

Ian Campbell
Deputy High Representative for Legal Affairs
Head of Department for Legal Affairs

18 January, 2001
017/2001/RE/VK

Professor Dr. Kasim Begic
President
Constitutional Court of Bosnia and Herzegovina

Case No. U 25/00

Dear Professor Dr. Begic,

On behalf of the High Representative, I write to thank you for your letter dated 16 November 2000.

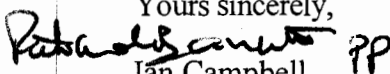
The High Representative very much appreciates that you have given his Office the opportunity to comment on case number U 25/00, which was instituted at the request of members of the National Assembly of Republika Srpska on 12 October 2000.

This case concerns the constitutionality of the High Representative's Decision on Amendments to the Law on Travel Documents of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 27/2000).

In my capacity as Head of the Legal Affairs Department and Deputy High Representative for Legal Affairs, I am pleased to forward comments on this case as requested by you for the consideration of the Court.

These comments are of course intended to be made available to all parties to the proceedings.

Yours sincerely,


Ian Campbell

Attachment: Comments

OHR
Office of the
High Representative

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(kurtoazni prijevod)

18. januar 2001.
017/2001/RE/VK

Prof. dr Kasim Begić
Predsjednik
Ustavni sud Bosne i Hercegovine

Predmet br. U 25/00

Poštovani prof. dr Begiću,

Zahvaljujem Vam u ime Visokog predstavnika na Vašem pismu od 16. novembra 2000. godine.

Visoki predstavnik veoma cijeni činjenicu da ste njegovom uredu omogućili da iznese svoja gledišta u vezi predmeta br. U 25/00, koji je pokrenut na zahtjev poslanika Narodne skupštine Republike Srpske 12. oktobra 2000. godine.

U spomenutom predmetu radi se o ustavnosti Odluke Visokog predstavnika o izmjenama i dopunama Zakona o putnim ispravama Bosne i Hercegovine (Službeni glasnik Bosne i Hercegovine, br. 27/2000).

U svojstvu šefa Pravnog odjeljenja i zamjenika Visokog predstavnika za pravna pitanja, zadovoljstvo mi je dostaviti Sudu na razmatranje komentar koji ste tražili.

Ovaj komentar je svakako namijenjen da se stavi na uvid svim strankama u postupku.

S poštovanjem,

Potpisao:
za Ian Campbell
Richard Barrett

U prilogu:

Komentar

Response to a request from the President of the Constitutional Court of Bosnia and Herzegovina, Professor Dr. Kasim Begic, for Comments on the Constitutionality of the Decision on Amendments to the *Law on Travel Documents of Bosnia and Herzegovina* (Official Gazette of Bosnia and Herzegovina, No. 27/2000).

In a letter dated 16 November 2000 and addressed to the High Representative for Bosnia and Herzegovina, His Excellency Wolfgang Petritsch, the President of the Constitutional Court of Bosnia and Herzegovina, Professor Dr. Kasim Begic, invited comments on the constitutionality of the Decision on Amendments to the *Law on Travel Documents of Bosnia and Herzegovina* (Official Gazette of Bosnia and Herzegovina, No. 27/2000).¹

This invitation was prompted by a challenge to the above-mentioned Decision by thirty-four representatives of the National Assembly of Republika Srpska. On 12 October 2000, the applicants sent a letter to the Constitutional Court requesting that the Court review the constitutionality of the High Representative's Decision on the following grounds:

- I) the High Representative does not possess the competence to adopt legal regulations;
- II) the High Representative cannot amend the *Law on Travel Documents* through a decision, as a decision has "weaker legal force" than a law;
- III) the High Representative's decision was not necessary as an interim measure under paragraph XI.2(b) of the Conclusions of the 1997 Bonn Peace Implementation Council;
- IV) the imposed Amendments are in breach of Article I (7)(a) and (b) of the Constitution of Bosnia and Herzegovina (BiH);
- V) the High Representative is not competent to transfer income received from the passports to the common BiH institutions.
- VI) the Amendments are in breach of Article 34 of the *Law on Citizenship of BiH*.

The following comments address each of these challenges in turn.

