



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 3 August 2020
Ref.No.:RK 1596/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI17/19

Applicant

Zymer Neziri, Rexhep Doçi, Daut Bislimi, Xheladin Shala, Adem Zejnullahu, Exhlale Dobruna, Mehmet Ahmetaj

Constitutional review of Administrative Instruction No. 09/2015 on categorization of beneficiaries of the contribute paying pensions according to the qualification structure and duration of payment of contributions-pension experience of the Ministry of Labor and Social Welfare

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Zymer Neziri, Rexhep Doçi, Daut Bislimi, Xheladin Shala, Adem Zejnullahu, Exhlale Dobruna and Mehmet Ahmetaj all researchers at the Albanological Institute of Prishtina (hereinafter: the Applicant), who are represented by Mr. Riza Smaka.

Challenged decision

2. The Applicants challenge Article 4 of Administrative Instruction no. 09/2015 on categorization of beneficiaries of the contribute paying pensions according to the qualification structure and duration of payment of contributions-pension experience of the Ministry of Labor and Social Welfare (hereinafter: MLSW).

Subject matter

3. The subject matter is the constitutional review of the abovementioned Administrative Instruction of MLSW, which is allegedly in contradiction with paragraph 2 of Article 3 [Equality Before the Law] and Article 7 [Values], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). The Applicants also allege that the challenged Administrative Instruction is contrary to Article 8 of Law no. 04/L-131 on Pension Schemes Financed by the State (hereinafter: the Law on Pension Schemes Financed by the State).

Legal basis

4. The Referral is based on Article 113 (1) and (7) of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 32 of the Rules of Procedure no. 01/2018 of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 30 January 2019, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court). The Referral was submitted by Mr. Riza Smaka, who submitted an authorization to represent the Applicants. The authorization in question was signed by all the Applicants, except Mr. Mehmet Ahmetaj.
6. On 6 February 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha member.
7. On 15 February 2019, the Court notified the Applicants' representative about the registration of the Referral and requested that the official form of the Court be completed and that it be clarified whether he himself is one of the Applicants, or only a representative of the Applicants (this fact was not clarified in the Referral). The Court also requested authorization for Mr.

Mehmet Ahmetaj, because his signature did not appear in the authorization submitted to the Court.

8. On 21 February 2019, the Applicants' representative submitted the referral form and some additional documents.
9. On 26 February 2019, one of the Applicants, namely Mr. Mehmet Ahmetaj, deposited his signature in the Court.
10. On 18 March 2019, the Court reiterated the request for the Applicants' representative, Mr. Riza Smaka, asking him once again to clarify whether he is also one of the Applicants or only a representative of the Applicants.
11. On 21 March 2019, Mr. Riza Smaka submitted to the Court his answer where he emphasized: *"Prof. Dr. Riza Smaka I am authorized for legal representation"* of case KI17/19 and *"If the Court would approve the substantive request, the case would be extended in favor of all masters and doctors of science "Benefitium Cohesionis" and therefore in my favor as authorized for legal representation of the case"*.
12. On 27 March 2019, the Court notified the MLSW about the registration of the Referral and provided it the opportunity to submit comments regarding the case within a period of fifteen (15) days from the moment of receipt of the notification. Within the set deadline, the Court did not receive any comment from the MLSW.
13. On 9 July 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

14. On 5 June 2014, the Law on Pension Schemes Financed by the State was published in the Official Gazette and entered into force fifteen (15) days after its publication.
15. On 31 December 2015, MLSW published the challenged Administrative Instruction which was intended *"to determine the conditions and criteria for the categorization of contribute paying pensioners, based on the qualifying structure and duration of payment of pension contributions,"* (See Article 1 of the Administrative Instruction).
16. Between 8 December 2016 and 2 November 2018, the Applicants submitted several requests regarding their case to: the United Trade Union of Education, Science and Culture, the Ombudsperson, MLSW; Parliamentary Committee on Education, Science, Culture, Youth, Sports, Innovation and Entrepreneurship; Parliamentary Committee on Health, Labor and Social Welfare. In all of these requests they had submitted their claims and allegations as to what they considered to belong to them. Most of these institutions received written responses, where in the response of the chairman of the Committee on Education it was stated that their requests will be addressed and a response

will be requested from the Ministry of Labor and Social Welfare and the Ministry of Education.

