

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 57(2)(b), Article 59(1) and (2) and (3) and Article 72(2), (4) and (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised Text (*Official Gazette of Bosnia and Herzegovina*, 94/14), in Grand Chamber and composed of the following judges:

Mr. Zlatko M. Knežević, President

Mr. Mato Tadić, Vice-President

Mr. Mirsad Ćeman, Vice-President

Ms. Valerija Galić,

Mr. Miodrag Simović,

Ms. Seada Palavrić,

Having deliberated on the appeals of **Ms. Lejla Dragnić and A.B.**, in case no. **AP 1217/20**, at its session held on 22 April 2020, adopted the following

## DECISION ON ADMISSIBILITY AND MERITS

The appeals lodged by **Ms. Lejla Dragnić** and **A.B.** against the Order of the Headquarters of the Federal Department of Civil Protection, no. 12-40-6-148-34/20 of 20 March 2020 and Order of the Headquarters of the Federal Department of Civil Protection, no. 12-40-6-34-1/20 of 27 March 2020, are partially granted.

A violation of the right to liberty of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, with regard to **Ms. Lejla Dragnić, A.B.** and any other person in the same situation as to the points of fact and law, is hereby established.

Pursuant to Article 72(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina and the Headquarters of the Federal Department of Civil Protection are ordered to harmonize the Order of

the Headquarters of the Federal Department of Civil Protection, no. 12-40-6-34-1/20 of 27 March 2020, with the standards under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms within a time limit of 5 days from the delivery of this Decision, as expressed in this Decision.

The appeals of **Ms. Lejla Dragnić** and **A.B.**, in the part wherein they request the repeal of the Order of the Headquarters of the Federal Department of Civil Protection, no. 12-40-6-34-1/20 of 27 March 2020, are dismissed as ill-founded.

Pursuant to Article 72(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Government of the Federation of Bosnia and Herzegovina and the Headquarters of the Federal Department of Civil Protection are ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 3 days as of the date of the expiry of the time limit given in paragraph 3 of the enacting clause of this Decision, of the enforcement of the order referred to in paragraph 3 of the enacting clause of this Decision.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

## **REASONING**

### **I. Introduction**

1. On 31 March 2020, Ms. Lejla Dragnić from Sarajevo (“the appellant”), represented by Ms. Nina Kisić, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) against the Order of the Headquarters of the Federal Department of Civil Protection, no. 12-40-6-148-34/20 of 20 March 2020 (“the First Order”). The appellant also requested the Constitutional Court to adopt an interim measure to prevent further application of the First Order pending a final decision by the Constitutional Court. The appeal was registered under number AP 1217/20.
2. On 3 April 2020, the appellant, through her attorney, filed a new appeal against a new Order no. 12-40-6-34-1/20 of 27 March 2020 (“the Second Order”), wherein she requested the Constitutional Court to adopt the same interim measure. That appeal was registered under number AP 1247/20.
3. On 3 April 2020, A.B. from Sarajevo (“the appellant”), represented by Ms. Edisa Peštek Zorlak, a lawyer practicing in Sarajevo, filed an appeal against the First Order. The appeal was registered under number AP 1254/20.

### **II. Procedure before the Constitutional Court**

4. Given the fact that the appeals concern the same issue, pursuant to Article 23 of the Rules of the Constitutional Court, the Constitutional Court took a decision on the joinder of cases, in which the Constitutional Court shall conduct one set of proceedings and take a single decision under number AP 1217/20.
5. Pursuant to Article 23 of the Rules of the Constitutional Court, the Government of the Federation of Bosnia and Herzegovina and Headquarters of the Federal Department of Civil protection (“the Federal Headquarters”) were requested to submit their respective responses to the appeal. The Government of the Federation of Bosnia and Herzegovina submitted its response to the appeal on 9 April 2020. The Federal Headquarters failed to submit its response.

### **III. Facts of the case and allegations in the appeal**

- a) **As to appeals no. AP 1217/20 and AP 1247/20**

6. The appellant alleges the same facts and allegations in both appeals filed against both Orders.
7. On 20 March 2020, the Federal Headquarters issued the First Order, wherein it imposed confinement on the persons under the age of 18 and over the age of 65 on the territory of the Federation of Bosnia and Herzegovina (“the Federation of BiH”), which was entered into force immediately upon the issuance and the validity of which was until 31 March 2020.
8. The appellant alleges that she was born on 28 September 1951 and that she filed the appeal under Article 18(2) of the Rules of the Constitutional Court, given the fact that there is no decision of a competent court, which she could possibly have only if a sanction is imposed on her for violation of the Order and which would place an “excessive burden on her”. The appellant further alleges that she contests the First and the Second Order being general acts which “have been in violation of her human rights and freedoms, and that she has been treated in a discriminatory manner on the ground of her age”, “which is the reason why she has sustained irreparable damage on a daily basis” as a person directly affected by the measures referred to in the contested Orders. The appellant further alleges that the Orders are not based on law. In particular, the First and the Second Order, as alleged, were issued in accordance with Article 108 of the Law on Protection and Rescue of People and Property in the Event of Natural and Other Disasters (“the Law on Protection and Rescue”), which does not regulate the issuance of orders to prevent the BiH citizens from exercising their human rights”. She further alleges that despite the fact that Article 108(2) stipulates the powers of the civil protection headquarters to “order the implementation of appropriate protection and rescue measures”, this does not mean that it stipulates “the issuance of orders preventing the movement of population”. Next, the appellant also alleges that “such an option” is not mentioned in the Decision of the Government to Declare the State of Disaster caused by the Emergence of Coronavirus (COVID-19) in the Federation of BiH, no. 408/20 of 16 March 2020. Furthermore, the appellant alleges that no other law in BiH stipulates the adoption of such a measure.
9. The appellant further points out that Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”) safeguards the liberty and security of person and that Article 2 of Protocol No. 4 to the European Convention secures the freedom of movement to all person lawfully within the territory of a State of the Council of Europe and that restrictions on the exercise of these rights may be imposed only in accordance with the law if they are necessary in a democratic society. The appellant highlights that Bosnia and Herzegovina did not notify the Secretary General of the Council of Europe of its “intention to impose restrictions of the rights guaranteed under the European Convention, which is the reason why it has violated its obligations under Article 15 of the European Convention”. Furthermore, the appellant refers to the

statement made by the President of the Parliamentary Assembly of the Council of Europe, wherein he urges States to abide by the principle of proportionality when adopting emergency measures in order to respond to the crisis caused by COVID-19, and to adopt the measures strictly necessary.