I. Competence of the High Representative

Applicants allege that the High Representative's Decision on Amendments to the *Law on Travel Documents* is unconstitutional because the High Representative does not possess the competence to adopt legal regulations.

The High Representative possesses wide-ranging powers in the area of civilian implementation which are derived from an international mandate (See Annex 10 of the General Framework Agreement for Peace in BiH, Annex 10). The extent of those powers

¹ Reference No. U 25/00

is elaborated upon in the Conclusions of the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, in which the Peace Implementation Council welcomed the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace settlement. The High Representative as such final authority has interpreted his powers to include the power to enact legislation.

In the recent Decision of the Constitutional Court concerning the constitutionality of the *Law on State Border Service* (Case No. 9/00), the Court acknowledged that the High Representative may intervene in the legal order of BiH and that, when doing so, he effectively substitutes himself for lawmakers in the country. In characterizing the High Representative's imposition of this law, the Court noted that: "he...acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina." According to the Court's decision, the fact that the law was imposed by the High Representative and not adopted by the Parliamentary Assembly did not change its legal status, "since the law was published as such in the Official Gazette of BiH" and since "it relates to a field falling within the legislative competence of the Parliamentary Assembly."

II. Legal Nature of the Decision

The applicants contend that the Decision of the High Representative amending the existing Law on Travel Documents is without the force of law, based on the principle of **lex superior**. In other words, they argue that a Decision may not be used to effect changes to an existing law. However, as discussed above, the High Representative's Decision imposes Amendments to the *Law on Travel Documents*, which, for the reasons outlined in Section I above, are to be regarded as the national law of BiH. Just as BiH Laws can be modified in whole or in part through normal parliamentary procedure, so the Amendments imposed by the High Representative may be used to modify the Law on Travel Documents in this case.

The fact that the Amendments have their source in an instrument entitled a "Decision" or "Odluka" does not mean that they are the equivalent of an instrument having the same title in the legal tradition of Bosnia and Herzegovina.

III. Conformity of the Decision with the 1997 Bonn Conclusions

According to the applicants, the High Representative's Decision in this case was not in accordance with his powers under paragraph XI.2(b) of the Conclusions of the 1997 Bonn Peace Implementation Council. This paragraph recognizes the competence of the High Representative to use his final authority in theatre regarding interpretation of Annex 10 in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on: "interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has

adopted a decision consistent with the Peace Agreement on the issue concerned.” The applicants argue that since the *Law on Travel Documents* was in force at the time the Decision was implemented, the Decision could not properly be regarded as an *interim measure*.

However, the preamble to the Decision clearly states that it was issued pursuant to paragraph XI.2(c) of the Bonn Conclusions, which recognizes the competence of the High Representative to use his final authority in theatre to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on “other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and the Entities, as well as the smooth running of the common institutions.” Nothing in this paragraph, which forms the justification for the High Representative’s Decision, circumscribes the High Representative’s ability to issue laws on a matter if he deems it necessary in the furtherance of civilian implementation, even in a case where a relevant law exists.

Moreover, in its Decision on the constitutionality of the Law on State Border Service, the Court has recognized that the High Representative’s powers and the exercise of his powers under Annex 10 to the General Framework Agreement, the resolutions of the Security Council and the Bonn Conclusions, are not subject to review by the Constitutional Court.

IV. Conformity of the Imposed Amendments with Articles I((7)(a) & (b) of the BiH Constitution

The applicants take issue with those Amendments imposed by the High Representative’s Decision which have the effect of changing the style and format of passports, arguing in particular that removal of the previous reference to Entity citizenship on the passports is not in accordance with Article I(7)(a) and (b) of the Constitution of BiH, which provide for both Entity and BiH citizenship.²

As a preliminary matter, it should be noted that the Constitution of BiH clearly vests authorities at the State level with responsibility for regulating passports. Pursuant to Article I(7)(e), the Parliamentary Assembly has the power to *regulate* passports of Bosnia and Herzegovina, which are then issued by the Entities. (*Emphasis Added*).³ This is based

² All citizens of either Entity are thereby citizens of Bosnia and Herzegovina. (Constitution of BiH, Article I(7)(a))

No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina and Entity citizenship 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. (Constitution of BiH, Article I(7)(b)).

