

MAIN POINTS AND RECOMMENDATIONS

On 12 September 2016, the Open Society Justice Initiative (OSJI) and the European Implementation Network (EIN) convened a briefing on cases scheduled for review at the 1265 CM-DH meeting. The main points and recommendations are summarized below:

1. *Sejdić and Finci v Bosnia and Herzegovina* (App. Nos. 27996/06 and 34836/06)

Speaker: Jakob Finci, former Ambassador and applicant

The case concerns constitutionally entrenched racial discrimination in relation to the right to vote and the right to stand for election. In 2009, the Grand Chamber found Bosnia and Herzegovina (BiH) to be in breach of Protocol 12, 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 ECtHR also found a violation of Article 14 of the ECHR, which provides for freedom from discrimination, taken in conjunction with Article 3 of Protocol 1, which protects free elections to the legislature, as a result of the inability of ‘Others’ to stand for election to the House of Peoples.

State of execution

Despite supervision by the Committee of Ministers (CoM) since 2010—including adopting three interim resolutions— and the explicit concern expressed by the ECtHR about the consequences of non-implementation in subsequent identical cases, the Government of BiH has made no credible effort to remove discriminatory provisions from its Constitution and Electoral Law, both of which are required to fully implement the judgment. As a direct result of this failure, two rounds of national elections have been held since the judgment was issued, in direct contravention of the Convention, and under a system that is considered fundamentally discriminatory by the ECtHR.

As part of the reform deal with the European Union, in 2015 BiH political leaders signed a written declaration agreeing they would pay special attention to the implementation of the *Sejdić and Finci* judgment. These written commitments were agreed by the Presidency, signed by 14 parties of the Parliament and endorsed by the Parliamentary Assembly.

New information

After a period of non-activity and sidelining of the issue,¹ on 8 September 2015, BiH adopted an Action Plan indicating preparatory steps for the implementation of the judgment, and agreed that a new working group would be established, tasked with drafting relevant proposed constitutional amendments.

Since that Action Plan, we have seen no credible effort to ensure that the working group is formally established² and commences its work on the draft amendments. Nor has an indicative time-table been drawn up for the execution of the judgment. Local elections are scheduled for 2 October 2016, and political leaders now claim they have to wait until after the elections to take the promised steps.

In May 2016, in the case of *Šlaku v. Bosnia and Herzegovina* (App. No. 56666/12)—concerning a citizen of BiH belonging to the Albanian ethnic minority who was prevented from running as a candidate for the Presidency and the House of Peoples—the ECtHR stressed that the finding of a violation in the case was the direct result of the failure of BiH authorities to introduce measures to ensure compliance with *Sejdić and Finci* judgment and reiterated that the continuing failure to appropriately amend the Constitution and Electoral Law both perpetuates an unacceptable political system and undermines the credibility and the effectiveness of the ECtHR and the Convention system.

Recommendations

The Committee of Ministers should :

- Place the case back on the agenda of the next (1266) CM-DH meeting and request an Updated Action Plan from the Government of BiH, with a specified time-frame for its envisaged compliance, including rapid deadlines for commencing and achieving the necessary steps toward full implementation.
- Urge the Government of BiH to commence without delay the measures necessary to implement the judgment and ensure that minority communities in BiH have the opportunity for effective participation in the consultation process, in line with international and regional minority rights standards—including those enshrined in the Council of Europe’s Framework Convention for the

¹ There was almost no effort made by BiH authorities and political leaders between May 2014 and September 2015 to address the issue of non-implementation of the judgment.

² Based on information received from authorities of BiH, as of 3 June 2016 the Working Group is still not fully formed—Email communication with the Ministry of Human Rights and Refugees (MHHR), 3 June 2016. Updated information was requested in September but MRG has received no response to date from the MHRR.

Protection of National Minorities— and recent recommendations of the UN Committee of Elimination of Racial Discrimination.

- If BiH authorities continue to make no credible effort to execute the judgment, consider invoking Article 46(4) as the next logical procedural step to take due to persistent failure of the Government of BiH to implement the ruling despite long-term supervision.

