

BOSNIA AND HERZEGOVINA  
FEDERATION OF BOSNIA AND HERZEGOVINA  
HERZEGOVINA-NERETVA CANTON  
CANTONAL COURT IN MOSTAR  
Number: 58 0 P 211881 19 P  
Mostar, 23 June 2022

*/Stamp: AC Public Company Motorways of the  
Federation of Bosnia and Herzegovina, limited  
liability company, MOSTAR  
Number: 02-4196-15/22  
Date: 29 June 2022*

Plaintiff: Lidija and Marina Berberović  
Defendant: Federal Attorney's Office Sarajevo, legal representative  
For: Others  
Value: 5,000.00 KM

LAWYER MILENKO KRČUM  
FEDERAL ATTORNEY'S OFFICE SARAJEVO  
JP AUTOCESTE FBIH,

Attached to this act, we submit the decision of the Mostar Cantonal Court No. 58 0 P 211881  
22 Gž dated 15 June 2022.

Judge:  
Gordana Puljarević

*/Stamp: Mostar Cantonal Court/*

*/Stamp: Accuracy of the copy is certified by the President of the Chamber, Judge: handwritten  
signature, on behalf of the court, authorized person of the court/*



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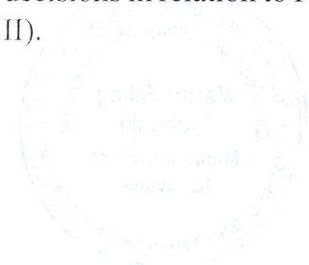
The Cantonal Court in Mostar, in a Council composed of judges: Vera Sudar, as the president of the Council, Rabija Tanović and Silvana Šuman, as members of the Council, in the legal matter of the Plaintiffs: 1. Lidija Berberović, Ortiješ b.b. Mostar and 2. Marina Berberović, Ortiješ b.b. Mostar, as the heir of the deceased Vujadin Berberović, 3. Slavko Berberović, Ortiješ b.b. Mostar, 4. Grujo Berberović, Ortiješ bb Mostar and 5. Nura Stein, Kosor bb, Mostar, represented by the lawyer Milenko Krčum, from Mostar, Kralja Petra Krešimira IV Street, bb Mostar, against the defendant Federation of Bosnia and Herzegovina, represented by its legal representative, Federal Attorney's Office Sarajevo, 15 Valtera Perića Street, Sarajevo, for protection against discrimination, value of the dispute 5,000.00 KM, deciding on the Defendant's appeal against the verdict of the Municipal Court in Mostar number: 58 0 P 211881 19 P dated 28 December 2021, at the session of the Council held on 15 June 2022, rendered this

## VERDICT

The appeal of the Defendant is upheld, the first instance verdict is amended in such a way that the Plaintiff's claim is rejected in its entirety.

## Explanation

The first instance verdict established that “the Defendant violated the Plaintiff's right to equal treatment - indirectly discriminated against the Plaintiffs in adopting the Spatial Plan of the area of special features adopted at the session of the House of Representatives of the Federation of Bosnia and Herzegovina on 27 January 2017 and at the session of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina on 09 February 2017, as well as during the adoption of the Decision of the Government of the Federation of BiH on determining the public interest in expropriation published in the “Official Gazette of the Federation of BiH”, no. 101/18 of 19 December 2018 in the part relating to the subsection of the Mostar Jug-Tunnel Kvanj motorway, in that they, in deciding, disproportionately to the public interest, violated the right to return of the Plaintiff as a member of the returnee population - the right to return displaced persons and refugees to their home, guaranteed by the Constitution of the Federation of BiH, which includes the right to remain after returning to their pre-war home, as well as the right to property, failing to limit encroachment on Plaintiffs' rights, especially encroachment on property rights, to the most necessary measure in proportion to the public interest in the construction of the motorway.” (paragraph I). The application of these decisions in relation to Plaintiffs in all proceedings of legal significance is prohibited (paragraph II).



The Defendant is obliged to reimburse the Plaintiffs for the costs of the proceedings in the amount of 840.00 KM within 30 days (paragraph III).