³ The High Representative, in issuing a Decision on Amendments to the Law on Travel Documents, substituted himself for the Parliamentary Assembly in this case. As outlined in Section I of these

on the notion that the issue of passports is essentially a matter of foreign relations or international affairs and that the BiH State, as a subject of international law, is the only authority competent to regulate this issue. Article I(7)(e) provided the Assembly with the authority to pass the original BiH *Law on Travel Documents*, which very clearly included provisions related to the style and format of passports issued in BiH. Thus, questions of style and format are a matter for the discretion of authorities at the State level and decisions on such matters are not subject to challenge by the Entities, absent their contravention of Constitutional guarantees.

In this context, the Court will be aware of the general principle of constitutional interpretation whereby laws and legal provisions are presumed to comply with constitutional norms, and the party arguing unconstitutionality must bear the burden of proof in the matter. This general principle has already been referred to with approval by the Court in U 5/98 Partial Decisions, II & IV. Indeed, in Partial Decision II, the Court states that "(i)t follows from established constitutional doctrine that a contested provision must be upheld as long as it can be interpreted in conformity with the Constitution."

Moreover, in the instant case, there is no basis for the statement that a change in the style and format of passports issued in BiH violates a Constitutional guarantee. As noted, applicants argue that the removal of a reference to Entity Citizenship on the cover of the passports infringes upon the right to Entity Citizenship enshrined in Articles I(7)(a) & (b) of the Constitution.

Whilst it is clear that a law denying citizens the right to Entity Citizenship would be contrary to the cited Constitutional provisions, the Amendments at issue do no such thing. On the contrary, it is clear from the face of Articles I(7)(a) & (b) that they make no requirement for passports to provide evidence of Entity Citizenship. In fact, they make no reference to passports whatsoever. Entity citizenship continues to be protected by the Entity and BiH laws regulating citizenship, which make detailed provision for its realization.

V. Conformity of the Imposed Amendments with Article VIII of the BiH Constitution

The applicants argue that the High Representative is not competent to transfer income derived from passports into the budget of the common institutions, since the original income received from distribution of passports belongs to the Entities.

Comments, the Amendments are in the nature of a national law which must be regarded as a law of Bosnia and Herzegovina.

However, under Article VIII(3) of the BiH Constitution, the Parliament may specify that revenues raised be placed in the BiH budget.⁴ As a result, in the matter at hand, the Parliament is entirely within its competence under Article VIII in directing funds realized from the issuance of passport to the common institutions.⁵

Moreover, the very regulation of passports is a matter of undisputed State competence. This competence has been exercised in both the *Law on Travel Documents* and the challenged Amendments, which are State-level legislation. It would seriously undermine the ability of the State to execute its passport-related responsibilities if it did not also possess the right to decide on the distribution of those revenues derived from the implementation of the *Law on Travel Documents*, as well as any Amendments to that Law. Accordingly, BiH possesses the right to transfer income derived from passports into the budget of the common institutions or to distribute such income in any manner that it deems necessary to implement the provisions of the Law.

VI. Conformity of the Imposed Amendments with the BiH Citizenship Law

The applicants contend that the imposed Amendments are not in conformity with Article 34 of the *Law on Citizenship of BiH*, which provides as follows: "(t)he citizenship of BiH and Entity citizenship is proved by the certificate of citizenship of BiH and Entity citizenship or by the passport of Bosnia and Herzegovina."

It is an established rule of statutory construction that laws should be interpreted as being consistent with one another, to the extent that such interpretation is possible. In the instant case, it is possible to read the Amendments to the *Law on Travel Documents* and Article 34 of the *Law on Citizenship of BiH* consistently.

BiH and Entity citizenship do not exist independently of one another. Any individual who possesses BiH citizenship must necessarily possess Entity citizenship as well. Therefore, to satisfy the requirements of Article 34, it may be possible for an individual to present evidence of his her BiH and Entity citizenship by means of a passport. Even if the passport does not specify *which* Entity citizenship is held, such specification is not necessary under Article 34.

