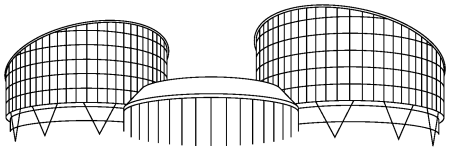

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ZORNIĆ v. BOSNIA AND HERZEGOVINA

(Application no. 3681/06)

JUDGMENT

STRASBOURG

15 July 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zornić v. Bosnia and Herzegovina,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President,*
Päivi Hirvelä,
George Nicolaou,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek,
Faris Vehabović, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 24 June 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 3681/06) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a citizen of Bosnia and Herzegovina Ms Azra Zornić ("the applicant"), on 19 December 2005.

2. The applicant was granted leave for self-representation. The Government of Bosnia and Herzegovina ("the Government") were represented by their Deputy Agent, Ms Z. Ibrahimović.

3. The applicant complained of her ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina because she does not declare affiliation with any of the "constituent people". She relied on Article 3 of Protocol No. 1 to the Convention taken alone and in conjunction with Article 14 of the Convention, and on Article 1 of Protocol No. 12.

4. On 14 March 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1957 and lives in Sarajevo.

6. She actively participates in the political life of the country. Among other things, in 2002 she stood as a candidate of the Social Democratic

Party of Bosnia and Herzegovina for election to the parliament of one of the Entities[1].

7. As the applicant does not declare affiliation with any of the "constituent people" (namely, Bosniacs[2], Croats[3] and Serbs[4]), but simply as a citizen of Bosnia and Herzegovina, she is ineligible to stand for election to the second chamber of the State parliament (the House of Peoples) and to the collective Head of State (the Presidency).

II. RELEVANT DOMESTIC LAW AND PRACTICE

8. The relevant law and practice were outlined in *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009. Notably, the Constitution of Bosnia and Herzegovina makes a distinction between "constituent peoples" (persons who declare affiliation with Bosniacs, Croats and Serbs) and "others" (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood or other reasons).

9. In the former Yugoslavia, a person's ethnic affiliation was decided solely by that person, through a system of self-classification. Thus, no objective criteria, such as knowledge of a certain language or belonging to a specific religion were required. Moreover, there was no requirement of acceptance by other members of the ethnic group in question. Since the Constitution contains no provisions regarding the determination of one's ethnicity it appears that it was assumed that the traditional self-classification would suffice.

10. In accordance with the Constitution (Articles IV § 1 and V), only persons declaring affiliation with a "constituent people" are entitled to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina.

---

[1] Bosnia and Herzegovina consists of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, and the Brčko District.

[2] Bosniacs were known as Muslims until the 1992-95 war. The term "Bosniacs" (*Bošnjaci*) should not be confused with the term "Bosnians" (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

[3] The Croats are an ethnic group whose members may be natives of Croatia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression "Croat" is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Croatian", which normally refers to nationals of Croatia.

[4] The Serbs are an ethnic group whose members may be natives of Serbia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression "Serb" is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Serbian", which normally refers to nationals of Serbia.

11. On 29 June 2010 the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") declared that it lacked jurisdiction to examine a discrimination complaint concerning the appellant's ineligibility to stand for election to the Presidency on the ground of his ethnic origin (decision no. AP 1945/10). The appellant in that case directly relied on the *Sejdić and Finci* judgment.

III. RELEVANT INTERNATIONAL LAW DOCUMENTS

12. The Committee of Ministers of the Council of Europe, in its supervisory function under the terms of Article 46 § 2 of the Convention, adopted three interim resolutions concerning the implementation of *Sejdić and Finci* judgment (see documents nos. CM/ResDH(2011)291, CM/ResDH(2012)233 and CM/ResDH(2013)259). It urged the authorities of Bosnia and Herzegovina to take all the necessary steps for the full execution of that judgment by adopting required measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further delay.