The Defendant filed an appeal against this verdict in due time, rebutting the verdict in its entirety, proposing that the appeal be upheld, the first-instance verdict revoked and the case returned for a retrial or that the first-instance verdict be amended. The Defendant files the appeal for all reasons provided by law with the explanation that the Plaintiff's claim that the Defendant by adopting the Spatial Plan of the area of special features of importance for the Federation of BiH "Motorway on Corridor V C" and by passing the Decision of the Government of F BiH to equal treatment, i.e. that it was established that the Plaintiffs were indirectly discriminated against, that their right to remain after returning to their pre-war home was violated, as well as the right to property was unfounded, because the adoption of these documents did not discriminate on any grounds, especially not on a national basis. The Defendant considers the assigned court as incompetent to decide in this legal matter, because the appeal refers to the violation of several civil rights guaranteed by the Constitution, for which the Constitutional Court is competent, and the Plaintiffs as natural persons are not authorized for the proposal of assessment of constitutionality. The appeal is considered non-compliant due to the fact that on the side of the Defendant there is a unique material multiparty litigation between the F BiH, the Federal Ministry of Transport and Communications and JP Autoceste F BiH d.o.o. Mostar, which, in addition to the named Defendant, had to be covered by the appeal, because the verdict would otherwise be ineffective, because it does not bind the Federal Ministry of Transport and Communications, nor the FBiH Motorways because they are not parties in this procedure, although the Decision of the Government of the Federation of BiH on determining the public interest in expropriation designates JP Autoceste F BiH as the beneficiary of expropriation. The verdict is considered to be contradictory in itself, because the operative part of the verdict already established that the Defendant violated the right to equal treatment - indirectly discriminated against the Plaintiffs, which is contrary to the legal definition of indirect discrimination, thus mixing the conditions for direct and indirect discrimination. The verdict cannot be reviewed, since the court did not directly determine according to which criteria and which group was discriminated against, and what the control group is in relation to the one that was discriminated against. The right to property is enjoyed by every person without exception, so the deprivation of property in the public interest does not have to be related to any specific group, which the court dealt with in the verdict, regarding which it gave a wrong explanation, since it failed to establish that the right to property is limited precisely in the public interest, and the right to property mentioned by the court is not an element of discrimination, concluding that the Plaintiffs did not make the existence of discrimination under Article 2, paragraph 1 of the Law on Discrimination probable. This is explained by case law on the standard of probability which the Plaintiff is required to prove.

The Plaintiffs responded to the Defendant's appeal.

Reviewing the first instance verdict within the limits of the appellate grounds as well as the reasons that this court monitors *ex officio* in accordance with Article 221 of the Civil Procedure Law ("Official Gazette of the F BiH", number: 53/03, 73/05, 19/06, 98/15, hereinafter CPL), it was decided as in the enacting clause of this verdict for the following reasons.

The Defendant's appeal is founded.

The first objection raised by the Defendant is the objection of absolute incompetence of the court, because according to the appeal, the Constitutional Court is exclusively competent to assess whether there are violations of the right to property and the right to a pre-war home.

First of all, the subject of the claim in this legal matter is to determine whether the Defendant violated the Plaintiff's right to equal treatment, i.e. that he indirectly discriminated against the Plaintiffs in adopting the Spatial Plan of the area of special features adopted at the session of the House of

Representatives on 27 January 2017, and later at the session of the House of Peoples of the Parliament of the Federation of BiH on 09 February 2017 (hereinafter: Spatial Plan), as well as in the adoption of the Decision of the Government of the Federation on determining the public interest in expropriation published in the Official Gazette of the F BiH, number: 101/18 dated 19 December 2018 (hereinafter: the Decision) regarding the construction of the Mostar South-Tunnel Kvanj sub-section of the motorway, which violated the right to return of the Plaintiff as a member of the returnee population ... disproportionately to the public interest, and to prohibit the application of these decisions in relation to Plaintiffs in all proceedings of legal significance.

In accordance with the provision of Article 11 of the Law on Prohibition of Discrimination ("Official Gazette of BiH" No. 59/09 and 66/16, hereinafter: the Law) it is prescribed that any person or group of persons who consider that they have been discriminated against may seek protection of their rights through existing judicial and administrative proceedings.

The provision of paragraph 2 of Article 11 of the Law also states that the regular court is competent to determine discrimination according to which even in cases where the violation of the right to equal treatment arises from an administrative act, an appeal in an administrative procedure and possible initiation of an administrative dispute based on protection against discrimination, and which requires annulment of such administrative act, shall not prevent the person referred to in paragraph 1 of this Article from initiating court proceedings for protection against discrimination.