2. *Namat Aliyev group (App. 18705/06.) v. Azerbaijan and Ilgar Mammadov v. Azerbaijan (App.15172/13)*

Speaker: Rasul Jafarov, Human Rights Defender and co founder, Human Rights Club

These cases concern parliamentary elections that occurring in Azerbaijan in November 2005; applicants were members of the opposition parties or independent candidates. The Court found violations of Article 3, Protocol No. 1 due to actions by the electoral commissions and domestic courts deemed arbitrary and without motivation, including rejecting complaints alleging breaches of electoral law and cancelling candidate registration. The Constitutional Court also annulled the elections in the electoral constituencies of certain applicants without sufficient reason, and without affording procedural safeguards to the parties (including the inability to participate in a review hearing).

State of execution

The authorities submitted a consolidated Updated Action Plan (which the CoM assessed in September 2014), as well as additional information in 2015.

New Information

The problems and shortcomings addressed in CoM decisions from its 1243rd meeting (8-9 December 2015) still remain unresolved with regard to current election practices in Azerbaijan. In response to the CoM, the government claimed that the Central Election Commission (CEC) held a series of trainings on free and fair elections for members of the electoral commissions. Further, the authorities asserted that it instituted additional safeguards to ensure the independence of those courts competent to examine election related complaints, notably by establishing administrative and economic courts as well as a so-called Judicial and Legal Council.

The training measures have failed to strengthen the impartiality and independence of the members of the electoral commissions and enhance the professionalisation of the electoral process. Indeed, the electoral commissions were mandated to organise the 26 September 2016 referendum on constitutional amendments, which aimed at expanding the powers of the President of Azerbaijan and restrict the right to information. On 18 August 2016, the CEC organized a seminar for the heads of Constituency Election

Commissions, at which officials expressed their support for the constitutional amendments, instead of focusing on the functioning of the electoral commissions³. CEC chief Mr Mazahir Panahov said: „The referendum to be held in Azerbaijan will help to maintain stability in the country. Azerbaijan is developing at a high pace; the standard of living of the population is increasing.“ Likewise, Deputy General Prosecutor Mr Rustam Usubov threatened opposition parties, movements, and individuals speaking against the referendum⁴. He said that “Some [groups] have attempted to tarnish the referendum by distributing leaflets calling for 'no constitutional amendments,' but the prosecutor’s offices and law-enforcement agencies will prevent this to happen.“

Even though administrative courts were created to review the legality of the electoral process and decisions of the electoral commissions, these courts do not afford safeguards against arbitrariness. To the contrary, judgments of these courts have led to many violations of election rights, similar to the ones found in the *Namat Aliyev* group of case. In its Communication dated 12 February 2015, the authorities stated that: “The Council [the Judicial-Legal Council] is the permanently functioning independent body and does not depend on legislative, executive, judicial or local authorities, or legal and natural persons in its organisational, financial and other matters.“⁵ It further indicated that the Council guarantees the independence of the judicial system by overseeing the functioning of courts and the behavior of judges. Chaired by Minister of Justice, Fikrat Mammadov, the Council is in practice subject to manipulation by the executive branch. Of particular concern is the fact that no proceedings were initiated by the Council against any of the judges who failed to review the legality of decisions taken by the electoral commissions, and no measures have been taken against them.

The CoM has urged compliance with recommendations of the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights⁶ to no avail.. To the contrary, the authorities suspended cooperation with both of those institutions, preventing the OSCE/ODIHR election monitoring mission to observe the 2015 parliamentary elections. However, the elections were monitored by the PACE monitoring group which found the elections to be „calm and peaceful“ and „adequate and generally in line with international standards.“⁷ However, three members of the PACE delegation issued a dissenting statement concluding that the elections can not be considered as "a step towards free, fair, and democratic elections," and that "the situation in the country with respect to political freedoms, freedom of expression and media, and freedom of assembly, and association does not provide conditions for holding free and democratic elections."

³ <http://bit.ly/2bUauyk>

⁴ <http://bit.ly/2cjG1c7>

⁵ Communication from the authorities – additional information (11/02/2015) concerning the *Namat Aliyev* group of cases against Azerbaijan (Application No. 18705/06)

⁶ <http://bit.ly/2cOt1Pi>

⁷ See Statement by PACE Election Observation Mission, available at <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5856&cat=31>

Finally, the Authorities have failed to implement the activities articulated in Section 4 of the Action Plan submitted to the CoM. Specifically, the electoral law was not amended, and the general measures⁸ as well as the measures spelt out in the recommendations of the Venice Commission were not taken.

