

Comments and preliminary observations made by the OHR Legal Department concerning the Case number CH/02/12470, Obradović v. BiH and the FBiH

Human Rights Chamber for Bosnia and Herzegovina

Case number CH/02/12470 Nedeljko Obradovic v. Bosnia nad Herzegovina and the Federation of Bosnia and Herzegovina

Comments and preliminary observations made by the Legal Department of the Office of the High Representative

Introduction

The General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter the "GFPA") was adopted with a view to restore of peace and stability in Bosnia and Herzegovina. As a result, a separate agreement was signed to enact the new Constitution for Bosnia and Herzegovina, the text of which was attached to the GFAP as Annex 4. Also it was deemed necessary to set up separate international or quasi-international institutions which would, during a transitional period, promote and facilitate the return of Bosnia and Herzegovina to normal and peaceful conditions and contribute to preventing renewed conflicts from erupting in the future. Thus, a Provisional Election Commission was to be set up under Annex 3, a Commission on Human Rights and a Human Rights Ombudsman under Annex 6, a Commission for Displaced Persons and Refugees under Annex 7 and a Commission to Preserve National Monuments under Annex 8.

Annex 10 provides for the appointment of a High Representative who would have a general responsibility for the implementation of the peace implementation.

Annex 1A which contains the Agreement on the Military Aspects of the Peace Settlement provides a basis for the implementation of the military aspects of the GFPA. As a part of the Agreement the Parties agreed under Article XII that in accordance with Article I, the IFOR Commander is the final authority in theatre regarding interpretation of this agreement on the military aspects of the peace settlement, of which the Appendices constitute an integral part.

Annex 11, Agreement on International Police Forces, envisaged to assist the Parties in meeting their obligations, especially to provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms, and by taking such other measures as appropriate.

The Constitutional Court of Bosnia and Herzegovina (hereafter the "Constitutional Court") pointed out that these institutions were not to be integrated into the normal national institutional framework of Bosnia and Herzegovina but were to function jointly with these institutions (see the Constitutional Court decision No. U-40/00 of 2 February 2001, para 11, published in the Official Gazette of Bosnia and Herzegovina No. 13/01).

In addition, while the Constitution was included as Annex 4 to the GFAP, the said international (or quasi-international) institutions were established under other annexes to the GFAP as a kind of parallel structure aimed at ensuring the construction of a peaceful Bosnia and Herzegovina, indicates that no hierarchical relationship was intended between the international (or quasi-international institutions) on the one hand, and the national institutions acting under the Constitution on the other, but that the two groups of institutions were intended to supplement each other and to function side by side.

The Human Rights Chamber has taken the same position in its decisions of 14 May 1998 on the admissibility of Cases Nos. CH/98/230 and 231 Adnan Suljanovi}, Edita ^i{i} and Asim Leli} v. Bosnia and Herzegovina and the Republika Srpska saying that "In concluding the General Framework Agreement, the Parties, with the assistance of the international community, have created a number of offices and institutions, either directly (such as the Chamber) or through existing international bodies (such as the OSCE), to assist them in achieving the objectives

set out therein. The Parties are required to comply with the decisions of such offices and institutions, as provided for in the General Framework Agreement. Thus, the nature of the functions carried out by the OSCE under Annex 3, which in substance is the conduct of elections in Bosnia and Herzegovina, is not to be subject to review, except as specifically provided for in Annex 3. The PEC, established by the OSCE in accordance with Annex 3 to the General Framework Agreement, passed a set of Rules and Regulations regulating the conduct of the 1996 General Elections ... Chapter VIII of the Rules and Regulations establishes the EASC. Article 114 sets out the functions of the EASC. Article 114(1) states that the EASC may adjudicate complaints regarding, inter alia, "violations of provisions on elections in the (General Framework Agreement)" as well as complaints regarding violations of the PEC Rules and Regulations. Article 118 clearly indicates that decisions of the EASC are to be binding and without appeal".

Having in mind the above stated it follows that decisions of all institutions enumerated in Article 19.9A of the Election Law of Bosnia and Herzegovina, taken within their respective mandate, are final and binding for the authorities of Bosnia and Herzegovina.

Comment

International Law recognizes that States in their internal legal orders make the rights to vote and to stand for election subject to conditions which are not in principle precluded. They have a wide margin of appreciation in this sphere. However, they should not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness. Also, any limitation to those rights should be imposed in pursuit of a legitimate aim and the means employed should not disproportionate.

In its letter of 9 June 2003 the Human Rights Chamber requested the OHR to give an opinion as *amicus curiae* on the extent to which the implementation of the provisions of Article 19.9A meets the requirement of Article 3 of the Protocol 1 to the ECHR, as well as Article 25 of the ICCPR in connection with Article II (2)(b) of the Human Rights Agreement (discrimination).

Article 3 of the Protocol 1 (Right to free elections) reads as follows:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature

The European Human Rights Court, in the case *Labita v. Italy* no. 26772/95, judgement of 6 April 2000 pointed out that "implicit in Article 3 of Protocol No. 1, which provides for "free" elections at "reasonable intervals" "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people", are the subjective rights to vote and to stand for election. Although those rights are important, they are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations (see the *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 2 March 1987, Series A no. 113, p. 23, § 52). In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see the *Gitonas and Others v. Greece* judgment of 1 July 1997, *Reports* 1997-IV, pp. 1233-34, § 39, and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I)."