The relevant part of the first interim resolution, adopted on 2 December 2011, reads:

> "Recalling that, from the beginning of its examination of this case, the Committee considered that the execution of this judgment would require a number of amendments to the Constitution of Bosnia and Herzegovina and to its electoral legislation;
>
> Bearing in mind further that, on 7 July 2010, on the occasion of the examination of Bosnia and Herzegovina's honouring of its obligations and commitments, the Ministers' Deputies urged the authorities of Bosnia and Herzegovina to bring the Constitution of Bosnia and Herzegovina in line with the Convention, in compliance with the present judgment;
>
> Stressing that, in becoming a member of the Council of Europe in 2002, Bosnia and Herzegovina undertook to "review within one year, with the assistance of the European Commission for Democracy through Law (Venice Commission), the electoral legislation in the light of Council of Europe standards, and to revise it where necessary";
>
> Noting also that the Parliamentary Assembly has periodically reminded Bosnia and Herzegovina of this post-accession obligation;
>
> ...
>
> Recalling that the Committee of Ministers deeply regretted that the elections took place in Bosnia and Herzegovina on 3 October 2010 in accordance with the legislation which was found to be discriminatory by the Court in the present judgment;
>
> ...

REITERATES ITS CALL ON the authorities and political leaders of Bosnia and Herzegovina to take the necessary measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further delay". (footnotes omitted)

The relevant part of the second interim resolution, adopted on 6 December 2012, reads:

"Underlining that these amendments, by allowing all citizens of Bosnia and Herzegovina to run for elections, would enhance the functioning of democratic institutions in the country and citizens' confidence in them;

...

Stressing that reaching a political consensus is an indispensable condition for the amendment of the Constitution and the electoral legislation in order to ensure not only the execution of the present judgment but also full compliance of future elections with Convention requirements;

FIRMLY RECALLS the obligation of Bosnia and Herzegovina under Article 46 of the Convention to abide by the judgment of the Court in the case of Sejdić and Finci;

STRONGLY URGES the authorities and political leaders of Bosnia and Herzegovina to amend the Constitution and the electoral legislation and to bring them in conformity with the Convention requirements without any further delay."

The relevant part of the third interim resolution, adopted on 5 December 2013, reads:

"Recalling the Committee's repeated calls on the authorities and political leaders of Bosnia and Herzegovina to reach a consensus and to amend the Constitution of Bosnia and Herzegovina and its electoral legislation to comply with this judgment and that these calls have been echoed notably by the Parliamentary Assembly of the Council of Europe (including most recently in its Recommendation 2025(2013)), as well as different bodies of the European Union and the United Nations;

Recalling the assurances given on numerous occasions by the representatives of the executive and the main political parties of Bosnia and Herzegovina that all political stakeholders are fully committed to finding an appropriate solution for the execution of this judgment;

Recalling also that the Constitution of Bosnia and Herzegovina provides that "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law";

Expressing the gravest concern that, despite the repeated assurances, including at its last human rights meeting in September 2013, the necessary constitutional and legislative amendments have still not been made and that time is running out for the 2014 elections to be held in compliance with the Convention requirements;

Reiterating that failure to do so would not only amount to a manifest breach of obligations under Article 46, paragraph 1, of the Convention but could also potentially undermine the legitimacy and the credibility of the country´s future elected bodies;

...

FIRMLY CALLS UPON all authorities and political leaders of Bosnia and Herzegovina to ensure that the constitutional and legislative framework is immediately brought in line with the Convention requirements so that the elections in October 2014 are held without any discrimination against those citizens who are not affiliated with any of the "constituent peoples"."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 14 OF THE CONVENTION, ARTICLE 3 OF PROTOCOL NO. 1 AND ARTICLE 1 OF PROTOCOL NO. 12

13. The applicant complained of her ineligibility to stand for election to the House of Peoples and the Presidency because of her refusal to declare affiliation with any of the "constituent people"; in her submission this amounted to discrimination. She relied on Article 14 of the Convention, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12.

Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 3 of Protocol No. 1 provides:

"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."

Article 1 of Protocol No. 12 to the Convention provides:

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

A. Admissibility

1. The parties

14. The Government advanced several objections as regards the admissibility of the complaints. Firstly, they submitted that Bosnia and Herzegovina could not be held responsible for the contested constitutional provisions because the Constitution of Bosnia and Herzegovina was part of an international treaty, the Dayton Agreement.

Furthermore, the applicant was not actively involved in the political life of the respondent State. She has participated in the elections only once, in 2002, when she unsuccessfully ran for the Parliamentary Assembly of the Federation of Bosnia and Herzegovina. Therefore, the applicant could not claim to be a "victim" of the violations which she alleged. Lastly, the Government submitted that the applicant failed to use available domestic remedies for her complaints, in particular, a constitutional appeal.