Applicant's allegations

17. The Applicants allege violation of paragraph 2 of Article 3 [Equality Before the Law] and 7 [Values] of the Constitution.
18. The Applicants allege that the provision of Article 4 of Administrative Instruction no. 09/2015 is *“to the disadvantage of beneficiaries of age contribute paying pension, with the level of master and the degree of doctor of science together with the relevant titles, the provision of Article 8 of Law no. 04/L-131 on Pension Schemes, because, unlike and for beneficiaries of contribution-payer pensions with primary and secondary and higher education, for beneficiaries of contribution-payer pensions with a master's degree and a doctor of science degree, no qualifying categorization has been done, which unjustly violated the right of the beneficiaries of the age contribution-payer pensions with the level of Mr. and Dr. of Science, guaranteed by Article 8 of the Law on Pension Schemes”*.
19. The Applicants further state that: *“ according to the provision of Article 8 of the Law no.04-L-131 on Pension Schemes, the categorization namely the amount of the age contribution-payer pension in accordance with the qualifying structure, with the relevant sub-legal act, should be elaborated concretely for all levels of primary education, secondary, higher, superior, master level and the degree of doctor of science with the titles Prof. Ass. Dr., Prof. Associate Dr., and Prof. Dr.!”*
20. The Applicants point out that there is a flaw in provision of Article 8 of Law 04-L-131 on Pension Schemes, as well as Administrative Instruction no. 09-2015, due to the inadequate categorization of the latter according to the qualifying structure of the amount of the age contribution-payer pensions.
21. The Applicants allege that: *“according to Article 8 of the Law on Pension Schemes, it was necessary that with Article 4 of the Administrative Instruction no. 09-2015, conform to the degree of professional structure, the coefficients of contribution-paying pension are set and also for pension users with scientific degrees Mr. Sc and Dr. Sc, but out of forgetfulness, negligence or eventual tendency, for the beneficiaries of the contribution-payer pension with the scientific degree Mr. Sc and Dr. Sc, the Ministry of Labor and Social Welfare, unlike other categories, has not set any coefficient”*.
22. Finally, the Applicants request the Court to render a Judgment by which:
 - “1. To approve the Request for interpretation and assessment of the incompatibility of Article 4 of AICBPQSDPPE [Challenged Administrative Instruction] with Article 8 of LPSFS [Law on Pension Schemes Financed by the State],*
 - 2. To annul the provision of Article 4 of AICBPQSDPPE with the finding that it is in contradiction with Article 8 of LPSFS,*

3. *To oblige the Government of Kosovo - Ministry of Labor and Social Welfare to amend Article 4 of the AICBPQSDPPE by stipulating the relevant coefficients of the qualifying structure for the beneficiaries of the age contribution-payer pension with the scientific degree Mr. Sci and Dr. Sci.*
4. *To oblige the Government of Kosovo - Ministry of Labor and Social Welfare that, in conformity with the amended Article 4 of AICBPQSDPPE, beneficiaries of the age contribution-payer pension with the scientific degree Mr. Sci and Dr. Sci, from December 2015 onwards, to pay the monthly amounts in cash according to certain coefficients in accordance with the qualifying structure.*
5. *The amount of the costs of proceedings until the realization of the Request to be paid by the Government of Kosovo - Ministry of Labor and Social Welfare.”*

Relevant legal provisions

Constitution of the Republic of Kosovo

[...]

Article 3.2

[Equality Before the Law]

2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.

Article 7

[Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life..

LAW No. 04/L-131 ON PENSION SCHEMES FINANCED BY THE STATE

[...]

Article 8
Conditions and criteria for recognition of the right to age contribution-payer pension

1. The right to age contribution-payer pension shall be realized by all persons who have citizenship of Kosovo and who:

1.1. have reached the age of sixty-five;

1.2. should have pension contribution-payer work experience, according to the Law on pension and disability insurance, No. 011-24/83 (Official Gazette of SAPK No.26/83) before the date 01.01.1999;

1.3. provide valid evidence on payment of contributions under provisions of the Law on Pension and Disability Insurance No.011-24/83 (Official Gazette of SAPK No.26/83) before 01.01.1999.

