

Discrimination and political participation in Bosnia and Herzegovina

Sejdic and Finci v. Bosnia and Herzegovina

By Lucy Claridge

A Bosnian Jew and an ethnic Roma have successfully challenged discriminatory provisions within Bosnia's Constitution and electoral laws. In a groundbreaking case before the European Court of Human Rights (ECtHR) on 22 December 2009, the Court found certain provisions of the Bosnian Constitution and election laws to discriminate against minorities.¹ The Constitution was drawn up as part of the internationally agreed 1995 Dayton Peace Accord.

Jakob Finci, a prominent Jew, and Dervo Sejdić, of Roma ethnicity, argued that the country's Constitution and election law are discriminatory in preventing them from running for or being elected to the presidency or the upper house of the parliament.

The Constitution and electoral law state that only members of the 'Constituent Peoples' – ethnic Serbs, Croats and Bosniaks – are eligible to stand for election to either the three-member presidency or the House of Peoples of the Parliamentary Assembly. Those who are not 'Constituent Peoples' – defined in the Constitution as 'Others' – are denied the right to stand for election to these bodies. This includes national minorities who have lived in Bosnia and Herzegovina for centuries.

The case was lodged in 2006 and took only three years to be decided. Significantly, it bypassed usual procedure, and was referred directly to the Grand Chamber of the ECtHR in February 2009. The case was heard in June and judgment was delivered in the space of just six months. The case is the first time that the Court has looked at how to apply relatively recent anti-discrimination provisions of the

European Convention on Human Rights (ECHR). Minority Rights Group International (MRG) represented and advised Mr Finci throughout.

The Court found Bosnia and Herzegovina to be in breach of Protocol 12 of the ECHR, which provides for the right to equal treatment and non-discrimination, in failing to allow its citizens who are not 'Constituent Peoples' to stand for election to the presidency. The Court also found a violation of Article 14 of the ECHR, which provides for freedom from discrimination, taken in conjunction with Article 3 of Protocol No. 1, which protects free elections to the legislature, as a result of the ineligibility of 'Others' – including national minorities – to stand for election to the House of Peoples.

Impact

The ruling is expected to have huge ramifications in Bosnia and Herzegovina and beyond. If correctly implemented, it will assist in breaking down ethnic and religious divisions in Bosnia and Herzegovina by encouraging political participation and representation, and promoting social cohesion. In addition, the decision also offers important protection for minorities who lack electoral rights in other ECHR states, in providing a legally binding judgment that can be relied upon against their own governments. The case is also highly significant on an international level as it is the first time that the ECtHR has considered how Protocol 12 of the ECHR should be applied to potentially discriminatory situations.

The applicants

The applicants, Mr Sejdić, a citizen of Bosnia and Herzegovina of Roma ethnicity, and Mr Finci, a citizen of Bosnia and Herzegovina of Jewish ethnicity, are both prominent public figures. Mr Sejdić is now the Roma rights coordinator for the Organization for Security and Co-operation in Europe (OSCE) mission to Bosnia and Herzegovina, having previously served as coordinator of the Bosnia and Herzegovina Council for Roma (the highest representative body of the Roma community in the state) and as a member of the Bosnia and Herzegovina Council of Ministers' Roma Council. Mr Finci is now serving as Ambassador of Bosnia and Herzegovina to Switzerland, having previously held positions including Chair of the Constitutional Commission and the Head of the Civil Service Agency. The applicants originally brought their cases to the ECtHR individually but, as both cases were concerned with the same discriminatory provisions, the ECtHR subsequently decided to consider them together.

The electoral system of Bosnia and Herzegovina

The Constitution of Bosnia and Herzegovina was drawn up and included as an annex to the 1995 Dayton Peace Accord. The Dayton Peace Accord was key to establishing peace in the country after years of armed conflict. It established a power-sharing arrangement by creating two separate 'ethnic' entities, the Republika Srpska, and the Federation of Bosnia and Herzegovina. Above these sit a central government with a rotating three-member presidency and a central parliament, which are superior to the 'entity' institutions. In order to assist the country's transition into a peaceful democracy, the Dayton Accord also created the Office of the High Representative (OHR).² This is an international institution responsible for overseeing the implementation of certain aspects of the Accord. It guides the people and institutions of the country and the international community, working towards the point when Bosnia and Herzegovina is able to take full responsibility for its own affairs.³

The central parliament consists of two houses, the House of Representatives and the House of Peoples. The House of Representatives consists of 42 members, who are elected by proportional representation. In contrast, the House of Peoples has 15 members distributed equally among the three 'Constituent Peoples' (five Bosniaks⁴ and five Croats from the Federation of Bosnia and Herzegovina, and five Serbs from the Republika Srpska). All legislation requires the approval of both chambers. The House of Peoples is therefore effectively able to support or veto proposed legislation.