Recommendations

- 1) The government should hold officials of constituency election commissions or other election commissions responsible for violations of a right to free elections, and accountability measures must be publicized. Articles 164-179 of the Code of Administrative Offences stipulate various penalties for committing offences during an election period. Fining responsible officeholders of the commissions or removing them from the commission under the said articles could be effective measures;
- 2) Legislative amendments relating to the formation of election commissions on a parity basis, i.e. equal division of election commission members between the Government and the opposition, should be tabled in Parliament. According to the current Election Code of the Republic of Azerbaijan, the formation of election commissions is based on representation of political parties and politicians in the Parliament⁹.

Ilgar Mammadov v Azerbaijan (app no 15172/13)

Speaker: Rasul Jafarov

The case concerns the arrest and detention of the applicant, an opposition politician, in violations of Article 5, 6 and 18 of the Convention. The European Court concluded *inter alia* that the applicant was arrested for reasons other than those permitted by Article 5, namely to silence or punish the applicant for having criticized the government.

State of execution

Despite calls by the CoM¹⁰ the judgment of the ECtHR in the case of Ilgar Mammadov, the chairman of the opposition REAL Movement, has not been not executed and Mr. Mammadov remains in detention. Although the ECtHR has recognized that Mr Mammadov was arrested unlawfully as a result of his political activities in violation of Article 18 of the Convention, he has been behind bars for 3 years and 8

⁸ The Court concluded that the proceedings before the electoral commissions and the decisions delivered by them did not afford safeguards against arbitrariness. The Court's findings regarding the lack of safeguards against arbitrariness also concern the remedies before the domestic courts.

⁹ According to the Article 19 of the Election Code: The Chairman of the election commission shall represent the political party of which the deputies are in majority in the Milli Majlis, and the Secretaries shall each respectively represent the political parties of which the deputies are in minority in the Milli Majlis and the independent deputies.

¹⁰ <http://bit.ly/2cCK0Rp>

¹¹ <http://bit.ly/2cpmeJO>

months. Arrested in February 2013, Mr Mammadov was sentenced to 7 years in prison by Sheki Grave Crime Court on March 17, 2014. ECtHR announced its judgment on Ilgar Mammadov's case on May 22, 2014. On September 24, 2012, after the judgment was announced and entered into force, Sheki Appellate Court upheld Mammadov's prison sentence without any change. Subsequently, an appeal was lodged with the Supreme Court against the decision. On 13 October 2015, the Supreme Court heard Mr Mammadov's appeal one year after the decision of Sheki Appellate Court, annulling the decision of the Appellate Court and sending it back for review. On 29 April 2016, Sheki Appellate Court refused to release Mr Mammadov and upheld a 7-year prison sentence for a second time. Although Mammadov and his lawyers appealed the decision in June 2016, the date for hearing is still unknown. Part of the Sheki Appellate Court's decision¹² relates to the judicial investigation in Sheki Grave Crimes Court. Of utmost concern is the statement by the Court implying that because Mr Mammadov is guilty of a crime in any event, the ECtHR judgment is of little importance. While the ECtHR judgment recognizes violation of Articles 5 and 18, Sheki Appellate Court only comments on violation of Article 5, ignoring violations found under Article 18 of the Convention.

Another development in relation to this case is that Natig Jafarli, executive secretary of the ReAL Movement, was arrested on the 12th of August 2016 on politically motivated charges. The charges brought against Natif Jafarli stem from from a criminal case the Prosecutor General launched against local and international NGOs in 2014, which resulted in the arrest and detentions of prominent human rights defenders and journalists. Although Mr. Jafarli was released on 9 September 2016, The Prosecutor General has not dropped the charges and Mr Jafarli is banned from traveling.

Recommendations:

To initiate infringement proceedings against Azerbaijan, under Article 46.4 of the European Convention of Human Rights (ECHR).