10. Next, the appellant alleges that the measures less rigorous than those preventing her from leaving her home were not considered before the issuance of the Orders. In this connection, the appellant points out that the issuer of the Order should have considered other measures to achieve the same aim, as well as the measures to protect other vulnerable categories. Instead of that, the issuer of the Order, as alleged by the appellant, put her in a life-threatening situation and imposed unreasonable restrictions” preventing her from going to “bank, pharmacy, doctor or from providing necessities” or from “taking her dog for a walk”.
11. The appellant is of the opinion that all the aforementioned reduced her freedom to what is called “house arrest” in criminal law and so subject to punishment which is not prescribed by the law in force”, which is “logical”, given the fact that “the Order itself is not based on the law”. In this connection, the appellant alleges that she does not have any possibility to address a court or any other authority which would examine that decision to impose the “house arrest” on her, except the appeal to the Constitutional Court. She further alleges that reducing the movement to one’s home, where the conditions “are much better than those in a prison, could be regarded as deprivation of liberty”. The additional factor showing that the measure mentioned in the Order constitutes deprivation of liberty is “the fact that it is imposed under threat of sanctions (even “detention” which was mentioned by some political officials), which additionally shows the criminal character of such a conduct”. The appellant further alleges that the Orders are fully arbitrary, since the criteria to prohibit the movement of the persons over the age of 65 are not clear, which is, in fact, “the limit to exercise the right to retirement” under the Labour Law, although there are exceptions to that rule (judges, prosecutors, attorneys, university professors). Next, the appellant is of the opinion that such an Order is not in the interest of public health, as the movement of the appellant is forbidden on a discriminatory ground, regardless of her health condition, whereas it allows the movement of the persons under the age of 65, who exercise the right to disability pension on the ground of, for example, respiratory diseases and, thus, belong to the category of highly vulnerable persons insofar as COVID-19 is concerned”.
12. Given the foregoing, the appellant proposes that the Constitutional Court quash the contested Orders and find the violation of her rights under Article 5 of the European Convention and Article 2 of Protocol No. 4 to the European Convention.

13. As to the interim measure requested, the appellant alleges that a serious violation of human rights “cannot be remedied in proceedings at a later point” and that the interim measure to prevent further implementation of the Order until a final decision by the Constitutional Court “is in interest of the appellant as a party to the proceedings and in the interest of the State of Bosnia and Herzegovina”.

**b) As to appeal AP 1254/20**

14. The appellant filed an appeal as a parent of a child under the age of 18 without indicating the age and name of the child. He alleges, *inter alia*, that the confinement imposed on the persons under the age of 18 prevents him from “providing care and protection for his child” and that this renders his everyday life and life of his child “more difficult”. He further alleges that “the fact that the state of emergency is not declared in the Federation of BiH means that differential treatment towards the mentioned age groups of population is not necessary in the given situation”. In his opinion, “the authorities did not give any reason for issuing the contested legal act.” He claims that “so far the World Health Organisation has not made any recommendation to suggest that the persons under the age of 18 are dangerous persons transmitting the virus”. Also, the appellant alleges that “the practice of European countries does not show in any way whatsoever that children contribute to the transmission of virus”. Next, the appellant alleges that “the mentioned Order directly affects physical and mental health of children and elderly persons” and that “as a parent he is not able to ensure the life to his child in accordance with the child’s best interests”.

15. In the appellant’s opinion, “the right to the liberty and security of person, right to freedom of movement and residence, right to non-discrimination, right to dignity, right to liberty of person, right to an effective and efficient legal remedy” have been violated. With regard to the violation of the mentioned rights, the appellant refers to the Constitution of Bosnia and Herzegovina, European Convention and International Covenant on Civil and Political Rights.

**c) Response to the appeal**

16. In its response to the appeal, the Government of the Federation of BiH alleges that on 21 February 2020, the Ministry of Health of the Federation of BiH, in information on the outbreak of novel coronavirus and COVID-19, which the WHO determined as a “public health emergency of international concern”, informed the Federal Headquarters of the measures to be taken on the territory of the Federation of BiH in order to prevent the outbreak and transmission of the disease caused by coronavirus. Following a number of measures taken, the Federal Headquarters, as alleged, assessed the situation and proposed that the Government of the Federation of BiH, in

accordance with Article 24(11) of the Law on Protection and Rescue, take a decision to declare disaster, whereupon that decision was taken. The Government of the Federation of BiH further alleges that the Federal Headquarters, having considered the epidemiological situation in the Federation of BiH and worldwide and Orders of the Crisis Centre of the Federal Ministry of Health, issued the contested Order on 20 March 2020, whereby the movement of persons under the age of 18 and over the age of 65 was forbidden. In this connection, the Government of the Federation of BiH considered as unfounded the allegations that the Federal Headquarters' conduct towards the mentioned groups is discriminatory, the reason being that the "elderly persons are exposed to a risk of having more severe symptoms if infected by coronavirus because the immune system of elderly persons is weakened so that the consequences are more dangerous for them, and the persons under the age of 18, "although having milder symptoms than the elderly persons and are not so affected by diseases, transmit the virus to elderly persons". The Government of the Federation of BiH also points out that the measure of prohibition of movement imposed on elderly persons as a "vulnerable group of person" was issued because "during the epidemic worldwide, a number of persons belonging to these age groups were infected by coronavirus, and the immunity, i.e. the strength of immune response to infection is an important factor".

17. The Government of the Federation of BiH contests the allegations that there was no legal basis for issuing the Orders contested, since Article 54 of the Law on the Protection of Population against Infectious Diseases stipulates, *inter alia*, protection measures of confinement with the aim of preventing and controlling infectious diseases. Furthermore, the Government of the Federation of BiH alleges that the protection of health of a greater number of people and prevention of spread of epidemic is a legitimate aim sought to be achieved through contested measures and other imposed measures (adapted opening and closing time of stores, closed stores, self-isolation and quarantine). In the opinion of the Government of the Federation of BiH, there is a proportional balance between the contested measures and legitimate aim, and they do not place an excessive burden on individuals, all the more so since, as the Government alleges, "that measure and other measures are subject to continuous reconsideration", which was the reason why they issued a supplement to the contested Order, wherein the movement of the persons under the age of 18 was allowed while in car, and the movement of persons over the age of 65 was allowed from 8h00 to 12h00 in the period from 6 to 10 April 2020 in order to make it possible for them to get their retirement payments. Taking in into account all the aforementioned, and the fact that "the measures for the protection of the health of people must be taken promptly and effectively, as well as the measures to prevent the



spread of virus”, the Government of the Federation of BiH proposes that the appeals and request for interim measure be dismissed.

#### **IV. Relevant Law**

18. **In the Constitution of Bosnia and Herzegovina**, the relevant provisions read as follows::

*Article X*

*Amendment*

[...]