2. Categorization of users of contribution-payer pension, according to the duration of the payment of contribution according to the qualification structure and other criteria shall be defined by a sub-legal act which shall be approved by the respective Ministry.

3. Persons who meet the conditions and criteria for the age contribution-payer pension may not be users of any other pension scheme established by this Law.

4. Exceptionally, the users of the age contribution-payers pension and users of other pensions determined by this Law, may also be foreign nationals, with the state of whom the Republic of Kosovo shall conclude Bilateral Agreement for social insurance.

5. Provisions of Bilateral Agreement for social insurance which are concluded by the Republic of Kosovo with the respective states shall prevail over the provisions of this Law and other laws of the social security field.

6. With this Law there shall be recognized the work experience on contribution-payer pension for the years 1989- 1999 of the employees of education, health and others who have worked in the system of the Republic of Kosovo.

Administrative Instruction (MLSW) no. 09/2015 on the categorization of users of contribution- payer pension according to the qualification structure and the duration of the payment of contribution pension experience

[...]

Article 4
Categorization according to the qualification structure and duration of payment of contributions

1. Categorization of beneficiaries contribute paying pensions according to the qualification structure, divided into four (4) categories:

1.1. For pensioners with low education level;

- 1.2. *For pensioners with secondary education level;*
 - 1.3. *For pensioners with high education level;*
 - 1.4. *For pensioners with superior education level.*
2. *Categorization of contribute paying pension beneficiaries according to duration of payment, is calculated according to the value of 0.5% for every year, of the actual amount of contribute paying pension.*
 3. *The height of the amount of pension under paragraph 1 of this Article shall be established by decision of the Government after consultation with Ministry of Finance.*
 4. *The basis of the contribute paying pension is the amount determined under the recent decision issued by the Government of Kosovo no. 01/74 of dated 10.03.2014.*

Admissibility of the Referral

23. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.

24. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

“1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties;

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law”.

25. The Court further refers to Articles 47 and 49 of the Law, which stipulate:

Article 47 of the Law
[Individual Requests]

1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.

Article 49 of the Law

[Deadlines]

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force.

26. The Court takes into account Rule 39 (1) (a) of the Rules of Procedure , which specifies:

“(1) The Court may consider a referral as admissible if:

(a) the referral is filed by an authorized party”.

27. Initially, the Court recalls the facts of the case and the main allegations of the Applicants.

28. The Law on Pension Schemes Financed by the State entered into force in June 2014. In December 2015, the MLSW issued the challenged Administrative Instruction. Before this Court, the Applicants challenge the constitutionality of the Administrative Instruction issued by MLSW, more precisely Article 4 thereof, claiming that it is contrary to Articles 3.2 and 7 of the Constitution, as well as Article 8 of the Law on Pension Schemes Financed by the State. Consequently, the Applicants request the Court that:

- (i) to interpret the compatibility of Article 4 of the challenged Administrative Instruction with Article 8 of the Law on Pension Schemes Financed by the State;
- (ii) to annul Article 4 of the challenged Administrative Instruction, finding that it is contrary to Article 8 of the Law on Pension Schemes Financed by the State;
- (iii) to oblige MLSW to amend Article 4 of the challenged Administrative Instruction *“stipulating the relevant coefficients of the qualifying structure for the beneficiaries of the age contribution-payer pension with the scientific degree Mr. Sci and Dr. Sci”*;
- (iv) to oblige MLSW that in accordance with the amendment of Article 4 of the challenged Administrative Instruction *“beneficiaries of the age contribution-payer pension with the scientific degree Mr. Sci and Dr. Sci, from December 2015 onwards, to pay the monthly amounts in cash according to certain coefficients in accordance with the qualifying structure”*;
- (v) to oblige the MLSW to pay the amount of costs of proceedings until the realization of the Applicants’ referral.

29. In light of this, the Court notes that the Applicants submitted several requests related to their case to: the United Trade Union of Education, Science and Culture, the Ombudsperson, MLSW, and two Parliamentary Committees of the Assembly of the Republic of Kosovo. But the Court notes that the Applicants have not clarified the epilogue of eventual administrative proceedings in the above mentioned authorities and bodies. Therefore, they do not challenge any decision or concrete procedure, administrative or judicial, as they do not prove

how the challenged act violated their individual rights and freedoms. The Applicants request the Constitutional Court to assess the constitutionality of the challenged Administrative Instruction.