Al Nashiri v Poland (App. No 28761/11) and El Masri v. The Former Yugoslav Republic of Macedonia (App no 39630/09)

Al-Nashiri v. Poland (App. No. 28761/11)

Speaker: Rupert Skilbeck, Open Society Justice Initiative Litigation Director

In this case, the Court concluded that Poland violated Articles 2, 3, 5, 6 § 1 and 8 of the Convention and Article 1 of Protocol No. 6 by participating in the extraordinary rendition and secret detention of Mr. Al Nashiri in a secret CIA prison on Polish soil, and by failing to effectively investigate this participation. The Court found it established beyond reasonable doubt that the applicant was secretly detained in a secret CIA prison on Polish territory from 5 December 2002 until 6 June 2003. In addition, the Court

¹² See Annex 1 29 April 2016 decision of Sheki Appellate Court comments on the ECtHR judgment on Mr Mammadov's case

found that by refusing to comply with its evidentiary requests, Poland failed to discharge its obligations under Article 38 of the Convention. Since 2006, the applicant has been held at Guantanamo Bay, facing the prospect of an unfair trial by a military commission and continuing risk of the death penalty.

State of Execution

The judgment requires Poland to conduct an effective investigation and seek diplomatic assurances that the United States will not subject the applicant to the death penalty or to a flagrant denial of justice. On 13 May 2016, the Polish authorities submitted an Updated Action Plan,¹³ which still falls short of the requirements imposed by the Court to fully implement the judgment. The Updated Action Plan fails to demonstrate both political will and a plan by the Polish government in respect of the following:

- **Timeline and deadline for finalizing investigation:** The Updated Action Plan fails to express a commitment to complete the investigation, as well as lacks a clear and specific timeframe and deadline by which the investigation will be finalized;
- **Diplomatic assurances:** The Plan fails to commit to disclosure to all counsel for Mr. Al Nashiri of the communications addressed from the Polish government to the United States. We welcome however the fact that the request for diplomatic assurances have been renewed in July 2016.
- **Public acknowledgement:** The judgment affirmed both the victim's and the public's right to truth, which requires public acknowledgment of the Polish government's role in the CIA extraordinary rendition and secret detention program rendition. The Updated Action Plan fails to describe when and by what means the Polish government intends to publicly acknowledge their role in the violations of Mr. Al Nashiri's fundamental rights.

New Information

While Polish counsel was given access to the entire non-classified files and was allowed to make photocopies of those files, he still has not received unhindered access to all the classified documents of the investigation. Indeed, the prosecutor chooses which of these files counsels can access.

According to the Polish Counsel for the applicant, investigative activities in the main case are ongoing. Counsel was notified about two witness interviews that took place in August and November 2015 and was given the opportunity to take active part in these interviews. An additional eight witnesses were

¹³ DD(2016)627, Communication from the Polish authorities concerning the Al Nashiri group of cases against Poland (Application No. 28761/11) - Updated Action Plan- 13.05.2016.

interviewed between May and July 2016. Counsel was notified of these interviews and was invited to participate in them.

However, in late December 2015, part of the investigation concerning the failure of public officials to respond to allegations about the existence of a CIA rendition centre was separated from the main investigation. According to public statements by the Prosecutor's office to the press, it decided to discontinue this part of the investigation.¹⁴ Polish counsel for Mr. Al Nashiri appealed this decision. This important procedural decision (for the Prosecutor to discontinue a portion of the investigation) has been classified, even though there seem to be no legal grounds for such classification. The fact that the Polish legal framework does not allow for judicial review of classification decisions made by the Prosecutor is most concerning. Furthermore, despite the fact that the Prosecutor General was granted new statutory power in March 2016 to declassify any materials of important public interest, to our knowledge, no steps have been taken to declassify any documents from the case file. To the contrary, the Prosecutor has classified new documents.

We have been informed that the leading Prosecutor (Katarzyna Płończyk) was removed from the case in early 2016. With the departure of the lead prosecutor, it is unlikely that the remaining single Prosecutor, aided by one assistant, will be able to complete the investigation rapidly.