15. The applicant disputed these arguments.

2. The Court's assessment

(a) Compatibility *ratione personae*

16. In *Sejdić and Finci*, cited above, the Court held that, leaving aside the question whether the respondent State could be held responsible for putting in place contested constitutional provisions, it could nevertheless be held responsible for maintaining them (ibid., § 30). The Court therefore rejects the Government's preliminary objection under this head.

(b) Victim status

17. As regards the second objection, in *Sejdić and Finci* the Court examined the applicants' victim status and concluded that, given their active participation in public life, they might claim to be victims of the alleged discrimination (ibid., § 29). The Court sees no reason to depart from this conclusion in the present case and therefore rejects the Government's second preliminary objection.

(c) Exhaustion of domestic remedies

18. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, *inter alia*, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of*

Judgments and Decisions 1996-IV; *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; and *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 et al., ECHR 2010).

19. As to legal systems which provide constitutional protection for fundamental rights, such as that of Bosnia and Herzegovina, the Court recalls that it is incumbent on the aggrieved individual to test the extent of that protection (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006).

20. That said, the Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant (see *Akdivar and Others*, cited above, § 69, and *Selmouni v. France* [GC], no. 25803/94, § 77, ECHR 1999 V).

21. Turning to the present case, the Court notes that the applicant failed to use a constitutional appeal before lodging the present application. However, in view of the Constitutional Court's approach to the matter (see paragraph 11 above), the Court considers that a constitutional appeal was not an effective remedy for the present applicant's complaints which she had to exhaust. In these circumstances, the Court considers that the Government's objection on grounds of failure to exhaust domestic remedies cannot be upheld.

3. Conclusion

22. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

23. The applicant maintained that despite being a citizen of Bosnia and Herzegovina she is denied by the Constitution any right to stand for election

to the House of Peoples and the Presidency because she does not declare affiliation with one of the "constituent peoples" or any ethnic group.

2. The Government's submissions

24. The Government argued that the current constitutional structure in Bosnia and Herzegovina was established by a peace agreement following one of the most destructive conflicts in recent European history. Its ultimate goal was the establishment of peace and dialogue between the three main ethnic groups – the "constituent peoples". The Government maintained that the contested constitutional provisions, excluding persons who did not declare affiliation with a "constituent people" from the House of Peoples and the Presidency, should be assessed against this background. They claimed that the time was still not ripe for a political system which would be a simple reflection of majority rule, given, in particular, the prominence of mono-ethnic political parties and the continued international administration of Bosnia and Herzegovina.

25. Moreover, they argued that the present applicant did not belong to any "minority", but chose of her own will not to declare affiliation with any of the "constituent people". She could change her mind at any time should she wish to participate in the political life of Bosnia and Herzegovina.

3. The Court's assessment

26. Discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among many authorities, *Andrejeva v. Latvia* [GC], no. 55707/00, § 81, ECHR 2009). The scope of a Contracting Party's margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (ibid., § 82).

27. The Court further reiterates that the same term "discrimination" from Article 14 was used in Article 1 of Protocol No. 12 as well. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court sees no reason to depart from the settled interpretation of "discrimination", as developed in the jurisprudence concerning Article 14 in applying the same term under Article 1 of Protocol No. 12 (see *Sejdić and Finci*, § 55, and *Ramaer and Van Willigen v. the Netherlands* (dec.), no. 34880/12, 23 October 2012, §§ 88-91).

(a) As regards the House of Peoples of Bosnia and Herzegovina

28. The applicant relied on Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone, and Article 1 of Protocol No. 12. The Court will first examine this complaint under the first-mentioned provisions. Furthemore, the test for Article 14 and Article 1 of Protocol No. 12 being the same (see paragraph 27 above), the Court finds it appropriate to look at this complaint under Article 1 of Protocol No. 12 at the same time.

29. The Court has already held in *Sejdić and Finci* that elections to the House of Peoples of Bosnia and Herzegovina fall within the scope of Article 3 of Protocol No. 1 (ibid., §§ 40 and 41). Accordingly, Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1 is applicable in the present case.