The exclusion of 'Others' – that is, non-Bosniak, Serb or Croat citizens of Bosnia and Herzegovina – from both the opportunity to stand for president and for election to



Jakob Finci / image © OSCE

the House of Peoples, seriously hampers their ability to participate and be represented in the political and democratic process. The applicants' case therefore claimed that, in the preoccupation with ensuring that Bosnia and Herzegovina's government is proportionally balanced along ethnic lines, the rights of national minorities – including Jews and Roma – had been seriously ignored.

In fact, although the case did not specifically address this issue, it is not only minorities throughout Bosnia who are disenfranchised as a result of these arrangements: Serbs in the Federation of Bosnia and Herzegovina and Bosniaks and Croats in the Republika Srpska are also excluded from standing for office.

The key arguments

The applicants argued that, despite possessing experience comparable to the highest elected officials, they are prevented from being candidates for the presidency and the House of Peoples solely on the grounds of their race/ethnicity and, in the case of Mr Finci, his religion. They submitted that the country's electoral provisions infringe their rights, as citizens of Bosnia and Herzegovina, to participate fully and effectively in public life in their own country. They claimed that this exclusion amounts to direct racial and religious discrimination, in violation of:

- (i) Article 14 in conjunction with Article 3 of Protocol 1 of the ECHR, which provide for a prohibition on discrimination with regard to the right to free elections; and
- (ii) Article 1 of Protocol 12 of the ECHR, which establishes a right to equal treatment without discrimination.

Protocol 12 became effective on 1 April 2005 and strengthens the ECHR by guaranteeing the right to equal treatment without discrimination. Unlike Article 14, which prohibits discrimination only in conjunction with other rights protected by the Convention, Protocol 12 is a stand-alone provision which extends the right to equal treatment to all legal rights. This case is particularly significant as it is the first case in which the ECtHR has considered the application of Protocol 12.

The applicants also claimed a breach of Article 13, which provides the right to an effective remedy before a national authority. Under the law of Bosnia and Herzegovina, the issue of whether national law is compatible with a state's obligations under the ECHR can only be considered by the Constitutional Court. In a previous ruling, the Constitutional Court declared that it did not have powers to hear such a case, leaving the applicants with no way of challenging the discriminatory election provisions in their national courts.

In addition, Mr Sejdić claimed that the discrimination caused by the electoral rules was in violation of Article 3, which prohibits degrading treatment. He argued that the

effect of the discrimination reduced members the Roma community, as well as members of national minorities in Bosnia and Herzegovina, to 'second-class citizens'.

The applicants' case drew on previous ECtHR case law which establishes that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.⁵ They argued in particular that discrimination in relation to the right to stand for election could never be justified.

The applicants further claimed that, should the Court believe that such treatment could be justified, Bosnia and Herzegovina had to reach a high standard when seeking to establish that the different treatment of 'Others' under the election rules could objectively and reasonably be defended.

This was especially true in the case of racial discrimination, which the ECtHR has stated is 'particularly invidious',⁶ especially in relation to electoral rights, since 'democracy is without doubt a fundamental feature of the European public order'.⁷ When considering whether a discriminatory measure can be justified, the ECtHR will consider whether its aim is legitimate and proportionate. The applicants argued that this could not be established, claiming in particular that total exclusion of a significant portion of the population of Bosnia and Herzegovina is not proportionate to the government's stated aim of 'achieving peace'.

In response, the government of Bosnia and Herzegovina relied on two main arguments. First, it claimed that the election rules were not discriminatory, denying that the Constitution effectively barred the applicants from participating in the democratic process, since they were eligible to register to vote and also to stand for election to the House of Representatives (the lower house of Parliament). It further stated that, even if the provisions were discriminatory, there were objective and legitimate justifications for limitations on their democratic rights. These included the preservation of the peace and achieving equal representation of all three 'Constituent Peoples' in a few legislative bodies.