Recommendations

- In light of the deficiencies of the Updated Action Plan, we urge the Committee of Ministers to make the following recommendations to the Polish authorities after its next debate of the *Al Nashiri* case in a quarterly CM-DH meeting:
 - Conduct an effective criminal investigation into Poland's role in the CIA extraordinary rendition and secret detention program and the violation of Mr. Al Nashiri's rights, which includes but is not limited to the following elements:
 - Disclose the full terms of reference of the investigation to Mr. Al Nashiri's counsel in both Polish and European Court proceedings, as well as to the public;
 - Grant Polish counsel unhindered access to the entire case file (including classified files) on a regular basis;
 - Make information about the non-classified materials of the investigation publically available within a specified timeframe;

¹⁴ See Krakowska Prokuratura umorzyła jeden z wątków śledztwa, Radio Kraków, published on 25 April 2016, available at: <https://www.radiokrakow.pl/wiadomosci/aktualnosci/krakowska-prokuratura-umorzyla-jeden-z-watkow-sledztwa-w-sprawie-wiezien-cia/od-was/> (accessed on 21 July 2016).

- Declassify materials of the investigation to the fullest extent possible, especially with regard to any procedural decisions made by the prosecutor;
 - Disclose to Polish counsel the investigative actions to be undertaken in the course of the investigation, together with the anticipated time frame.
- Disclose all communications between the Polish authorities and the U.S. government concerning Mr. Al Nashiri to his Polish counsel, particularly communications concerning assurances relating to the death penalty as well as the flagrant denial of justice.
 - Officially acknowledge, at the highest level of government, that Poland hosted a secret CIA prison on its territory in 2002 and 2003.

El Masri v. The Former Yugoslav Republic of Macedonia (App no 39630/09)

Speaker: Rupert Skilbeck, OSJI Litigation Director

In *El-Masri v. The Former Yugoslav Republic of Macedonia*, the Grand Chamber of the European Court found Macedonia in violation of the Convention for the extraordinary rendition of Khaled El-Masri, and the subsequent failure to conduct an effective investigation into his torture and ill-treatment.

State of Execution

In its judgment, the Grand Chamber found that Macedonia had failed to conduct an effective investigation, and gave clear guidance as to what was required in order to satisfy its legal obligations in this respect:

“Such investigation should be capable of leading to the identification and punishment of those responsible. . . . The investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions. . . . They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence. . . . Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard. . . . Furthermore, the investigation should be independent from the executive. . . . Independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms. . . . Lastly, the victim should be able to participate effectively in the investigation in one form or another.”³

Macedonia’s first Action Plan, submitted on February 25, 2015, contained no reference to the duty of authorities to conduct an effective investigation, and was similarly silent with respect to its intentions to undertake such investigation. Following the decision of the Committee of Ministers at its 1230th meeting

(DH) in June 2015, Macedonia submitted a revised Action Plan in November 2015 proposing to establish “an ad hoc Fact-Finding Commission.”

New Information

Since the announcement to create an independent mechanism in November 2015, the government of Macedonia has continued to delay forming the Commission, relying on the political situation and pending elections in the country to postpone implementation of the judgment. Elections in Macedonia, which were initially scheduled to take place in April 2016, have been postponed twice, with ongoing uncertainty as to when they will occur in the future.

Recommendations

The Open Society Justice Initiative respectfully requests that the Committee of Ministers, in its upcoming September 2016 CM-DH debate and ensuing decision regarding the implementation of this case, urge the Government of Macedonia to:

A. Establish an independent commission of inquiry capable of leading to the identification and punishment of Macedonian officials who participated or were otherwise complicit in the extraordinary rendition of Mr. El-Masri.

Toward this end, the Government should:

- Immediately publish a draft law for the Commission, together with the necessary regulations.
- Convene a meeting of national and international experts to review the draft law to ensure it meets international standards, with technical assistance from the Council of Europe.
- Set out a timeline for the legislative passage of the law and regulations.
- Seek technical assistance to ensure the establishment of an effective Commission of Inquiry in compliance with international legal standards, possessed of the following characteristics:

-a clear legal basis;

- appropriate powers;

- a comprehensive mandate;

- independent members, advice, counsel, and investigators;

- an adequate budget;

- committed to publish a final report

B. Amend domestic law so as to remove any limitation period for the prosecution of offences committed in the rendition operation.