Alternatively, Article 34 could be read to mean that *either* a passport *or* a citizenship document may be used to provide proof of Entity citizenship. Under this reading too, the Amendments to the *Law on Travel Documents* would not be inconsistent with Article 34, since the certificate of citizenship may be used to provide proof of citizenship.

⁴ As noted above, the High Representative has substituted himself for the National Parliament in imposing Amendments to the Law on Travel Documents, which include the provision transferring the income from passports into the budget of the common institutions.

⁵ The High Representative, in issuing a Decision on Amendments to the Law on Travel Documents, substituted himself for the Parliamentary Assembly in this case. As outlined in Section I of these Comments, the Amendments are in the nature of a national law, which must be regarded as a law of Bosnia and Herzegovina.

However, even if Article 34 is interpreted to mean that both a passport and a certificate of Entity citizenship (rather than BiH citizenship) must provide evidence of Entity citizenship, the Amendment is nonetheless valid under the principle of **lex posterior**.

VII. Conclusion

In issuing its Decision on Amendments to the *Law on Travel Documents*, the High Representative acted pursuant to his international mandate, as provided in Annex 10 of the General Framework Agreement for Peace in BiH, Security Council Resolutions and the Bonn Conclusions. The Court, in its decision on the constitutionality of the *Law on State Border Service*, has recognized the competence of the High Representative to enact legislation with the force of law in BiH.

The imposed Amendments relating to the change in passport style and format represent a decision on the regulation of passports which falls squarely within the jurisdiction of the State-level authorities. These Amendments do nothing to abrogate the right to Entity citizenship, either on their face or in practice, as both existing BiH and Entity laws regulating citizenship make detailed provision for its realization.

Finally, the allocation to the common institutions of funds realized from the issuance of passports is in accordance with the BiH Constitution, which permits the use of funds derived from the implementation of a State-level law to be directed to the common institutions.

As a result, the Amendments imposed by the High Representative are fully in compliance with the Constitution of Bosnia and Herzegovina. To the extent that they run contrary to any prior existing provisions of BiH Law, they must be deemed as modifying these provisions under the doctrine of **lex posterior**.

(radni prijevod)

Odgovor na molbu Predsjednika Ustavnog suda Bosne i Hercegovine, prof. dr. Kasima Begića, za komentar vezan za ustavnost Odluke o izmjenama i dopunama Zakona o putnim ispravama Bosne i Hercegovine (Službeni glasnik Bosne i Hercegovine, br. 27/2000)

U pismu datiranom 16. novembar 2000. god. i naslovljenom na Visokog predstavnika za Bosnu i Hercegovinu, ekselenciju Wolfganga Petritscha, Predsjednik Ustavnog suda Bosne i Hercegovine, prof. dr. Kasim Begić, zatražio je komentar vezan za ustavnost Odluke o izmjenama i dopunama *Zakona o putnim ispravama Bosne i Hercegovine* (Službeni glasnik Bosne i Hercegovine, br. 27/2000).¹

Ova molba je došla zbog osporavanja navedene Odluke od strane trideset četiri poslanika Narodne skupštine Republike Srpske. Podnosioci zahtjeva su 12. oktobra 2000. godine u pismu Ustavnom sudu zatražili da Sud ocijeni ustavnost Odluke Visokog predstavnika zbog toga što:

- I) Visoki predstavnik nema ovlaštenja za donošenje zakonskih propisa;
- II) Visoki predstavnik ne može mijenjati *Zakon o putnim isprava* odlukom, jer odluka predstavlja akt "slabije pravne snage" od zakona;
- III) odluka Visokog predstavnika nije bila potrebna kao privremena mjera prema tački XI.2.b) Zaključaka iz Bona 1997. godine Vijeća za implementaciju mira;
- IV) nametnute izmjene su u suprotnosti sa članom I.7.(a) i (b) Ustava Bosne i Hercegovine (BiH);
- V) Visoki predstavnik nije nadležan da prihode od pasoša prenosi u budžet zajedničkih institucija BiH;
- VI) navedene izmjene nisu u skladu sa članom 34. *Zakona o državljanstvu BiH*.