Second, the government claimed that the current election rules were established as part of an international agreement (the Dayton Peace Accord) and so it did not have the authority or the powers to amend them, nor could it bear the responsibility of any breach of the ECHR. It also argued that, because the rules were implemented under international law, the government was unable to amend them to remove the offending provisions.

In February 2009, the ECtHR referred the case direct to its upper chamber, the Grand Chamber, as opposed to considering it first in the main Chamber. This decision is indicative of the huge importance of the case in the view of the Court.

An analysis of the Court's ruling

In its judgment, the ECtHR found that the applicants had been discriminated against as a result of the restrictions in the Constitution and Election Law of Bosnia and Herzegovina relating to minority electoral rights. The Court found Bosnia and Herzegovina to be in breach of Protocol 12 of the ECHR, which provides for the right to equal treatment and non-discrimination, in denying citizens who are not 'Constituent Peoples' the possibility of standing for election to the Presidency. The Court also found a violation of Article 14 of the ECHR, which provides for freedom from discrimination, taken in conjunction with Article 3 of Protocol No. 1, which protects free elections to the legislature, as a result of the ineligibility of 'Others' – including national minorities – to stand for election to the House of Peoples.

However, the Court did not find violations of Article 13 in relation to both applicants, or of Article 3 in relation to Mr Sejdić. The Court further ruled that the finding of a violation was sufficient compensation for any damage that the applicants may have suffered, and therefore only granted an award to the applicants in respect of legal costs and expenses of the case.

MRG welcomes the judgment, which is particularly significant as it is the first case in which the Court has considered the application of Protocol 12. In the absence of previous decisions regarding the Protocol, the Court has now ruled that the test for determining whether or not there has been discrimination under Protocol 12 will be the same as that previously applied under Article 14 of the ECHR, which provides for freedom from discrimination in conjunction with another ECHR right. Discrimination, the Court held, should have the same meaning as already established under Article 14 of the ECHR: 'treating differently, without an objective and reasonable justification, persons in similar situations'.⁸

The Court set a high benchmark with regard to racial discrimination. Referring to previous case law, the Court stated that: 'racial discrimination is a particularly egregious kind of discrimination' which 'requires ... special vigilance and a vigorous reaction'.⁹ Therefore, where a difference in treatment is based on race or ethnicity: 'the notion of objective and reasonable justification must be interpreted as strictly as possible'.¹⁰ The Court further stated that: 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.¹¹ However, the Court recognized that ECHR states may treat groups differently in order to correct 'factual inequalities' between them.

The allegation of discrimination under Article 14 was contingent upon the right protected by Article 3 of Protocol 1, the right to free elections. Free and fair elections ensure that individuals are able to participate in the politi-



Dervo Sejdić/image © OSCE

cal process and so determine the political make-up and policies of their government. This right to engage in the political process underpins the effectiveness of the enjoyment of human rights since, as the Court has acknowledged, democracy is a fundamental feature of the European public order. However, as explained above, states are allowed some discretion to determine the conditions in which these rights function.

In determining the extent to which Bosnia could be afforded this discretion, the Court was placed in the difficult position of examining the terms of a peace agreement. As the Court recognized, when the Constitution was put in place:

*a very fragile cease-fire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and 'ethnic cleansing'. The nature of the conflict was such that the approval of the 'constituent peoples' ... was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of other communities ... at the peace negotiations and the participants' preoccupation with effective equality between the 'constituent peoples' in the post-conflict society.*¹²

However, the Court found that while: 'the time may still not be ripe for a political system which would be a simple reflection of majority rule', other methods of power-sharing exist which do not automatically lead to the total exclusion of representatives of the other communities.¹³ This 'possibility of alternative means of achieving the same end' was found to be an important factor.¹⁴ Further, as Bosnia had previously agreed with the Venice Commission and the European Union (EU) to amend its electoral legislation, the Court concluded that there could be no reasonable or objective justification in relation to the exclusion of 'Others' from standing for election to Bosnia's House of Peoples.

The judgment and its impact in Bosnia and Herzegovina and beyond

As a result of this judgment, the Bosnian government should now allow all citizens full participation in the electoral process. The right to effective participation is a fundamental human right, affirmed in a number of key international legal instruments. Effective participation enables citizens to express or protect their identity, giving them a stake in society and ensuring the survival and dignity of the minority. Measures taken towards ensuring the effective participation of minorities contribute to the alleviation of tensions and to conflict prevention. States which welcome the participation and integration of minorities tend to be not only more stable but also more prosperous.¹⁵

In addition, the judgment has provided invaluable insight into the parameters of Protocol 12 in relation to discrimination: the same test as already established under Article 14 will apply. The judgment has also confirmed that racial discrimination can rarely, if ever, be justified.¹⁶ This emphasizes the importance of non-discrimination within international human rights law.