30. Regarding the Applicants' request for constitutional review of Article 4 of the Administrative Instruction, in relation to Article 8 of the Law on Pension Schemes Financed by the State, alleging that the Administrative Instruction of MLSW is contrary to Articles 3.2 and 7 of the Constitution, the Court emphasizes its consistent position that natural or legal persons are not authorized parties to seek an abstract assessment of the compatibility of the legislation with the Constitution, or requests of an *actio popularis* nature. Thus, in its case law, the Court has consistently emphasized that individuals cannot challenge *in abstracto* normative acts of a general nature.
31. In this regard, the Court refers specifically to its decision in case KI102/17, where the Applicant requested that the constitutionality of the same Administrative Instruction of the MLSW be reviewed, which is also challenged by the current Applicants. In that case, the Court reasoned that the Applicant "*did not prove in any way how that challenged act violated his fundamental rights and freedoms.*" and "*that the constitutional text and the case law of this Court do not recognize the right of individuals to challenge in abstracto the acts of general character*". Consequently, the Court declared inadmissible the Applicant's request for constitutional review of the same Administrative Instruction, considering that the Referral was not submitted by an authorized party as provided by Article 113.7 of the Constitution (See, case of the Court no. KI102/17, Applicant *Meleq Ymeri*, "*Constitutional review of Administrative Instruction no. 09/2015 on the categorization of users of contribution- payer pension according to the qualification structure and the duration of the payment of contribution pension experience of the Ministry of Labor and Social Welfare*", Resolution on Inadmissibility of 10 January 2018, paragraphs 19-22).
32. In the circumstances of the present case, the Court sees no circumstance or reason to decide otherwise than its case law in similar cases.
33. The Court reiterates the fact that the Constitution does not provide for the right of individuals to submit a request for abstract constitutional review, namely to challenge directly in the Constitutional Court the general normative acts of public authorities. The Constitution provides protection for individuals with respect to the actions or failure to act of public authorities, only within the scope provided by Articles 113.1 and 113.7 of the Constitution. These constitutional provisions require Applicants to prove that: (1) they are authorized parties; (2) they are directly affected by a concrete act or failure to act by public authorities; and (3) that they have exhausted all legal remedies provided by law. (See, for this purpose, among other authorities, the cases of the Court: KI21/19, Applicant *Pjetër Boçi*, Resolution on Inadmissibility of 27 May 2019 - where the interpretation of the relevant legislation regarding the definition of "official position" was requested, paragraphs 21-28 and references cited therein; KI92/12 Applicant *Sali Hajdari*, Resolution on Inadmissibility of 6 December 2012- requesting the constitutional review of the Law on Pensions; KI62/12 Applicant *Liridon Aliu*; Resolution on Inadmissibility of 20

September 2012 - requesting interpretation of the Constitution; KI40/11 Applicant *Zef Prenaj*, Resolution on Inadmissibility of 23 September 2011 - requesting the constitutional review of the Administrative Instruction no. 11/2010 for the payment of the basic pension issued by MLSW in October 2010).

34. Therefore, according to the relevant provisions of the Constitution (Article 113.7) and the Law (Articles 47 and 49), the only way natural or legal persons can challenge the constitutionality of a law before the Constitutional Court is if they prove that their referral is not of an “*actio popularis*” nature - but that they have been directly or indirectly affected by a “law” in the absence of any act, decision or measure implementing that law. In the circumstances of the present case, as it was explained above, this was not the case.
35. In the light of the foregoing, the Court concludes that the Referral is to be declared inadmissible because it was not filed by an authorized persons, as established in paragraphs 1 and 7 of Article 113 of the Constitution, as well as Rule 39 (1) (a) of the Rules of Procedure of the Constitutional Court.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 39 (1) (a) of the Rules of Procedure, in its session held on 9 July 2020, unanimously

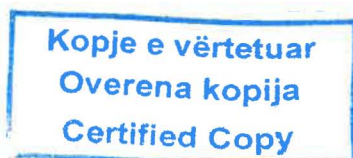
DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bekim Sejdiu



Arta Rama-Hajrizi

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