U slijedećim komentarima odgovara se na svaki od ovih navoda redom:

I – Ovlaštenja Visokog predstavnika

Podnosioci zahtjeva tvrde da je Odluka Visokog predstavnika o izmjenama i dopunama *Zakona o putnim ispravama* neustavna, jer Visoki predstavnik nema ovlaštenja za donošenje zakonskih propisa.

Visoki predstavnik ima široka ovlaštenja u oblasti civilne implementacije koja proizilaze iz međunarodnog mandata (vidi Aneks 10 Općeg okvirnog sporazuma za

¹ Veza br. U 25/00

mir u BiH, Aneks 10). Obim tih ovlaštenja je detaljno razrađen u Zaključcima sa Konferencije Vijeća za implementaciju mira održane u Bonu 9. i 10. decembra 1997. godine, na kojoj je Vijeće za implementaciju mira pozdravilo namjeru Visokog predstavnika da iskoristi svoj vrhovni autoritet na terenu u pogledu tumačenja Sporazuma o civilnoj implementaciji Mirovnog ugovora. Visoki predstavnik, kao konačni autoritet, protumačio je svoja ovlaštenja tako da ona uključuju i donošenje zakonskih propisa.

U nedavnoj Odluci Ustavnog suda o ustavnosti Zakona o državnoj graničnoj službi (predmet br. 9/00), Sud je potvrdio da Visoki predstavnik može intervenirati u pravni sistem BiH i da pri tome on efektivno supstituira domaće zakonodavce. Određujući karakter donošenja ovog zakona od strane Visokog predstavnika, Sud kaže da: "on ... je djelovao kao vlast Bosne i Hercegovine, a zakon koji je on donio je prirode domaćeg zakona te se mora smatrati zakonom Bosne i Hercegovine." Prema odluci Suda, činjenica da je zakon donio Visoki predstavnik, a ne Parlamentarna skupština, ne mijenja njegov status zakona, "budući da je ovaj zakon objavljen kao takav u "Službenom glasniku BiH" i budući da se "tiče sfere koja potpada pod zakonodavnu nadležnost Parlamentarne skupštine."

II – Pravni karakter Odluke

Podnosioci zahtjeva navode da Odluka Visokog predstavnika kojom se mijenja postojeći *Zakon o putnim ispravama* nema zakonsku snagu, na osnovu principa *lex superior*. Drugim riječima, oni tvrde da se odlukom ne može mijenjati postojeći zakon. Međutim, kako je već rečeno, Odlukom Visokog predstavnika donose se Izmjene i dopune *Zakona o putnim ispravama*, koji se, iz razloga navedenih u poglavlju I, mora smatrati domaćim zakonom BiH. Baš kao što se zakoni BiH mogu mijenjati u cjelini ili djelimično u redovnoj parlamentarnoj proceduri, tako i izmjene i dopune koje donosi Visoki predstavnik mogu biti upotrijebljene za mijenjanje, u konkretnom slučaju, *Zakona o putnim ispravama*.

To što navedene izmjene i dopune imaju svoj izvor u instrumentu koji je nazvan "Odluka" ne znači da su ekvivalent instrumentu koji ima isti naziv u pravnoj tradiciji Bosne i Hercegovine.

III – Usklađenost Odluke sa Bonskim zaključcima iz 1997. godine

Prema podnosiocima zahtjeva, Odluka Visokog predstavnika u ovom slučaju nije u skladu sa njegovim ovlaštenjima iz tačke XI.2.b) Zaključaka Vijeća za implementaciju mira u Bonu 1997. godine. U ovoj tački priznaje se ovlaštenje Visokog predstavnika da upotrijebi svoj vrhovni autoritet na terenu u pogledu tumačenja Aneksa 10 kako bi olakšao rješavanje problema donošenjem obavezujućih odluka, kada to bude smatrao neophodnim, o: "privremenim mjerama koje stupaju na snagu kada se strane ne mogu dogovoriti, koje ostaju na snazi dok Predsjedništvo ili Vijeće ministara ne donesu odluku o navedenom pitanju koja je u skladu sa Mirovnim sporazumom." Podnosioci zahtjeva navode da, budući da je

Zakon o putnim ispravama bio na snazi u vrijeme kada je Odluka implementirana, ona se ne može pravilno smatrati *privremenom mjerom*.