*2. Human Rights and Fundamental Freedoms*

*No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.*

19. **Within the Framework Law on the Protection and Rescue of People and Property in the Event of Natural or Other Disasters in Bosnia and Herzegovina** (*Official Gazette of BiH*, 50/08), the relevant provisions read as follows:

*Article 13*

*(BiH Council of Ministers)*

[...]

*h) Declare the beginning and the end of the state of natural or other disaster in the territory of Bosnia and Herzegovina upon the proposal of the Coordination Body of Bosnia and Herzegovina for Protection and Rescue or upon the request of the competent bodies of the Entities or the Brčko District of BiH, which have already declared the state of the disaster in their territory.*

[...]

*Article 17*

*(Competences of the Coordination Body)*

*(1) The Coordination Body is an expert operational body of the BiH Council of Ministers and shall be responsible to:*

*a) propose to the BiH Council of Ministers, upon the request of the Entities or the Brčko District of BiH, to declare the state of a natural or other disaster in the territory of Bosnia and Herzegovina and to declare the end of such state; [...]*

20. In the **Law on the Protection and Rescue of People and Material Property from Natural and Other Disasters** (*Official Gazette of the FBiH*, 39/03, 22/06 and 43/10), the relevant provisions read as follows:

*Article 1*

*This Law regulates the system of protection and rescue of people, flora and fauna, material, cultural, historical and other goods and environment (hereinafter: people and material property) from natural disasters, technical, technological, ecological and other disasters or war hazards (hereinafter: natural and other disasters), rights and duties of citizens and bodies of the Federation, cantons and municipalities, companies and other legal entities, and other issues of importance in the field of protection and rescue from natural and other disasters in the Federation of Bosnia and Herzegovina*

*Article 3*

*For the purposes of this Law, the notion:*

*1) natural disasters means any events that are caused by natural forces that cannot be influenced by the human factor such as: earthquake, flood, high snow and wind-driven snow, high-speed wind or hurricane wind, hail, torrential downpours, landslide, drought, cold, and the widespread emergencies of human, animal and plant diseases; [...]*

*Article 106*

*Civil protection headquarters shall be established as expert operational bodies for the management of protection and rescue activities in the territory of the Federation, that is, in the cantons and municipalities, and for carrying out other protection and rescue activities in accordance with the law and other regulations. These headquarters shall be established by the Federation, cantons and municipalities.*

*Article 108*

*In managing the protection and rescue activities, the civil protection headquarters referred to in Articles 106 and 107 of this Law shall carry out the following duties:*

- 1) decide on the use of forces and means of civil protection related to the protection and rescue of endangered and injured people and material property and deploy those forces to the stricken areas;*
- 2) order the implementation of appropriate protection and rescue measures and determine the forces and means to implement those measures;*
- 3) direct, coordinate and manage the protection and rescue activities of all participants involved in protection and rescue in their area;*
- 4) resolve all issues arising during the implementation of protection and rescue operations related to the engagement of civil protection forces and means and the implementation of protection and rescue measures, and self-protection of citizens.*

21. **In the Law on the Protection of the Population against Infectious Diseases** (*Official Gazette of the FBiH*, 29/05), the relevant provisions read as follows:

*Article 1*

*This Law regulates infectious diseases the prevention and control of which are of interest to the Federation of Bosnia and Herzegovina (hereinafter: the Federation) and measures for the protection of the population from infectious diseases.*

*Article 2*

*For the purposes of this Law, the notions shall mean:*

*[...]*

- an epidemic of an infectious disease is the emergence of an unusual number of diseases resulting from infectious diseases that are on the list of infectious diseases that must be reported or the emergence of new infectious diseases that threaten the health of the population;*

*[...]*

*Article 54*

*The measures provided for in this Law and international sanitary conventions and other international treaties shall be taken to protect the population of the Federation from the appearance of cholera, plague, viral haemorrhagic fevers, yellow fever, SARS and other infectious diseases.*

[...]

*Aimed at the prevention and control of infectious diseases referred to in paragraph 1 of this Article, the Federal Ministry of Health may order special emergency protective measures against these diseases:*

[...]

*2. prohibition of movement of the population, i.e. restriction of movement in the infected or directly endangered areas;*

[...]

*6. other measures in accordance with international regulations.*

#### *Article 70*

*A fine to the amount between KM 100.00 and KM 2,000.00 shall be imposed on an individual if:*

*7. he/she fails to comply with Articles 54, 55 and 56 of this Law;*

*When the obligation relates to a minor as regards the offences referred to in paragraph 1 items 3, 4, 5, 6 and 7 of this Article, a parent or guardian failing to provide the minor with due care shall be punished by a fine referred to in paragraph 1.*

22. **The Convention on the Rights of the Child** [adopted at the General Assembly of the United Nations on 20 November 1989] (*Official Gazette of SFRY – International Treaties*, 15/90, *Official Gazette of RBiH*, 25/93 and the Decision to Withdraw the Reservation to Article 9, paragraph 1 of the UN Convention on the Rights of the Child, *Official Gazette of BiH*, 42/08), as relevant, reads:

#### *Article 1*

*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*

*Article 2*

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

*Article 3*

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her; and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

23. **The Decision to Declare the State of Disaster caused by the Emergence of Coronavirus (COVID-19) in the Federation of BiH** (*Official Gazette of the FBiH*, 21/20), as relevant, reads:

*I*

*The state of disaster caused by the emergence of coronavirus (COVID-19) in the territory of the Federation of Bosnia and Herzegovina is hereby declared.*

[...]

*IV*

*The Federal Civil Protection Headquarters is hereby obligated to undertake, in accordance with the Federation Plan and applicable legal regulations, all activities related to the coordination and management of actions to protect and rescue people in the stricken areas.*

[...]

#### VI

*All heads of the administration and administrative organizations of the Federation and the cantons, i.e. heads of municipal/city administration offices and heads of legal entities and other institutions are hereby obligated to ensure the implementation of the order of the competent civil protection headquarters.*

#### VII

*The Decision shall enter into force on the day of its adoption and shall be published in the “Official Gazette of the Federation of BiH”.*

*This Decision shall be published through print media and electronic media.*

24. **The Decision to Declare the Emergence of a State of Natural or other Disaster in the Territory of Bosnia and Herzegovina** (*Official Gazette of BiH*, 18/20), as relevant, reads:

#### *Article 1*

#### *(Subject-matter)*

*(1) The emergence of a state of natural or other disaster in the territory of Bosnia and Herzegovina is hereby declared due to the risk of a possible epidemic of an infectious disease caused by a new coronavirus (COVID-19), with a view to diminish the risk of rapid spread of the infection in Bosnia and Herzegovina and to secure additional resources to respond to this public health threat.*

*(2) The prevention and control of the spread of infectious disease caused by a new coronavirus (COVID-19) is of general interest to Bosnia and Herzegovina.*