The provision of paragraph 3 of the same article stipulates that all specific requirements listed in Article 12 of this Law (special appeals for protection against discrimination), as individual or joint, may be requested for the purpose of filing an appeal in civil proceedings.

The provision of Article 12 of the Law stipulates that a person or group of persons who are exposed to any form of discrimination are authorized to file an appeal which, *inter alia*, may request a) determination that the Defendant violated the Plaintiff's right to equal treatment, ... b) prohibition of taking actions that violate or may violate the right to equal treatment, i.e. to perform actions that eliminate discrimination or its consequences, c) ... d) ....

Therefore, it undoubtedly follows from the Plaintiff's claim that the Plaintiffs filed the appeal from the provision of Article 12, paragraph 1, items a) and b) of the Law.

Pursuant to paragraph 3 of Article 11 of the Law, it clearly follows that in a specific legal matter the appeal was filed with the competent and territorially competent Municipal Court in Mostar, which is why there are no allegations that only the Constitutional Court could hear the appeal.

True, the appeal and the claim relate to determining that the Defendant discriminated against the Plaintiffs by violating the right to return of the Plaintiff as a member of the returnee population - the right to return displaced persons and refugees to their home guaranteed by the Constitution of BiH and the Constitution of the Federation of BiH, when deciding on the Spatial Plan and Decision, which includes the right to remain after return, as well as the right to property, which is how the Plaintiffs claim to be discriminated against, which again does not exceed the jurisdiction of the regular court, thus the appeal of the Defendant in the first sense had to be rejected as unfounded.

The appeal also unfoundedly indicates that there is a single material multiparty litigation on the part of the Defendant and that this arises from the Decision of the Government of the Defendant to determine the public interest in the construction of the Mostar-South-Buna motorway section Mostar-South-Tunnel Kvanj on the route of corridor V C, number: 1435 / 2018 dated 12 December 2018.

Item 2 of this Decision determines that the user of the expropriation of real estate necessary for the construction of the facility referred to in item 1 of this Decision is JP Autoceste F BiH d.o.o. Mostar. According to item 3 of this Decision, the funds for its realization will be provided by the user of expropriation, i.e. JP Autoceste F BiH, in accordance with the business plan for 2018 and the three-year business plan for the period from 2018 to 2020.

Therefore, it follows from the provision of item 3 of this Decision that the investor in the construction of the disputed facility is JP Autoceste F BiH. Item 4 of the Decision in question stipulates that the Federal Ministry of Transport and Communications and JP Autoceste F BiH d.o.o. Mostar are in charge of its implementation, each within its statutory competencies.

The lawsuit in question does not request that the Spatial Plan and the Decision be declared null and void, so that in addition to the Federation of BiH, JP Autoceste F BiH should be marked as the Defendant in this procedure, which is why the appeal should be rejected in that part as well.

However, the appeal of the Defendant is founded, because the position of this court is that in the specific case the Plaintiffs were not discriminated on the stated basis, nor in the described manner.

The Constitution of the FBiH (Official Gazette of the FBiH 1/94, and numerous amendments to the Constitution of the FBiH published in the Official Gazette of the FBiH No. 1/94, 13/97, 16/02, 22/02, 52/02, 60 / 02, 18/03, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05 and 88/08, hereinafter: the Constitution), in the provision of Title II (Human Rights and Fundamental Freedoms), stipulates in Article 2 that the Federation shall ensure the application of the highest level of internationally recognized rights and freedoms set forth in the documents listed in the annex to this Constitution. In particular: .... d) the prohibition of any discrimination based on race, colour, sex, language, religion or belief, political or other belief, national or social origin, ... k) property, ....

The provision of Article 3 of Chapter II of the Constitution stipulates that all refugees and displaced persons have the right of free return to the place of residence from which they were expelled.

The provision of Article 4 of Chapter II of the Constitution stipulates that all persons have the right, in accordance with Annex VII of the General Framework Agreement, to restitution of all property deprived during ethnic persecution and hostility since 1991, and to compensation for total property that cannot be returned....

The provision of Article 20 of the Constitution, Chapter IV - Structure of the Federal Government, prescribes the competencies of the Parliament of the F BiH, which paragraph 1 prescribes: In addition to other competencies established in this Constitution, the Federation Parliament is competent for: ... d) passing laws on performing the function of federal authorities..., k) performing other competencies entrusted to it.