30. The Court observes that in accordance with the Constitution only persons declaring affiliation with a "constituent people" (Bosniacs, Croats and Serbs) are entitled to run for the House of Peoples of Bosnia and Herzegovina. The applicant, who does not declare affiliation with a "constituent people", but declares herself as a citizen of Bosnia and Herzegovina, is, as a result, excluded (see, mutatis mutandis, *Sejdić and Finci*, cited above, § 45). The Court considers, therefore, that the present case is identical to *Sejdić and Finci*. Although, unlike the applicants in that case, who were of Roma and Jewish origin respectively, the present applicant does not declare affiliation with any particular group, she is also prevented from running for election to the House of Peoples on the ground of her origin.

31. As regards the Government's argument that the applicant could at any time choose to affiliate with one of the "constituent people", the Court observes that the same could be said for members of minority groups, such as the applicants in *Sejdić and* Finci, or citizens without any ethnic affiliation. As noted above, there are no objective criteria for one's ethnic affiliation (see paragraph 8 above). It depends solely on one's own self-classification. There may be different reasons for not declaring affiliation with any particular group, such as for example intermarriage or mixed parenthood or simply that the applicant wished to declare herself as a citizen of Bosnia and Herzegovina. While it is not clear what the present applicant's reasons are, the Court considers them in any case irrelevant. The applicant should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification.

32. The Court reiterates that identical constitutional provisions have already been found to amount to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 in *Sejdić and Finci* (ibid., § 50). Accordingly, and for the detailed reasons elaborated in *Sejdić and Finci* (§§ 47-49), the Court concludes that there has been a violation of Article 14 taken in conjunction with Article 3 of

Protocol No. 1 and a violation of Article 1 of Potocol No. 12 resulting from the applicant's continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina.

33. Having regard to its finding in the preceding paragraphs, the Court considers that it is not necessary to examine separately whether there has also been a violation of Article 3 of Protocol No. 1 taken alone as regards the House of Peoples.

(b) As regards the Presidency of Bosnia and Herzegovina

34. The applicant relied on Article 1 of Protocol No. 12 only.

35. The Court has already found this Article to be applicable to elections to Presidency of Bosnia and Herzegovina in *Sejdić and Finci* (ibid., § 54).

36. The lack of a declaration of affiliation by the present applicant with a "constituent people" also renders her ineligible to stand for election to the Presidency. An identical constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 as regards the House of Peoples (see paragraph 32 above) and, moreover, the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner (see paragraph 27 above). In *Sejdić and Finci* (ibid., § 56) the Court has already found that the constitutional provisions which rendered the applicants ineligibile for election to the Presidency were discriminatory and in breach of Article 1 of Protocol No. 12. The Court does not see any reason to depart from that jursiprudence in the present case.

37. There has accordingly been a violation of Article 1 of Protocol No. 12 as regards the present applicant's ineligibility to stand for election to the Presidency.

II. APPLICATION OF ARTICLE 46 OF THE CONVENTION

38. The Court finds it appropriate to consider the present case under Article 46 of the Convention, which provides, in so far as relevant:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution..."

39. The Court recalls that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by

solving the problems that have led to the Court's findings (see, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000 VIII; *Karanović v. Bosnia and Herzegovina*, no. 39462/03, § 28, 20 November 2007; *Čolić and Others v. Bosnia and Herzegovina*, nos. 1218/07 et al., § 17, 10 November 2009; *Burdov v. Russia (no. 2)*, no. 33509/04, § 125, ECHR 2009-...; and *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 106, ECHR 2010 (extracts)).

40. The Court further recalls its finding in *Sejdić and Finci* that constitutional provisions which rendered the applicants ineligible to stand for elections to the House of Peoples and to the Presidency of Bosnia and Herzegovina amounted to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12. It emphasises that the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*. The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery (see *Broniowski*, cited above, § 193, and *Greens and M.T.*, cited above, § 111).

41. Pursuant to Article 46 § 2, *Sejdić and Finci* is currently under the supervision of the Committee of Ministers, which has regularly examined domestic developments and sought a speedy end to the prevailing situation of non-compliance. It has always considered that a number of amendments to the Constitution of Bosnia and Herzegovina and its electoral legislation should be adopted for the execution of this judgment. The Committee of Ministers adopted three interim resolutions urging the authorities of Bosnia and Herzegovina to take all the necessary steps for the full execution of that judgment by adopting necessary measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further delay (see paragraph 12 above; see also Resolutions nos. 1701(2010), 1725(2010) and 1855(2012) and Recommendation no. 2025(2013) of the Parliamentary Assembly of the Council of Europe). In its third resolution in particular the Committee of Ministers called upon the respondent State "to ensure that the constitutional and legislative framework is immediately brought in line with the Convention requirements so that the elections in October 2014 are held without any discrimination against those

citizens who are not affiliated with any of the 'constituent peoples'" (see paragraph 12 above).