In that particular case the applicant, as a result of the imposition of the special supervision measure on him, was stricken off from the electoral register on the ground that his civil rights had lapsed pursuant to Article 32 of Presidential Decree no. 223 of 20 March 1967. Article 32 § 1 (3) of that decree provides that in such cases the prefect (*questore*) empowered to enforce such measures shall notify the municipality where the person concerned resides of any decision entailing the loss of civil rights. The municipal electoral committee shall then remove the name of the person concerned from the electoral register, even outside one of the usual periods for updating the lists.

The Court had no doubt that temporarily suspending the voting rights of persons against whom there is evidence of mafia membership pursues a legitimate aim. However, it did not accept the Government's view that the serious evidence against the applicant had not been rebutted during his trial. Thus, when his name was removed from the

electoral roll there was no concrete evidence on which a suspicion that he belonged to the mafia could be based, and the measure cannot be regarded as proportionate.

As stated above, decisions of institutions enumerated in Article 19.9A of the Election Law of Bosnia and Herzegovina, taken within their respective mandate, are final and binding for the authorities of Bosnia and Herzegovina.

Legitimate aim

The elections in Bosnia and Herzegovina were a major opportunity for the people of to express their wishes about the future of their country and to elect leaders ready to make the difficult compromises required to create a lasting peace and allow Bosnia and Herzegovina to take its rightful place in Europe. As such, elections were perceived as a tool to bring Bosnia and Herzegovina back to normality and were seen as a prerequisite for, inter alia, the reconstruction of BiH as well as for the return of refugees. Their importance was such that a separate agreement on elections was concluded as an annex to the GFAP. In its Declaration the Peace Implementation Council (hereafter the "PIC") made in Luxemburg on 9 June 1998 called for a free and democratic election that would be a turning point for Bosnia and Herzegovina that would open the door to the establishment of democratic institutions.

The PIC reiterate often and called upon the leaders of the country to conduct the election campaign in a constructive spirit, refraining from expressions of nationalism and of ethnic division. It was also emphasised that conditions must be created which enable elections to take place on time in the right conditions. Unless this happens it will not be possible to bring into existence on the timetable called for in the Peace Agreement the new institutions for Bosnia and Herzegovina.

The rationale behind Article 19.9A (as well as similar articles adopted under the aegis of the Provisional Election Commission) was to ban persons who had personally obstructed the implementation of the General Framework Agreement for Peace and endangered the establishment of a democratic society and lasting peace from standing as candidates for elections

Proportionality of measures employed

In the case CH/98/1226, Decision on Admissibility, *^avic v. Bosnia and Herzegovina* of 18 December 1998, the Human Rights Chamber found that the actions complained of were carried out by the High Representative in the performance of his functions under the General Framework Agreement, as interpreted by the Bonn Peace Implementation Conference. There is no provision for any intervention by the respondent Party (or by any of the other Parties to the General Framework Agreement) in those actions. In addition, the High Representative cannot be said to be acting as, or on behalf of, the State or the Entities when acting in pursuance of his powers. As a result, the actions giving rise to the present application cannot be considered to be within the scope of responsibility of the respondent Party. This reasoning holds true for all the decisions taken by the international bodies listed under article 19.9A of the Election Law of Bosnia and Herzegovina.

It should be noted that Article 19.9A is limited in two ways. First of all, once the High Representative mandate terminates, the exclusion employed by the said Article would be lifted by force of this Law. Secondly, the High Representative, within his mandate and using Bonn powers entrusted to him has discretion to lift this ban.

On 30 July 1999, the High Representative lifted with immediate effect the ban that was compelled to impose on Dragan *^avi}*'s activities as member of National Assembly of the Republika Srpska and upon his holding of official position in Bosnia and Herzegovina (copy attached). Today, Dragan *^avi}* holds the position of President of Republika Srpska.

It follows from the above that Bosnia and Herzegovina cannot be found in breach of Article 3 of the Protocol 1 to the Convention.

Article 25 of the International Convention on Civil and Political Rights (ICCPR), reads as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

The Human Rights Committee General Comment No. 25 (hereinafter the “General Comment 25”), para 1 stated Article 25 of the ICCPR recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in place, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant. [1]

Furthermore, the General Comments 25 in para 15 underlined that the effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person candidacy. The grounds for such exclusion should be reasonable and objective. [2]

However, in order to assess whether Article 25 of the ICCPR is applicable in this case, one should firstly assess whether the applicant was discriminated against in enjoyment of his rights as guaranteed by Article 25 of the ICCPR. Firstly it should be noted that Article 19.9A does not preclude any group of their right to stand for elections, as the exclusion is based on individual decisions, affecting only these individuals. The applicant in its submission fails to show the grounds under which he was discriminated against and did not provide any evidence to that extent. Although it is evident that the applicant cannot exercise his right to stand for election, we are of the opinion that this is a case of permissible differentiation.

The Human Rights Committee’s General Comment No. 18 provides that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. In paragraph 7 of the said Comment, the Committee emphasized that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance (see, http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/0/32409d20d5fb80b2c125688700532c35?OpenDocument).

The Committee also observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[3]

Consequently, Article 25 seems not to apply in this case.

Notes:

[1] The International Convent on Civil and Political Rights, *Cases, Materials and Commentary* by Sarah Joseph, Jenny Schultz and Melissa Castan, published by Oxford University Press Inc. New York 2000, page 496, para 22.05

[2] *ibidem*, page 505, para 22.26

[3] *ibidem*, page 540, para 23.40