The Spatial Plan in question was adopted by the Federation Parliament within the limits of its competence prescribed by the Constitution and Articles 5 and 19 of the Law on Spatial Planning and Land Use at the F BiH level (Official Gazette of the F BiH no. 2/06; 72/07, 32/08, 4/10, 13/10, 45/10, 85/21 and 92/21), in legally prescribed procedure.

This court is not competent to review the procedure of adopting the Spatial Plan, nor the decisions, but the Plaintiffs could influence its adoption through their representatives who were elected to the House of Representatives and the House of Peoples of the Parliament of the F BiH.

The Plaintiffs point out in the claim that as returnees of Serbian nationality, i.e. of Orthodox denomination, they are discriminated against in relation to residents of predominantly Catholic denomination who declare themselves as members of the Croatian people (p. 2 of the claim, which designates as a comparative group), i.e. the population declaring themselves as Bosniaks - owners of plots in the Neretva valley, north of Mostar (which are designated as a comparative group on page 3 of the appeal).

It is not disputed that the current Plaintiffs are not exclusively members of the Serbian people, nor are they members of the Orthodox denomination, which arises from the appeal itself and the Plaintiff's submission of 17 December 2020, which "specified" the claim, and the expropriated real estate on the subsection of Corridor Vc Mostar South - Tunnel Kvanj are not exclusively owned by members of one people, nor members of one denomination, but belong to persons of different nationalities and different religions.

Therefore, the subject sub-section of Corridor Vc does not cross plots exclusively owned by members of one nation, but is owned by members of different nationalities, as evidenced by the appeal, because the current Plaintiffs are not only members of the Serbian people, nor members of the Orthodox denomination, nor are all the property owners, which are expropriated in the general interest, returnees (there are also Bosniak natives), which means that there is no discrimination on either national or social grounds.

The Government of the Federation of F BiH passed the Decision on determining the public interest for the construction of the section of the motorway - Buna, subsection Mostar Jug - Tunnel Kvanj, on the route of Corridor Vc, based on the provision of Article 14, in conjunction with Articles 3, 4, 5 and 6 of the Law on Expropriation (Official Gazette of the F BiH, number: 70/07; 36/10; 25/12; 8/15- Decision of the Constitutional Court and 34/16) in the general interest. This Decision is harmonized with the Spatial Plan of the area of special features of importance for the FBiH "Motorway on Corridor Vc" for a period of 20 years, and affects members of all nationalities and members of any religion whose real estate is located in the area. Such a decision does not affect equally all persons to whom it applies, which depends on many factors, both objective and subjective.

The fact is that this decision made on the basis of the Constitution and the Law on Expropriation is in the public interest, and the public interest is always above the individual interest. Decisions made in the public interest are binding on all persons concerned, and must be respected by individuals who do not agree with them, as Plaintiffs in this case, because there was a legitimate goal for the adoption of the Spatial Plan and the Decision.

From the many Records of the Real Estate Service of the City of Mostar, as well as many decisions on expropriation filed in the file, it follows that several dozen persons of Serbian nationality from the returnee settlement Ortiješ from the subject area accepted the Decision of the Federation Government from 12 December 2018, i.e. they agreed with the expropriation of their real estate and in agreement with the administrative body determined the compensation for the expropriated real estate.

It follows from the above that there are no conditions for qualifying the Defendant's behaviour as discriminatory, nor determining that the Defendant committed discrimination in the described manner, in accordance with the provisions of Article 3, paragraph 2 of the Law, because in the group that considers itself discriminated. i.e. whose real estates were expropriated in order to build the Vc corridor are not only returnees and are not exclusively Serbs, and the comparative group does not consist only of persons of Bosniak and Croat nationality and Islamic and Catholic religion, but are members of all nationalities, thus there was no basis for the Plaintiff's claim.

Due to the above, this court accepted the appeal of the Defendant and changed the first instance verdict without scheduling a main hearing, based on the provision of Article 229, item 2 of the LCP, because it based its decision on material evidence in the file, and not on testimonies of heard witnesses.

Bearing in mind the foregoing, this court, based on Article 224, paragraph 1, item 5 and Article 229, item 2 of the LCP, decided as in the enacting clause of this verdict.

Council President

Vera Sudar

*/handwritten signature/*

*/Stamp: Municipal Court in Mostar/*

*/Stamp: Transcript accuracy is certified by the authorized court employee/*

I hereby certify that this translation fully corresponds to the original written in Bosnian

Date: 30 June 2022, Registry no. V

Certified Court Interpreter for English and German – Marina Šiljeg

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