42. In light of the lengthy delay which has already occurred, the Court, like the Committee of Ministers, is anxious to encourage the speediest and most effective resolution of the situation in a manner which complies with the Convention's guarantees (compare, *Greens and M.T.*, cited above, § 112).

43. In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing" (see ibid., § 45). The nature of the conflict was such that the approval of the "constituent peoples" was necessary to ensure peace (ibid.). However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

45. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award her any sum on that account.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 as

regards the applicant's ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina;

3. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 12 as regards the applicant's ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina;

4. *Holds* unanimously that there is no need to examine the same complaint under Article 3 of Protocol No. 1 taken alone;

5. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 12 as regards the applicant's ineligibility to stand for election to the Presidency of Bosnia and Herzegovina.

Done in English, and notified in writing on 15 July 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Wojtyczek is annexed to this judgment.

I.Z.
F.A.

PARTLY DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I agree that in the instant case there has been a violation of Article 1 of Protocol No. 12, but I do not share the view that Bosnia and Herzegovina has violated Article 14 of the Convention taken in conjunction with Article 3 of Protocol No 1.

2. I note that the case raises very complex issues belonging to the scope of constitutional law. The majority decided to follow the approach adopted in the Grand Chamber judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, (nos. 27996/06 and 34836/06, ECHR 2009). In that judgment, the Court proceeded in four steps. Firstly, it analysed the powers of the House of Peoples of Bosnia and Hercegovina and emphasised their broad scope (paragraph 41). Secondly, given the broad scope of the powers enjoyed by this parliamentary chamber, it concluded that elections to it fell within the scope of Article 3 of Protocol No. 1. Thirdly, the Court verified whether the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina had an objective and reasonable justification. Fourthly, after carrying out an analysis of Bosnian law, it concluded that "the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lack[ed] an objective and reasonable justification and ha[d] therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1" (see paragraph 50 of the *Sejdić and Finci* judgment).

The reasoning in the case of *Sejdić and Finci* seems to be based on the following implicit assumptions concerning the meaning of Article 3 of Protocol No. 1: (i) if the second chamber has relatively broad legislative powers, then it must be elected; (ii) the elections to this second chamber should meet the same criteria as the elections to the first chamber; and (iii) every adult citizen therefore has a subjective right to stand for election to such a second chamber. I am not persuaded that the wording of Article 3 of Protocol No. 1 justifies accepting these assumptions as the necessary legal consequences of this provision. If we apply the proposed approach with consistency, then certain other European States with a bicameral legislature may be in breach of Article 3 of the Convention.

According to the case-law of the Court, Article 3 is applicable to the legislature of the European Union (see *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I). The European Union has a Parliament which is elected through universal but unequal suffrage and an unelected Council which enjoys wide legislative powers. In this context, serious doubts may arise as to whether the constitutional system of the European Union would pass the test implicitly laid down in the *Sejdić and Finci* case.

3. The Preamble to the Convention contains important guidelines concerning the interpretation of the Convention. At least two of them are of paramount importance in cases concerning questions of constitutional law. Firstly, the Preamble refers to the "common understanding and observance of human rights". The Convention should therefore be construed in a way which reflects the common understanding of human rights among the High Contracting Parties. When different interpretations are possible under the applicable rules of treaty interpretation, preference should be given to the solution which better reflects the common understanding of human rights.

Secondly, the Preamble refers to "a common heritage of political traditions, ideals, freedom and the rule of law". The interpretation of the Convention should therefore take this common heritage into due account. When different interpretations are possible under the applicable rules of treaty interpretation, preference should be given to the solution which better reflects the common heritage of political traditions. The same idea may also be expressed in slightly different words: the interpretation of the Convention should take into due account the common European constitutional heritage. The paradigm of European constitutionalism is an inescapable point of reference for interpretation of the Convention.