#### *Article 2*

*(Coordination Body of Bosnia and Herzegovina for Protection and Rescue from Natural or Other Disasters in Bosnia and Herzegovina)*

*With a view to protect and rescue people and material property, the Council of Ministers of Bosnia and Herzegovina (hereinafter: the Council of Ministers of*

*BiH) shall activate the Coordination Body of Bosnia and Herzegovina for Protection and Rescue from Natural or Other Disasters in Bosnia and Herzegovina (hereinafter: the Coordination Body) and shall order the Coordination Body to carry out its activities in accordance with Article 17 of the Framework Law on the Protection and Rescue of People and Property in the Event of Natural or Other Disasters in Bosnia and Herzegovina (hereinafter: the Framework Law).*

*Article 4*

*(Civil Protection Headquarters of the Entities and the Brčko District of Bosnia and Herzegovina)*

*(1) The civil protection headquarters of the Entities and the Brčko District of Bosnia and Herzegovina and other crisis headquarters are hereby recommended to undertake all activities to fully implement measures to prevent the spread of infectious disease caused by a new coronavirus (COVID-19).*

*(2) With a view to preventing the spread of coronavirus (COVID-19), the governments of the Entities and the Brčko District of Bosnia and Herzegovina may also adopt individual measures in accordance with the laws falling within the scope of their jurisdiction. The Coordination Body shall provide information about the measures taken.*

*[...]*

*Article 6*

*(Entry into force)*

*This Decision shall enter into force on the day of its adoption and shall be published in the Official Gazette of BiH.*

25. **The Order of the Federal Civil Protection Headquarters No. 12.40-6-148-34/20** of 20 March 2020 reads as follows:

*Pursuant to Article 108 of the Law on the Protection and Rescue of People and Material Property from Natural and Other Disasters (Official Gazette of the Federation BiH, Nos. 39/03, 22/06 43/10) and Article 18 of the Rules of Procedure of the Federal Civil Protection Headquarters Nos. 11-49/14833/11 of 26 October 2011 and 12-02/10-542-4/17 of 4 October 2017 and the Decision of the Government of the Federation of Bosnia and Herzegovina to*

*declare the state of disaster caused by the emergence of coronavirus (COVID-19) in the territory of the Federation of BiH, V. No. 408/2020 of 16 March 2020, the Federal Civil Protection Headquarters hereby issues the following*

**ORDER**

*1. A ban on the movement of persons under the age of 18 and over 65 in the Federation of BiH is hereby ordered.*

*2. The Ministers of the Cantonal Ministries of the Interior shall be responsible for the implementation of this Order.*

*3. The Ministries referred to in paragraph 2 of this Order shall report to the Federation Civil Protection Headquarters, through the Federal Civilian Protection Operational Centre, on all measures taken to comply with this Order.*

*4. This Order shall enter into force on the day of its adoption and shall be applicable by 31 March 2020.*

26. **The Order of the Federal Civil Protection Headquarters** No. 12.40-6-148-34-1 / 2, of 27 March 2020, reads as follows:

*The Order number 12.40-6-148-34/20 of 20 March 2020 shall be applicable until further notice.*

*This Order shall enter into force on the day of the adoption thereof.*

27. **The Order of the Federal Civil Protection Headquarters** No. 12.40-6-148-34-1-1/20, of 17 April 2020, reads as follows:

*1. The Orders Nos. 12.40-6-148-34/20 of 20 March 2020, 12.4-6-148-34-1/20 of 27 March 2020 and 12.40-6-148-34-2/20 of 3 April 2020 shall be applicable by 30 April 2020.*

*2. This Order shall enter into force on the day of the adoption thereof.*

**V. Admissibility**

28. Pursuant to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.



29. Pursuant to Article 18(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

30. Pursuant to Article 18(2) of the Rules of Constitutional Court, the Constitutional Court indicates that, exceptionally, it may examine an appeal where there is no decision of a competent court, if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina. In the present case, the appellants claim that the challenged Orders violated their right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, the right under Article 2 of Protocol No. 4 to the European Convention, and the right to non-discrimination in connection to these rights. The Constitutional Court deems that all three lodged appeals indicate serious violations of the rights under the Constitution of Bosnia and Herzegovina and the European Convention, which makes them, according to the case-law of the Constitutional Court, admissible within the meaning of Article 18(2) of the Rules of Constitutional Court (see, the Constitutional Court, *mutatis mutandis, inter alia*, Decision on Admissibility and Merits no. AP 3376/07 of 28 April 2010, available at [www.ustavnisud.ba](http://www.ustavnisud.ba)). Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court, because there is neither a formal reason rendering the appeal inadmissible, nor is it manifestly (*prima facie*) ill-founded.

31. Having regard to the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 18 (2), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that all three appeals meet the admissibility requirements.

## **VI. Merits**

32. The appellants challenge the impugned Orders, because they held that the said Orders are in violation of their rights to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, the right to freedom of movement under Article 2 of Protocol No. 4 to the European Convention, and the right to non-discrimination under Article 14 of the European Convention in connection to the mentioned rights.

### **Introductory remarks**

33. On 11 March 2020, the World Health Organization (“WHO”) declared a pandemic of coronavirus SARS-CoV-2 and the disease named COVID-19 with the call on the governments “to

affect the course of the virus transmission through ‘urgent and aggressive action’, however “all countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights” (see: WHO Director-General’s Media Briefing, available at: <https://www.pscp.tv/w/1djxXQkqApVKZ>). At that moment in time, according to WHO Report, there were more than 118,000 cases in 114 countries reported throughout the world, and over 4,000 people have already lost their lives due to the disease caused by or related to COVID-19. According to the WHO statistics as of 8 April 2020, 212 countries have reported a total 1,317,130 confirmed cases with 74,304 confirmed deaths. In a situation like that, undoubtedly all states have faced an emergency and a huge challenge of undertaking efficient measures to prevent the transmission, to treat a completely new type of virus spreading very quickly, for which no medicine or vaccine existed, as well as to preserve and safeguard constitutional and human rights.

34. In response to this crisis, on 16 March 2020 the FBiH Government rendered a Decision to Declare the State of Disaster caused by the Emergence of Coronavirus (COVID-19) in the Federation of BiH, 408/20 (published in the *Official Gazette of FBiH*, 21/2, “Decision of the FBiH Government”). This Decision ordered, among other things, “for all FBiH ministries, administrations and administrative organizations, legal entities and other institutions to make themselves available to the FBiH Civil Protection Headquarters”, while the Federal Headquarters was ordered “to undertake, in accordance with the FBiH Plan and the applicable legislation, all activities regarding the coordination and management of people protection and rescue actions in an endangered area”. On the basis thereof, the Federal Headquarters adopted a set of measures (an obligation of self-isolation, isolation, ban on crossing the state border, restriction of working hours, ban on work for certain businesses, curfew, etc.), with one of the measures being the prohibition of movement for those under age of 18 and above age 65, which was ordered by the challenged Orders.