Međutim, u preambuli Odluke jasno se kaže da je donesena na osnovu tačke XI.2.c) Zaključaka iz Bona, gdje se priznaje nadležnost Visokog predstavnika da iskoristi svoj konačni autoritet u zemlji kako bi pomogao u iznalaženju rješenja za probleme, kako je prethodno rečeno, donošenjem konačnih odluka, kada to bude smatrao neophodnim, o "drugim mjerama u svrhu obezbjeđenja implementacije Mirovnog sporazuma na čitavoj teritoriji Bosne i Hercegovine i njenih entiteta, kao i nesmetano funkcioniranje zajedničkih institucija". Ničim u ovoj tački, koja predstavlja osnovu za Odluku Visokog predstavnika, nije ograničena mogućnost Visokog predstavnika da donosi određene zakone ako to smatra neophodnim u procesu unapređenja civilne implementacije, čak i u slučaju kada odgovarajući zakon postoji.

Pored toga, Sud priznaje u svojoj Odluci o ustavnosti Zakona o državnoj graničnoj službi da ovlaštenja Visokog predstavnika iz Aneksa 10 Opšteg okvirnog sporazuma, rezolucija Vijeća sigurnosti i Bonskih zaključaka, kao i vršenje tih ovlaštenja, nisu podložne kontroli Ustavnog suda.

IV – Usklađenost donesenih izmjena i dopuna sa čl. I.7.(a) i (b) Ustava BiH

Podnosioci zahtjeva osporavaju izmjene i dopune donesene Odlukom Visokog predstavnika koje su dovele do promjene izgleda pasoša, a posebno tvrde da brisanje ranije oznake entitetskog državljanstva sa pasoša nije u skladu sa članom I.7.(a) i (b) Ustava BiH kojim se predviđa državljanstvo i entiteta i BiH.²

Potrebno je reći, kao prethodno pitanje, da se Ustavom BiH izričito daje organima vlasti na državnom nivou nadležnost uređenja pasoša. Na osnovu čl. I.7.e), Parlamentarna skupština ima pravo da *uređuje* pasoš Bosne i Hercegovine, koji zatim izdaju entiteti. (*istakao autor*)³ To se zasniva na konceptu da je izdavanje pasoša u suštini pitanje iz oblasti vanjskih odnosa ili međunarodnih pitanja i da je država BiH, kao subjekt međunarodnog prava, jedini autoritet nadležan da uređuje ovo pitanje. Članom I.7.e) ovlašćuje se Parlamentarna skupština da donese osnovni *Zakon o putnim ispravama*, koji je vrlo jasno sadržavao i odredbe o izgledu pasoša

² Svi državljani bilo kojeg entiteta su, samim tim, državljani Bosne i Hercegovine. (Ustav BiH, čl. I.7.a).

Nijedno lice ne može biti arbitrarno lišeno državljanstva Bosne i Hercegovine, ili državljanstva entiteta, ili na drugi način ostavljeno bez državljanstva. Niko ne može biti lišen državljanstva Bosne i Hercegovine, ili entiteta, po bilo kojem osnovu, kao što je pol, rasa, boja, jezik, vjera, političko ili drugo mišljenje, nacionalno ili socijalno porijeklo, povezanost sa nacionalnom manjinom, imovina, rođenje ili bilo koji drugi status. (Ustav BiH, čl. I.7.b)).

³ Visoki predstavnik, donoseći Odluku o izmjenama i dopunama Zakona o putnim ispravama, supstituira Parlamentarnu skupštinu u ovom slučaju. Kao što je istaknuto u poglavlju I ovog komentara, navedene izmjene i dopune imaju karakter domaćeg zakona koji se mora smatrati zakonom Bosne i Hercegovine.

izdatog u BiH. Dakle, pitanja izgleda pasoša su pitanja ostavljena na određivanje organima na državnom nivou i odluke o tim stvarima ne mogu biti osporavane od strane entiteta, ako nisu u suprotnosti sa ustavnim garancijama.

