnia and Herzegovina for justified reasons. The applicant was invited to submit a written request for such an exception to the Fund in Sarajevo, which he did.

13. On 24 June 1997 the Fund sent the applicant a decision finding no possibility to grant his request since Bosnia and Herzegovina and Canada had not concluded any bilateral agreement regarding pension payments. Nothing was stated in relation to the possibility of applying the exception to the rule to him.

14. The applicant wrote to the Director again, but he did not receive an answer.

15. At the end of 1997 the applicant wrote to the Presidency of Bosnia and Herzegovina, but he received no response. Therefore, in the beginning of 1998, he wrote to the President of the Trade unions of Bosnia and Herzegovina, who also did not respond.

16. In response to a request from the Chamber, on 16 April 2002 the Federation informed the Chamber that on 21 October 2001, the Fund issued a decision approving pension payments to the applicant in Canada. The starting point for these payments is 1 July 1998. However, according to the information provided by the respondent Party, the pension payments have not yet started because the applicant has not submitted his account number to the Fund.

17. On 11 June 2002 the Chamber received the applicant's observations regarding the Fund's decision. The applicant maintains his claims and emphasises the fact that the payment of his pension for the period from April 1996, the date of his arrival in Canada, until July 1998 has not been allowed.

IV. RELEVANT LEGAL PROVISIONS

A. Laws applicable until July 1998

18. The Framework Law on Pension and Disability Insurance (Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 23/82, 77/82, 75/85, 8/87, 65/87, 87/89, 44/90), provides in pertinent part as follows:

Article 82

(1) In the procedure for realisation of rights from pension and disability insurance, the protection of rights shall be secured inside the Communities and by the courts, in accordance with the law and the internal rules of the Communities. (...)

Article 83

(...)

(2) Communities in which the insuree realised his rights to pension or pecuniary allowance shall secure payment of these payments abroad under the conditions set out by the law, international contract or if reciprocity exists.

19. The Law on Pension and Disability Insurance (Official Gazette of the Republic of Bosnia and Herzegovina nos. 38/90, 22/91), provides in pertinent part as follows:

Article 68

(1) Rights from Pension and Disability Insurance that are secured by the Fund shall be realised in the procedure prescribed by the Law on General Administrative Proceedings, in accordance with the Framework Law on Pension and Disability Insurance and this Law.
(...)

Article 72

(1) The insuree, user of the pension or the member of the insuree's or user's family may submit an appeal against the procedural decision of the Fund issued in the first instance procedure to the second instance organ of the Fund.

(2) On the basis of a valid procedural decision of the Fund, the company, employer, *i.e.* the Fund shall secure realisation of appropriate rights to the insuree in accordance with the Law.

(...)

Article 80

(...)

(2) The pension, disability allowance and maintenance and care allowance shall be paid to a citizen of SFRY abroad if such obligation exists in accordance with an international agreement. If such obligation does not exist, the Fund may approve payment if it assesses that the reasons for permanent residence abroad are justified.

B. Laws applicable after July 1998

20. The Law on Pension and Disability Insurance (Official Gazette of the Federation of Bosnia and Herzegovina no. 29/98 and 32/01) entered into force on 23 July 1998. It provides in pertinent part as follows:

Article 107

(...)

(2) The pension shall be paid to a citizen of the Federation abroad if such an obligation exists in accordance with an international agreement. If that is not the case, the pension may be paid to a citizen of the Federation if he lives with permanent residence abroad for family or health reasons.

V. OPINION OF THE CHAMBER

21. The Chamber notes that the Federation of Bosnia and Herzegovina took over all pension responsibilities in its territory from the State of Bosnia and Herzegovina when the new Law on Pension and Disability Insurance entered into force in July 1998. Therefore, both the State of Bosnia and Herzegovina, for the period before this Law entered into force, and the Federation of Bosnia and Herzegovina, for the period after this Law entered into force, should be considered the respondent Parties in this case.

A. As to Bosnia and Herzegovina

22. 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: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted"

23. Regarding the responsibility of Bosnia and Herzegovina to pay the applicant's pension until July 1998, the Chamber notes that Article 82 of the Framework Law on Pensions and Disability Insurance in conjunction with Article 72 of the Law on Pension and Disability Insurance provided legal remedies when insurees consider their rights to have been violated by the Funds. However, the applicant did not use these possible legal remedies, and therefore, he failed to raise either in form or in substance the complaint that is being made to the Chamber. Accordingly, the applicant has not exhausted domestic remedies as required by Article VIII (2)(a) of the Agreement. The Chamber therefore decides to declare the application inadmissible as against Bosnia and Herzegovina.

B. As to the Federation of Bosnia and Herzegovina

24. In accordance with Article VIII(3) of the Agreement, “the Chamber may decide at any point in its proceedings to suspend consideration of, reject or strike out, an application on the ground that ... (b) the matter has been resolved; ... provided that such a result is consistent with the objective of respect for human rights.”

25. Regarding the responsibility of the Federation of Bosnia and Herzegovina to pay the applicant’s pension after July 1998, the Chamber notes that on 21 October 2001, the Fund issued a decision approving pension payments to the applicant in Canada as of 1 July 1998. Those pension payments have not yet commenced because the applicant has not submitted his account number to the Fund. The Chamber is satisfied, however, that as regards pension payments from 1 July 1998, the matter raised in the application has been resolved. Furthermore, the Chamber finds no special circumstances regarding respect for human rights which require the examination of the application to be continued. The Chamber, therefore, decides to strike out the application as against the Federation of Bosnia and Herzegovina, pursuant to Article VIII(3) of the Agreement.

VI. CONCLUSION

26. For these reasons, the Chamber decides,

1. by 5 votes to 2, to declare the application inadmissible as against Bosnia and Herzegovina; and
2. by 6 votes to 1, to strike out the application as against the Federation of Bosnia and Herzegovina.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Giovanni GRASSO
President of the Second Panel

Annex I: Dissenting opinion of Mr. Manfred Nowak joined by Mr. Mehmed Deković

ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Manfred Nowak, joined by Mr. Mehmed Deković.

DISSENTING OPINION OF MR. MANFRED NOWAK JOINED BY MR. MEHMED DEKOVIĆ

I agree that the matter raised *vis-à-vis* the Federation of Bosnia and Herzegovina has been resolved by the decision of the Fund approving pension payments to the applicant in Canada as of 1 July 1998. I disagree, however, with the decision to declare the application inadmissible against Bosnia and Herzegovina for non-exhaustion of domestic remedies. As the decision indicates in paragraphs 10 to 15, the applicant filed petitions against various administrative authorities of Bosnia and Herzegovina, without any result. Since there existed no ordinary courts at the level of the State of Bosnia and Herzegovina at that time, the remedies indicated by the Chamber in paragraph 23 would not have been effective.

On the merits, I am of the opinion that the applicant has been discriminated against in his right to social security, including social insurance, under Article 9 of the International Covenant on Economic Social and Cultural Rights, on the sole ground that he has left Bosnia and Herzegovina in 1996, i.e. six years after his retirement, in order to join his wife and her invalid son in Canada. The Chamber, in my opinion, should have declared the case admissible against Bosnia and Herzegovina, found a violation of the Agreement and order Bosnia and Herzegovina to pay compensation to the applicant for his pecuniary damages.

(signed)
Manfred NOWAK

(signed)
Mehmed DEKOVIĆ