35. Also, the Constitutional Court indicates that according to the statistics of the FBiH Ministry of Health (“FBiH MH”) as of 20 April 2020 there was a total of 737 confirmed cases of persons infected with the virus and disease COVID-19 and with 31 deaths (statistics taken from the FBiH MH website: <https://www.covid-19.ba/> on 20 April 2020), which is a substantial and continuous increase in the number of those infected ever since the outbreak of COVID-19 in FBiH.

**Impact of the pandemic crisis on the protection of human rights – possibility and manner for the restriction thereof**

36. The protection of population from the COVID-19 threat is a huge and difficult challenge for the authorities in all states. What is clear from the start is that because of such exceptional circumstances it is not possible to maintain regular functioning of the society, particularly when it comes to protective measures, which are necessary to successfully curb the new type of virus, to protect the lives of people, as well as to lessen the great burden on the healthcare services as a result of people falling ill with COVID-19, in order for such services to be able to efficiently respond to the challenge. Therefore, it is clear that measures ordered in such a situation undoubtedly restrict a number of rights referred to in the Convention and the Constitution. The European Convention and the European Court of Human Rights (“the European Court”) do not prohibit *a priori* the introduction of such measures. On the contrary, positive obligations ordered in the European Convention in order to pursue a legitimate aim of the protection of the health of people require that member states demonstrate active care and timely reaction. Therefore, a failure to undertake measures, as well as their untimely undertaking, could be considered a violation of the positive obligations of the state. On the other hand, measures restricting human rights, such as the prohibition of assembly, isolation, prohibition of leaving one’s own home etc., have to be lawful, pursue a legitimate aim and have to be “necessary in a democratic society”, i.e. there has to be proportionality between the measures undertaken and the aim sought to be achieved. These are the rules derived from the hitherto case law of the European Court and they are as applicable in an emergency as they are applicable during the normal times.

37. Concurrently with the introduction of the measures restricting certain human rights, some of the High Contracting Parties of the Council of Europe have used the possibility of derogation from the European Convention in accordance with Article 15 of the European Convention (by 9 April 2020, eight High Contracting Parties have informed the Secretary General of the Council of Europe of derogations, as follows: Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia, Romania and Serbia). Article 15 of the European Convention allows High Contracting Parties to derogate from the European Convention in times of emergency, which COVID-19 pandemic certainly is. However, the right to derogate is “clearly circumscribed by the text of Article 15. Furthermore, and crucially, both the scope and the form of a State’s derogation are subject to the scrutiny of the European Court of Human Rights” (see: Reply of the Committee of Ministers of the Council of Europe to the Recommendation of the Parliamentary Assembly of the Council of Europe (PACE) 2125 (2018), document no. 14770 of 5 December 2018). Derogation also has to meet

formal requirements of Article 15(3) of the European Convention to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor, and when such measures have ceased to operate.

38. Bosnia and Herzegovina has not informed the Secretary General of the Council of Europe that it is availing itself of the right to derogate the European Convention pursuant to Article 15 of the European Convention, which is a matter of appreciation of the state authorities, which will not be reviewed either by the European or the Constitutional Court, since that is a possibility and not an obligation. Therefore, the challenged measures will not be considered in the light of Article 15 of the European Convention, but in the light of a possibility of restricting human rights that the European Convention normally provides for. The Constitutional Court recalls that Article II(2) of the Constitution of Bosnia and Herzegovina sets forth the constitutional status of the European Convention, according to which that act shall have priority over all other law. Also, Article II(3) of the Constitution of Bosnia and Herzegovina sets forth the catalogue of rights, which are identical to the rights set forth in the European Convention and protocols to the European Convention, while under Article X(2) of the Constitution of Bosnia and Herzegovina no amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

**Allegations as to the violation of Article 5 of the European Convention and Article 2 of Protocol No. 4 to the European Convention**

39. The appellants alleged that there is a violation of their right under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention (deprivation of liberty) and Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention (freedom of movement).

40. Article II(3) of the Constitution of Bosnia and Herzegovina, in the relevant part, reads as follows:

*All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*

*[...]*

*d) The rights to liberty and security of person.*

*. [...]*

*m) The right to liberty of movement and residence.*

41. Article 5 of the European Convention, in the relevant part, reads as follows:

*1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

*[...]*

*e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*

*[...]*

42. Article 2 of Protocol No. 4 to the European Convention, in the relevant part, reads as follows:

*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

*[...]*

*3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

*4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.*

43. In determining whether the challenged restriction constitutes the deprivation of liberty or the interference with the freedom of movement, the Constitutional Court recalls that the European Court has constantly underlined in its case law that, in order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5 of the European Convention, “the starting-point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance” (see, the European Court, *De Tommaso v. Italy*, judgment of 23 February 2017, Application no. 43395/09, paragraph 80 with further references).

44. The Constitutional Court considered in its recent case-law the violation of the right to freedom of movement in connection with the imposed prohibition measures in a criminal procedure, and indicated that the prohibition measures may be considered within the scope of the standards of two separate rights: the right to freedom of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention, as well as the right to liberty and security of person under Article II(3)(d) of the Constitution of Bosnia and Herzegovina and Article 5 of the European Convention, all with the aim of more efficient and more affirmative protection of human rights and freedoms under the Constitution of Bosnia and Herzegovina and the European Convention (see, *inter alia*, Decision on Admissibility and Merits no. AP 3924/17 of 25 October 2017, paragraph 33 with further references, available at [www.ustavisud.ba](http://www.ustavisud.ba)).

45. The Constitutional Court observes that the essence of the allegations made in the appeal pertains to the fact that the appellant as a person over age 65 and the appellant's child under age of 18 cannot leave their home, go shopping or go to a physician, that is to say that parents cannot take their children to a public area, which "makes everyday life difficult" and "affects the mental and physical condition of children". On the other hand, the Constitutional Court also observes that, an Addendum to this Order no. 12-40-6-148-34-2/20 of 3 April 2020 permitted the persons younger than 18 to ride in a vehicle and permitted the persons above 65 the movement, among other things, for the purpose of collecting their pensions during the time intervals from 08.00 to 12.00 hrs Monday 6 April through Friday 10 April 2020. In addition, the Constitutional Court observes that there is no real physical duress, neither are drastic fines nor forced detention prescribed over the failure to comply with these measures, which are also factors that have to be taken into consideration.

46. In view of the aforementioned, the Constitutional Court deems that all the allegations made in the appeal ought to be examined from the aspect of the right to freedom of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention.