4. It is important to note the great variety of electoral laws across Europe, as well as the diversity of solutions concerning the organisation of legislative power. There exist a multitude of electoral systems which fulfil the criteria of free elections, and a multitude of models of bicameralism which fulfil the criteria of democracy.

The very idea of bicameralism presupposes that there exists a second chamber which is different in many respects from the first, and whose members may be chosen in a very different manner from the elections to the first chamber. Whereas the first chamber represents the Nation, understood as a political community consisting of citizens, the second chamber may be based on a different idea of representation. One of the possible justifications for a second chamber is to correct representational shortcomings in the first chamber. Constitution-makers may therefore devise a second chamber ensuring representation of special interests and opt for an electoral system which gives a stronger voice to certain social groups. This is the so-called model of incongruent bicameralism.

5. Article 3 of Protocol No. 1 is worded in a very specific way. As rightly pointed out in the joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens to the Grand Chamber judgment in the case of *Hirst v. the United Kingdom (no. 2)* (no. 74025/01, ECHR 2005-IX), the wording of this provision is different from nearly all other substantive clauses of the Convention. It is also completely different from the wording of Article 25 of the International Covenant on Civil and Political Rights, which states that "every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without

unreasonable restrictions ... 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".

In the Convention, the accent is placed on the objective guarantees of free elections rather than on the subjective rights of the right-holders. This focus on the objective law is of paramount importance for establishing the scope and content of the provision under consideration. There can be no doubt that free elections to the legislature refers to universal suffrage, understood as a lack of unreasonable restrictions on the right to vote and on the right to be elected. At the same time, democratic European constitutionalism has accepted certain inherent limitations on the scope of those rights. Electoral rights in respect of parliament are to be granted to adult citizens and do not necessarily encompass incapacitated persons or persons deprived of their right to vote in connection with a criminal conviction. Further restrictions and qualifications may be acceptable in the elections to the second chamber of parliaments.

6. Article 3 of Protocol No. 1 raises the very delicate issue of the adequacy between the scope of the second chamber's powers and the method of selecting its members. I agree that the distribution of legislative powers between the chambers of a national parliament is an important parameter from the perspective of this provision. If the second chamber has only limited powers, and if its opposition may be overcome by the first chamber, then the freedom to shape the method of selecting its members is extremely wide. If, however, the second chamber enjoys legislative powers equal to those of the first, then the scope of constitutional autonomy left to the States in shaping the method of selecting the members of the second chamber is much more restricted. However, I am not persuaded that in such a situation Article 3 of Protocol No. 1 not only imposes an obligation to elect the second chamber, but also lays down the same standards for such an election as for elections to the first chamber.

It is obvious that Article 3 of Protocol No. 1 imposes strict standards for elections to the first chamber of parliament. I agree with the view that this provision enshrines an individual and enforceable right to free elections to the "first" chamber of parliament, and that unreasonable limitations on the right to vote and on the right to stand for election are incompatible with the concept of free elections. Furthermore, it would be difficult to accept a first chamber elected by an indirect ballot.

As to the problem of the second chamber, it is impossible to disagree with the view reiterated in the *Sejdić and Finci* judgment (paragraph 40), to the effect that "Article 3 of Protocol No. 1 was carefully drafted so as to avoid terms which could be interpreted as an absolute obligation to hold elections for both chambers in each and every bicameral system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 53, Series A no. 113)". Furthermore, in my view, if Article 3 of Protocol No. 1 allows a

method of selecting the members of the second chamber other than through election by citizens, we can derive from this provision neither a subjective right to vote nor a subjective right to stand in elections to this chamber. In the absence of a right protected by the Convention and its Protocols, Article 14 is not applicable. This latter provision cannot apply to a right to stand for election to the second chamber which is enshrined only in domestic legislation.

In my opinion, Article 3 of Protocol No. 1 sets up a more general and a more flexible test as the basis for assessing the method of selecting members of the second chamber. The provision in question requires that the constitutional system as a whole complies with the following standard. Free and direct elections to the first chamber, coupled with the adopted system of choosing the members of the second chamber, should ensure the free expression of the opinion of the people in the choice of the legislature. As mentioned above, this general assessment has to take account, among other things, of the scope of the powers enjoyed by each chamber of the national parliament. The constitutional architecture should enable citizens to determine the political orientation of the legislative power, considered as a whole.