U ovom kontekstu, podsjećamo Sud na opći princip ustavnog tumačenja, gdje se polazi od toga da su zakoni i zakonske odredbe u skladu sa ustavnim normama, a strana koja postavlja pitanje neustavnosti mora podnijeti teret dokazivanja u toj stvari. Ovaj opći princip je već navođen, uz odobrenje Suda, u II. i IV. djelimičnoj odluci u predmetu U 5/98. Zaista, u II. djelimičnoj odluci Sud kaže da "(i)z ustanovljene ustavne doktrine slijedi da osporenu odredbu treba podržati dok god ju je moguće tumačiti na način saglasan sa Ustavom".

Pored toga, u ovom slučaju nema osnove za tvrdnju da se promjenom izgleda pasoša izdatog u BiH narušava ustavna garancija. Kao što je konstatirano, podnosioci zahtjeva navode da se brisanjem oznake entitetskog državljanstva sa korica pasoša krši pravo na entitetsko državljanstvo garantovano članom I.7.a) i b) Ustava.

Dok je jasno da bi zakon kojim bi se negiralo pravo građana na entitetsko državljanstvo bio u suprotnosti sa navedenim ustavnim odredbama, izmjenama i dopunama koje su predmet ovog komentara to se ne čini. Naprotiv, vidi se već iz samog čitanja članova I.7.a) i b) da se njima ne zahtijeva da pasoš pruža dokaz o entitetskom državljanstvu. U stvari, u njima se pasoš uopće ne spominje. Entitetsko državljanstvo se i dalje štiti zakonima entiteta i BiH kojima se uređuje državljanstvo i njima se detaljno utvrđuje ostvarivanje tog državljanstva.

V. Usklađenost donesenih izmjena i dopuna sa članom VIII Ustava BiH

Podnosioci zahtjeva navode da Visoki predstavnik nije nadležan da prihode od pasoša prenosi u budžet zajedničkih institucija, budući da izvorni prihod ostvaren od dodjele pasoša pripada entitetima.

Međutim, prema članu VIII.3. Ustava BiH, Parlament može utvrditi da se prikupljeni prihodi usmjere u budžet BiH.⁴ Kao rezultat, u pitanju koje se ovdje razmatra, Parlament u potpunosti postupa u okviru svoje nadležnosti iz člana VIII kada usmjerava sredstva ostvarena od izdavanja pasoša u zajedničke institucije.

Osim toga, samo uređenje pasoša je pitanje koje je neosporno u nadležnosti države. Ova nadležnost se ostvaruje i u *Zakonu o putnim ispravama* i pobijanim izmjenama i dopunama, a to su propisi na nivou države. Sposobnost države da izvršava svoje odgovornosti vezane za pasoš bila bi ozbiljno poljuljana ako ona ne bi imala pravo i da odlučuje o raspodjeli sredstava ostvarenih provođenjem *Zakona o putnim ispravama*, kao i bilo kojim izmjenama i dopunama tog zakona. Prema tome, BiH

⁴ Kao što je već rečeno, Visoki predstavnik je supstituirao državni parlament u donošenju izmjena i dopuna Zakona o putnim ispravama koje sadrže odredbu kojom se prihod ostvaren od pasoša prenosi u budžet zajedničkih institucija.

ima pravo da prihod od pasoša prenese u budžet zajedničkih institucija ili da ga raspodjeli onako kako smatra da je potrebno u cilju implementacije tog Zakona.

VI. Usklađenost donesenih izmjena i dopuna sa Zakonom o državljanstvu BiH

Podnosioci zahtjeva tvrde da donesene izmjene i dopune nisu u skladu sa članom 34. *Zakona o državljanstvu BiH* kojim se utvrđuje da "(d)ržavljanstvo BiH i državljanstvo entiteta dokazuje se uvjerenjem o državljanstvu BiH i uvjerenjem o državljanstvu entiteta ili pasošem BiH."

Utvrđeno je pravilo interpretacije zakona da zakone treba tumačiti tako da su međusobno usklađeni, u mjeri u kojoj je takvo tumačenje moguće. U ovom slučaju, moguće je konzistentno tumačiti izmjene i dopune *Zakona o putnim ispravama* i član 34. *Zakona o državljanstvu BiH*.