47. The Constitutional Court recalls that Article 2 of Protocol No. 4 to the European Convention guarantees to everyone the right to liberty of movement, within certain territory, and the right to leave that territory, meaning, the right to travel to any country of his/her choice wherein s/he may be accepted. As already stated above, the measures resulting in the restriction of the right to liberty of movement must be in accordance with law, pursue some of the legitimate aims set forth in Article 2(3) of Protocol No. 4 to the European Convention and to be "necessary in a democratic society"

(see, *op. cit. De Tommaso* judgement, paras 104 and 105 with further references and *op. cit. Decision AP 3924/17*, paras 37 and 39 with further references). Given the aforesaid, the Constitutional Court holds that the impugned orders indisputably represent an “interference” with the appellants’ right to liberty of movement.

**As to whether the interference is “in accordance with law”**

48. In addition, the Constitutional Court recalls that the expression “in accordance with law” not only requires that the impugned measures should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects. Concerning foreseeability, the European Court of Human Rights points out that a norm cannot be regarded as a “law” unless it is formulated with sufficient precision as to enable citizens to regulate their conduct. They must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty, the experience shows this to be unattainable. Again, whilst such certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Further, the level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed. Therefore, as pointed out by the European Court of Human Rights, it is primarily for the national authorities to interpret and apply domestic law (see, *ibid. De Tommaso* judgement, paras. 106 through 108, with further references). The European Court of Human Rights also reiterates that a norm is “foreseeable” when it affords a measure of protection against arbitrary interferences by the public authorities and that a law which confers a discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (*ibid*, paragraph 109, with further references).

49. In the particular case, the Orders are issued pursuant to Article 108 of the Law on Protection and Rescue which in the second paragraph stipulates that the civil protection headquarters have the power to “order the implementation of appropriate protection and rescue measures”. The appellants point out that this does imply that it is provided and allowed for the issuance of orders “preventing the movement of population”, and that such provision is not contained in any other piece of legislation, and that such restriction is contrary to the Constitution of Bosnia and Herzegovina and

the Convention on the Rights of Child, given that “the best interests of a child”, as required by the Convention, were not taken into account while adopting these measures. On the other hand, the FBiH Government stressed that the impugned measures are provided for by Article 54 of the Law on the Protection of the Population from Infectious Diseases, and that the unlawfulness is not concerned here but the enforcement of the existing legislation on extraordinary circumstances aiming at the protection of public health.

50. The Constitutional Court notes that both the Law on Protection and Rescue and the Law on the Protection of the Population from Infectious Diseases were published, as prescribed, in the *Official Gazettes* and, therefore, were accessible to everyone in the appropriate manner. In addition, the Constitutional Court indicates that the Law on Protection and Rescue regulates the system of protection and rescue of people and other from natural disasters (Article 1) and that the notion of natural disaster, *inter alia*, encompasses “mass appearance of human, animal and plant diseases” (Article 3(1)). The Law on the Protection of the Population from Infectious Diseases determines which diseases are infectious and provides for the protective measures against these diseases. Since the COVID-19 pandemic is indisputably “mass appearance of human diseases” in terms of the Law on Protection and Rescue, as well as it is a “new infectious disease that threatens the health of population” in terms of the Law on the Protection of the Population from Infectious Diseases, the Constitutional Court considers that Article 108(2) of the Law on Protection and Rescue and Article 54(2)(4) of the Law on the Protection of the Population from Infectious Diseases provided for the possibility of issuing the appropriate orders to prevent the spread of virus. However, the Constitutional Court also holds that the consequences such orders create, from the aspect of conformity with Article 2 of Protocol No. 4 to the European Convention, represent a substantive consideration that must be taken into account while deciding on whether the public authorities have struck a fair balance between the competing interests in the application of the prescribed measures (see, *mutatis mutandis*, ECtHR, *Broniowski v. Poland*, judgement of 22 June 2004, Application no. 31443/96, paragraph 143, with further references and the Constitutional Court, Decision on Admissibility and Merits, AP 2843/07 of 12 January 2010, paras 28 and 29). The Constitutional Court will, therefore, continue the analyses accepting that the impugned measures, in the extent to which they represent the interference with or the restriction of the appellants’ right to liberty of movement, were “in accordance with law” in terms of Article 2 of Protocol No. 4 to the European Convention.

**Does interference pursue a legitimate aim?**



51. The Constitutional Court notes that it follows from the response of the FBiH Government that the aim sought to be achieved by all the measures adopted so far, including the disputed ones, is "to protect the health of as many people as possible and to prevent the spread of the epidemic in society". The Constitutional Court considers that this is certainly a legitimate aim, as set out in paragraph 3 of Article 2 of Protocol No. 4 to the European Convention.

**Is a “fair balance” struck between the general interest of the community and the right to freedom of movement for individuals?**

52. The appellants consider that the disputed measures, which relate to the above categories of persons subjected to excessive burden, are disproportionate to the aim sought to be achieved, in particular that the competent authorities have not previously considered any more lenient measures. They state that persons under the age of 18 and over 65 are completely prevented from carrying out the necessary daily activities, such as shopping, going to the doctor and the pharmacy, walking pets, or that the parents cannot take their children to public places due to such measures. This significantly affects their overall health, including psychophysical health. The F BiH Government, on the other hand, points out that these groups are particularly sensitive, since persons over 65 are at greater risk of developing more severe symptoms if they become infected with a new type of virus for which there is neither a vaccine nor is an effective cure discovered, while persons under the age of 18 have milder symptoms if infected, but they can transmit the virus to the elderly.

53. The Constitutional Court points out that there is a great social, political and legal challenge for states facing the COVID-19 pandemic to respond effectively to such a crisis, while ensuring that the measures they take do not jeopardize the long-term interests in protecting fundamental democratic values, the rule of law and human rights. Even during the state of emergency, the rule of law must be complied with. Therefore, in such circumstances, the legislator may amend the existing and/or pass special laws that will be specially adapted to the crisis situation, which will give wider powers to the competent authorities than those they have under the already existing laws. In order to better and more effectively respond to a crisis, such new laws or amendments to existing laws must comply with the Constitution and international standards. Also, during a state of emergency, governments may be given the general authority to issue decrees with legal force, provided that such powers are of a limited nature. The basic purpose of a state of emergency or similar situation is to suppress the development of a crisis and to return to normal as

soon as possible. The control of the need for prolonging the state of emergency must be under the control of the legislative body, in order not to abuse and unacceptably prolong such state by the executive branch of power.