In fact, the ECtHR's ruling reflects prevailing international opinion on the matter. In 2006, MRG submitted a report on discrimination in Bosnia and Herzegovina to the UN Committee on the Elimination of Racial Discrimination (CERD)¹⁷ calling for clarification from Bosnia and Herzegovina that it would ensure that all citizens, including 'Others', were able to participate in the political process. CERD later recommended that the authorities of Bosnia and Herzegovina ensure that: 'All rights provided by law are granted, both in law and in fact, to every person within the territory of the State Party, irrespective of race or ethnicity', and that: 'the State Party review and remove all discriminatory language from the State and Entity Constitutions, and from all legislative and other domestic law texts, including especially, but not limited to, distinctions between so-called "constituent peoples" and "Others"'.¹⁸

Bosnia and Herzegovina must now amend its Constitution and election laws in order to ensure equal treatment of all its citizens in time for the presidential and parliamentary elections set for October 2010. The implementation of this judgment, which will require the government to allow all citizens full participation in the political process, thereby ensuring that elections are democratic, should be closely monitored by all members of civil society and the international community. By supporting and promoting citizenship in this way, it is hoped that the judgment will facilitate the building and consolidating of consensus among the people of Bosnia and Herzegovina.

Notes

1. *Sejdic and Finci v. Bosnia and Herzegovina*, Application Nos 27996/06 and 34836/06, judgment dated 22 December 2009.
2. The High Representative is also European Union Special Representative (EUSR). The EUSR is currently developing an office that is co-located with the OHR and will remain in Bosnia and Herzegovina after the closure of the OHR. The EUSR mandate is derived from the European Union's policy objectives in Bosnia and Herzegovina which include helping achieve progress in implementing the Dayton Peace Accord, as well as in the Stabilization and Association Process, the process by which Bosnia and Herzegovina moves towards the EU.
3. International actors, including the US and the EU, are currently discussing when the OHR's mandate will end, which could be as early as 2010.
4. Bosniaks are recognized as Muslims and the term is distinct from 'Bosnians', which denotes citizens of Bosnia and Herzegovina irrespective of their ethnic origin.
5. *Timishev v. Russia*, No. 55762/00 and 55974/00, 58.
6. See *Nachova and Others v. Bulgaria*, Nos 43577/98 and 43579/98, judgment of 26 February 2004, § 145; *Timishev v. Russia*, *op. cit.*, § 56.
7. See *Loizidou v. Turkey*, judgment of 23 March 1995, Series A, No. 301, § 75 and *Communist Party of Turkey and Others v. Turkey*, Nos 133/1996/752/951, 30 January 1998, § 75.
8. *Sejdic and Finci v. Bosnia and Herzegovina*, *op. cit.*, § 55.
9. *Ibid.*, § 42.
10. *Ibid.*, § 43.
11. *Ibid.*, § 44.
12. *Ibid.*, § 45.
13. *Ibid.*, § 48.
14. *Ibid.*
15. Ghai, Y., *Public Participation and Minorities*, London, MRG, 2003, p. 5.
16. *Sejdic and Finci v. Bosnia and Herzegovina*, *op. cit.*, § 44.
17. See CERD's Concluding Observations on Bosnia and Herzegovina, 68th session, 20 February–10 March 2006, URL (consulted January 2010): [http://www.unhchr.ch/tbs/doc.nsf/0/72b2390667c6f922c1257180004b369a/\\$FILE/G0641237.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/72b2390667c6f922c1257180004b369a/$FILE/G0641237.pdf)
18. *Ibid.*, p. 4.

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Acknowledgements Thanks to Julia Harkness, MRG intern, who assisted with an initial draft of this paper. MRG gratefully acknowledges the support of the Open Society Institute. The contents of this document are the sole responsibility of Minority Rights Group International and can under no circumstances be regarded as reflecting the position of the Open Society Institute. Commissioning editor: Preti Taneja. Report editor: Sophie Richmond.

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ISBN 978-190458493-3 This briefing is published as a contribution to public understanding. The text does not necessarily represent in every detail the collective view of MRG or its partners. Copies of this study are available online at www.minorityrights.org. Copies can also be obtained from MRG's London office.

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