Državljanstvo BiH i entitetsko državljanstvo ne postoje samostalno jedno od drugog. Zbog toga svako ko ima državljanstvo BiH mora samim tim imati i entitetsko državljanstvo. Dakle, da bi se zadovoljio uslov iz člana 34, omogućeno je licu da pruži dokaz da ima državljanstvo BiH i državljanstvo entiteta pomoću pasoša. Čak i ako u pasošu nije precizirano koje entitetsko državljanstvo nosilac ima, takva odrednica nije neophodna prema članu 34.

Ili, član 34. se može čitati tako da znači da se mogu uzeti *ili* pasoš *ili* uvjerenje o državljanstvu kao dokaz o državljanstvu entiteta. Ni prema ovom tumačenju izmjene i dopune *Zakona o putnim ispravama* ne bi bile u suprotnosti sa članom 34., budući da se uvjerenje o državljanstvu može uzeti kao dokaz o državljanstvu. Međutim, čak i ako se član 34. tumači tako da znači da i pasoš i uvjerenje o državljanstvu moraju pružiti dokaz o državljanstvu entiteta (a ne o državljanstvu BiH), navedene izmjene i dopune su ipak važeće prema principu *lex posterior*.

VII. Zaključak

Donošenjem Odluke o izmjenama i dopunama *Zakona o putnim ispravama* Visoki predstavnik je postupio u skladu sa svojim međunarodnim mandatom, kako je utvrđeno u Aneksu 10 Općeg okvirnog sporazuma za mir u BiH, rezolucijama Vijeća sigurnosti i Banskim zaključcima. U svojoj odluci o ustavnosti *Zakona o graničnoj službi*, Sud je priznao nadležnost Visokog predstavnika da u BiH donosi akte sa zakonskom snagom.

Donesene izmjene i dopune kojima se mijenja izgled pasoša predstavljaju diskrecionu odluku o uređenju pasoša, zadatak koji jasno počiva na organima na nivou države. Ove izmjene i dopune ničim ne ukidaju pravo na entitetsko državljanstvo, niti na površini niti u praksi, jer postojećim i BiH i entitetskim zakonima kojima se uređuje državljanstvo detaljno se uređuje ostvarivanje tog državljanstva.

I na kraju, dodjela sredstava od izdavanja pasoša zajedničkim institucijama u skladu je sa Ustavom BiH kojim se dozvoljava korištenje sredstava ostvarenih u provođenju zakona na državnom nivou zajedničkim institucijama.

Dakle, izmjene i dopune koje je donio Visoki predstavnik u potpunosti su u skladu sa Ustavom Bosne i Hercegovine. Ukoliko su u suprotnosti sa bilo kojom ranijom odredbom zakona BiH, mora se smatrati da mijenjaju te odredbe u skladu sa doktrinom *lex posterior*.

**OFFICE OF THE
HIGH REPRESENTATIVE**

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Fax Cover Sheet

To: Prof. dr Kasim Begić
Predsjednik
Ustavnog suda Bosne i Hercegovine

Fax No: 663 784

From: Ian Campbell

Function: Zamjenik Visokog predstavnika za pravna pitanja
Šef pravnog odjela

Date: 22. januar 2001.god.

No of Pages: 16

Dear Professor dr Begic,

Attached is an English and local language version of OHR's comments regarding the constitutionality of the Law on Travel Documents. These comments are identical to the preliminary English version that we sent to you on 18 January, with the exception of para.3 of section VI.

Please feel free to contact our office with any questions.

Yours sincerely,

Ian Campbell *IC*
PP

Poštovani prof. dr Begiću,

U prilogu Vam dostavljamo englesku verziju i prevod na lokalnom jeziku OHR komentara vezano za ustavnost Odluke o izmjenama i dopunama Zakona o putnim ispravama BiH. Ovi komentari su identični onim koje smo vam preliminarno poslali 18 januara, sa izuzetkom tačke VI. paragraf 3.

Ukoliko imate dodatnih pitanja molimo Vas da se obratite našem Uredu.

S poštovanjem,

Ian Campbell