54. Bearing in mind these general international requirements, as indicated by the Council of Europe, the Constitutional Court notes, with extreme concern, that in this particular situation faced by Bosnia and Herzegovina due to the COVID-19 pandemic, there was no timely response by the competent legislature, that is, the Parliament of the Federation of BiH. Namely, despite the fact that, as the FBiH Government stated in its response, the Federal Ministry of Health had already reported in February 2020 that the WHO declared that the emergence of the new virus is "a public health emergency of international importance", the FBiH Parliament did not consider it necessary to hold a session then and consider the need to harmonize existing and possibly pass new laws that would make possible an effective response to the pandemic crisis, while preserving the rule of law and, as far as possible, the constitutional and human rights. On the contrary, it was only at the extraordinary sessions held on 7 April (the House of Representatives) and on 8 April 2020 (the House of Peoples) that amendments were made to the Rules of Procedure of the Houses to allow emergency sessions to be held online. By way of comparison, the Constitutional Court recalls that on 18 March 2020, the Parliament of the Republic of Croatia passed the Law on Amendments to the Law on the Civil Protection System, which gave the Civil Protection Headquarters the power to make decisions and impose measures to protect the life and health of citizens, preserve property, and economic activities and the environment and conduct equal of treatment of legal entities and citizens.

55. In a situation of complete absence of timely activities by the competent legislative body, the F BiH Government acted by declaring the state of emergency and giving the task to the Federal Civil Protection Headquarters "to undertake, in accordance with the Federation Plan and applicable legal regulations, all activities related to coordination and management of actions to protect and rescue people at risk. Based on such a decision, the Federal Civil Protection Headquarters began imposing a series of measures, including the disputed orders, to prevent the uncontrolled spread of COVID-19 disease.

56. In this connection, the Constitutional Court again points out that Article 108 (2) of the Law on Protection and Rescue stipulates that civil protection headquarters have the power to "order the implementation of appropriate protection and rescue measures" in cases where a Government Decision declares a state of emergency, whereas Article 54 of the Law on the Protection of the

Population from Infectious Diseases provides that the Federal Ministry of Health may order special emergency protective measures against these diseases. The Constitutional Court points out that the stated legal provisions are not sufficiently precise in terms of the type of measures, the limitation of their duration, the obligation of continuous review and the consequences that non-compliance with these measures may have, which may lead to arbitrary decisions. However, the Constitutional Court recalls the provision of Article II(6) of the Constitution of Bosnia and Herzegovina, according to which “Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above“. This provision constitutes a constitutional obligation for every institution or body operating within BiH, including the F BiH, to harmonize all its activities with the rights and freedoms guaranteed by the European Convention and the Constitution of Bosnia and Herzegovina. Therefore, any authority applying a law is obliged to apply it in a way that will not violate the constitutional rights, that is, the rights under the European Convention. This further means that both the Government of the Federation of Bosnia and Herzegovina and the Federal Civil Protection Headquarters must, when authorizing or imposing any measure, take into account that they do not violate human and constitutional rights to a greater extent than necessary, and in particular that the measures are of limited duration, and also to review and adapt those measures to the current situation within a reasonable timeframe and not to place an excessive burden on those to whom they relate.

57. In this connection, the Constitutional Court notes that the first Order stipulated that the impugned measures would last until 31 March 2020. This order does not provide for any exceptions to both categories of persons covered by it, for example the specific needs of a category of persons under the age of 18 in relation to their health status, especially when it comes to children with special needs (autism, etc.). In particular, the Constitutional Court points out that, with regard to children with special needs, it is necessary to allow for an exception to the general prohibition in such a way that the imposed measures are adapted to their needs and the current situation. It is also indisputable that in relation to children, particular attention should be paid to the effect of enforcement of the imposed measures, i.e. the extent of the benefits and damages they may have on the psychophysical development of children.

58. Furthermore, the fact is disregarded that within the category of persons over 65 years of age, there are those who are active and professionally engaged in legal entities and their work is not prohibited in the state of emergency, such as judicial authorities, i.e. judges and prosecutors whose

term of office by law lasts until the age of 70. Also, the fact that is fully disregarded is that in this category there are persons who have a constitutional right and an obligation to perform certain duties entrusted to them in the legislative and/or executive branches of power (the representatives in legislative bodies in BiH, members of the BiH Presidency, Council of Ministers of BiH, and Entity governments). This is especially true when it comes to the Sarajevo city area, since it is an indisputable fact that it is the seat of the largest part of the mentioned institutions in Sarajevo. Namely, the fact that the exercise of functions in the legislative and/or executive branch does not have any constitutional or legal restriction on the basis of age is completely neglected, but those persons are generally prevented from performing their functions under such a general measure. In this way, the work of the legislative, executive and judicial authorities is largely impeded and they must be able to continue their work in such extraordinary circumstances in a way that will be adapted to those circumstances. The Constitutional Court also notes that no uniform measures have been introduced in the territory of Bosnia and Herzegovina to counteract the virus infection and disease COVID-19. For instance, in the Brčko District of Bosnia and Herzegovina (hereinafter: BD BiH) no such general measure of prohibition of movement has been adopted. However, in the Republika Srpska that measure has been adopted, but without restriction on movement of persons under the age of 18.

59. Although in the response to the appeal it is stated that the Federal Civil Protection Headquarters, taking into account the complete epidemiological situation in the FBiH and also in the light of the Order of the Crisis Headquarters of the Federal Ministry of Health, issued the disputed orders, it cannot be concluded with certainty from the text of the disputed orders, and based on the FBiH Government's response, that the aforementioned body used the views of the medical profession and, if it did, it did not inform the public about it. These findings appear to be based on statistics, whose collection and processing methodology are different and the results are variable. In addition, neither from the answers nor from the information published by the Federal Civil Protection Headquarters is it apparent that, prior to the adoption of the impugned general measure of prohibition of movement of persons under 18 and over 65, alternative and more lenient measures were considered, such as the prohibition of movement at certain times of the day, a ban on access to certain public institutions or sources of infection (so-called clusters), etc., which would specifically protect these groups if such special protection was needed.

60. In particular, the Constitutional Court points out that the new Order extends the duration of the impugned measures “until further notice”. Such uncertainty as to how long these measures

will last is unacceptable. Measures to be imposed, especially those which significantly interfere with the human rights guaranteed under the Constitution of Bosnia and Herzegovina and the European Convention, must be strictly limited in time, that is, they may only last as long as it is necessary. In addition, the time limit obliges the authority imposing the order, in this specific case the FBiH Government and the Federal Civil Protection Headquarters, to review these measures regularly and, in accordance with the situation, to mitigate or completely abolish the ordered measures. However, under the new Order on the Duration of Measures "until further notice," it is completely uncertain whether and when the Federal Civil Protection Headquarters will consider the necessity of such a measure, which leaves much room for arbitrariness that is unacceptable.

61. The Constitutional Court also points out that on 3 April 2020, the Federal Civil Protection Headquarters issued an Addendum to the new Order allowing persons over the age of 65 to go out for a certain period of time to take over pensions and carry out other necessary activities, while continuously inviting other citizens to reduce movement in the same period so as not to create crowds and put the elderly at unnecessary risk. However, the Constitutional Court notes that thereafter neither the FBiH Government, the Federal Civil Protection Headquarters, nor any other competent body (for example, the Federal Ministry of Health) considered and assessed whether and to what extent the movement of persons affected by the measure had possibly contributed to the faster and greater spread of Covid -19, in order to re-examine accordingly the measures which completely prohibit the movement of persons in question. In this connection, the Constitutional Court also points out that this Addendum allows persons under the age of 18 to move in a vehicle (transport from one place to another), but it remains unclear why such a permit does not apply to persons over age of 65, that is, whether the Federal Civil Protection Headquarters has considered this option at all and, if so, for what reasons it has not adopted it. The Constitutional Court also concludes that on 17 April 2020, the Federal Civil Protection Headquarters issued an order declaring that the said orders apply until 30 April 2020, and that this order does not contain any reasoning.

62. The Constitutional Court points out that this is an unprecedented event in modern history and a new way of acting for all executive and, in general, public authorities. There is no comparable legal situation, nor is there the same pattern of behaviour in all member states of the Council of Europe. The Constitutional Court is fully aware of the extreme seriousness of the situation related to Covid -19, the great danger this virus poses to the health of the population, as well as of the assessment of the competent institutions that there is a need to protect the existing health system

from a situation in which a large number of people would suddenly be infected and in need of medical assistance. In addition, the Constitutional Court also takes into account the well-known fact that, even at the global level, there is no unique expert position regarding the implementation of appropriate measures. However, in such a situation, the Constitutional Court must also take into account the balance between the needs and protection of society as a whole and the rights of individuals. In this regard, the Constitutional Court reiterates that the possibility of restricting the rights guaranteed by the Constitution of Bosnia and Herzegovina and the European Convention, in addition to the general social benefit, is directly conditioned by a number of factors on the basis of which the existence of a fair balance between the measures taken and the aim sought to be achieved is assessed, and in this particular case, it is especially conditioned by the time duration of their application and the regular review of their necessity. Otherwise, there would be an ample room for arbitrariness in the actions of the competent authorities, which is contrary not only to the principle of the right to freedom of movement, but also to the principle of the rule of law in Article I (2) of the Constitution of Bosnia and Herzegovina, regardless of the state of emergency due to which the measures have been issued.

63. In view of all stated above, the Constitutional Court considers that the impugned measures do not fulfil the requirement of "proportionality" under Article 2 of Protocol No. 4 to the European Convention, because they do not indicate the basis for the assessment of the Federal Civil Protection Headquarters that the groups concerned have a higher risk of contracting or transmitting COVID-19 infection, and no consideration was given to the introduction of milder measures if such risk was justifiably present, and the measures are not strictly limited in time, nor is there an obligation to review them regularly to ensure that they last only as long as 'necessary' within the meaning of Article 2 of Protocol No. 4 to the European Convention, that is, that they should be alleviated or abolished as soon as the situation permits.

64. The Constitutional Court also emphasizes the need for the FBiH Government to regularly monitor the functioning of the Federal Civil Protection Headquarters in order to minimize any restrictions on constitutional rights. In this regard, the Constitutional Court has issued orders relating to the acting of the FBiH Government and the Federal Civil Protection Headquarters referred to in the operative part of this Decision, in order to harmonize their activities with the standards set out in this Decision.

65. In particular, the Constitutional Court emphasizes the obligation, primarily the obligation of the FBiH Government, to publicly explain, on a daily basis, with the participation of eminent representatives of the health care profession, the need for all measures, their duration and possible mitigating or tightening. In particular, this relates to the effect of measures in relation to persons under the age of 18, but also to the assessment of the necessary duration of measures in relation to all categories of population.

66. In view of all stated above, the Constitutional Court finds that the impugned measures violated the appellants' right to freedom of movement under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention.

67. However, the Constitutional Court cannot grant the part of the appeal where it is requested to quash the impugned Order given the current situation and the fact that there is certainly a great public interest in imposing certain restrictions, and that negative consequences could arise should the impugned Order be quashed without the competent authorities having had previously the opportunity to review the impugned measures under this Decision and adopt appropriate measures in accordance with the standards set out therein. Therefore, the Constitutional Court decided to leave the impugned Order in force by giving the FBiH Government and the Federal Civil Protection Headquarters short deadlines for reviewing the ordered measures in accordance with this Decision, as stated in the enacting clause. In addition, the clear position of the medical experts concerning continued existence and duration of the relevant measures is also to be included.

68. Furthermore, having regard to what has already been said about the complete absence of adequate action by the FBiH Parliament in relation to the crisis caused by COVID-19 (see paragraph 53 of this Decision), the Constitutional Court decided to transmit this Decision to the FBiH Parliament for action in accordance with its authority.

### **Compensation**

69. For the purposes of Article 74 of the Rules of the Constitutional Court, the Constitutional Court may order compensation for non-pecuniary damage. However, the Constitutional Court recalls that, unlike proceedings before ordinary courts, it determines compensation for non-pecuniary damage in specific cases of violations of guaranteed human rights and fundamental freedoms.

70. In the present case, however, the Constitutional Court considers that, given the overall situation with the crisis caused by COVID-19, the adoption of this Decision is sufficient satisfaction to the appellants and that there is no basis for awarding any compensation.

### **Other allegations**

71. The appellants also complain that by the impugned measures they are discriminated against on the age related grounds when compared with all other citizens of FBiH. In view of the established violation of the right to freedom of movement, the Constitutional Court, relying also on the case-law of the European Court of Human Rights, considers that there is no need to examine separately the allegations of discrimination.

## **VII. Conclusion**

72. The Constitutional Court concludes that the appellants' freedom of movement under Article II (3) (m) of the Constitution of Bosnia and Herzegovina and Article 2 of Protocol No. 4 to the European Convention has been violated because there is no proportionality or fair balance between the measures ordered by the impugned Order and public interest in the protection of public health, since the impossibility of imposing more lenient measures has not been previously discussed and reasoned, and because the measures imposed are not strictly time-limited, nor is there an obligation of the Federal Civil Protection Headquarters to review and extend these measures on a regular basis only if it is "necessary in a democratic society".

73. The Constitutional Court concludes that part of the appeal where it is requested to quash the impugned Order is unfounded, because such quashing, given the undoubted public interest in imposing certain restrictions, could have negative consequences before the competent authorities have the opportunity to consider the impugned measures in accordance with this Decision.

74. Pursuant to Article 59 (1), (2) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

75. In view of this decision, the Constitutional Court shall not consider the request for an interim measure.



76. Pursuant to Article 43 of the Rules of the Constitutional Court, Judge Valerija Galić gave a statement of dissent to the decision of the majority.

77. Pursuant to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.