

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

THIRD SECTION

DECISION

Application no. 13902/11
Ionel PANFILE
against Romania

The European Court of Human Rights (Third Section), sitting on 20 March 2012 as a Chamber composed of:

Josep Casadevall, *President,*
Egbert Myjer,
Ján Šikuta,
Ineta Ziemele,
Luis López Guerra,
Mihai Poalelungi,
Kristina Pardalos, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 31 January 2011,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Ionel Panfile, is a Romanian national who was born in 1957 and lives in Mihail Kogălniceanu, Constanţa District.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. On an unspecified date the applicant applied for early retirement, after having worked for the Ministry of National Defence. His monthly pension

amounted to 2,880 Romanian lei. The legislation in force at the time, namely Law no. 164/2001 on State military pensions, allowed early retirees from the armed forces to apply for jobs in both the public and private sector, the status of retiree and that of employee being compatible.

On 4 June 2007 the applicant was appointed by the mayor of Mihail Kogălniceanu, a small town in Constanţa District, to work as a head of department within the Municipal Police Service. His monthly salary amounted to 986 lei, to which an additional allowance of 25% of his basic salary was paid on a monthly basis.

4. In November 2010, following the entry into force of Law no. 329/2009 on rationalisation of public expenditure, which introduced certain conditions for the concurrent receipt of a pension and of a State-paid salary (see paragraph 9 below), the applicant was notified by his employer that in view of the fact that his pension exceeded the national average gross salary of 1,836 lei (see also paragraph 6 below), he was obliged to choose within 15 days between having his pension suspended for the duration of his employment contract, or having the employment contract terminated.

The applicant refused to make such a choice, allegedly considering that the legal provisions preventing him from receiving concomitantly a pension and a salary were unconstitutional and in breach of European legislation and of the human rights treaties.

Consequently, on 9 December 2009 the mayor issued a decision confirming that from 10 December 2009 onwards the applicant's appointment as head of department was revoked, pursuant to section 20 of Law no. 329/2009.

5. On 18 January 2010 the applicant contested the mayor's decision before the Constanţa District Court. He asked to be reinstated in his previous post and to be paid the corresponding salaries, retroactively, for the period since 10 December 2009. The applicant mainly claimed that the provisions of Law no. 329/2009 were in breach of the Romanian Constitution and of the European Convention of Human Rights, as they infringed his right to work and to have his possessions, namely monthly income, protected.

6. The Constanţa District Court dismissed the applicant's action on 25 May 2010. It noted that the applicant did receive both a pension and a salary from a public institution, even though his pension exceeded the level of the national average gross salary, which was 1,836 lei for the year 2010. Therefore, it held that section 17-22 of Law no 329/2009, which had already been declared constitutional by the Constitutional Court, was relevant to his situation and justified the termination of his employment in a public institution.

Concerning the alleged breach of the applicant's right to work, the court held that he was still entitled to receive a salary if he were employed in the private sector; furthermore, the contested measure was not discriminatory,

since it applied equally to all persons that were in the same situation as that described in the legal instrument.

7. The applicant lodged an appeal on points of law against this judgment, invoking also a breach of his rights under Article 1 of Protocol No. 1 to the Convention, Article 14 of the Convention, Article 1 of Protocol No. 12 to the Convention and Article 15 paragraph 1 of the Charter of Fundamental Rights of the European Union.

8. His appeal was dismissed on 14 October 2010 by the Constanţa Court of Appeal. The court reiterated that the provisions of the disputed law had been declared constitutional by the Constitutional Court, its decision being final and binding. In so far as the applicant's criticism of the law coincided with the arguments already assessed and taken into consideration by the Constitutional Court in its reasoning, the court was bound to follow the Constitutional Court's approach. It followed that the mayor's decision to terminate the applicant's employment was lawful and in compliance with the Constitution.

B. Relevant domestic law and practice

1. Law no. 329/2009

9. Law no 329/2009, concerning the reorganising of public authorities and institutions, rationalisation of public expenditure, provision of support for the business field and compliance with the agreements signed with the European Commission and the International Monetary Fund, came into force on 12 November 2009. Its chapter IV was dedicated to "Measures regulating concurrent pension and salary entitlements, aimed at reducing public expenditure".

Section 17

1 – Anyone entitled to receive a pension, under either the State pension scheme or another pension scheme, who is also entitled to receive a salary pursuant to an employment contract or act of appointment within a public institution, whether national or local ..., shall be allowed to combine the pension with the salary if the pension received is lower than the national average gross salary, as validated by the Budget Act.

2 – The provisions of paragraph 1 shall be applicable to persons who:

(a) at the time of the entry into force of this chapter, are retired and enjoy concurrent pension and salary entitlements (*pensionari cumularzi*);

(b) after the entry into force of this chapter, begin to enjoy concurrent pension and salary entitlements.

Section 18

1 – Persons who are retired and fall under the provisions of section 17(2) (b) and who practise a profession pursuant to an employment contract or an act of appointment shall have an obligation, within 15 days following the entry into force of this chapter, to express in writing their choice between having the payment of their pension suspended while they practise that profession or having their employment/appointment terminated, in the event that the amount of their net pension exceeds the national average gross salary, as validated by the Budget Act ...

Section 20

Refusal to comply with the obligation to express a choice within the deadline set out in section 18 ... shall constitute justification for the termination of employment, whether it was based on a contract or on an act of appointment.

Section 21

If the choice is expressed within the time-limit set out in section 18 ..., the payment of the pension shall be suspended from the following month onwards.

Section 22

Any payments received unduly shall be recovered from the retiree, in compliance with the general rules on the statute of limitations/negative prescription.

2. Constitutionality issues before the Constitutional Court

10. The above-mentioned provisions of Law no. 329/2009 have been subjected to the scrutiny of the Constitutional Court, both before its promulgation (pre-legislative review) and after its entry into force (post-legislative review), as follows.

11. On 23 September 2009 more than one hundred Romanian MPs seised the Constitutional Court of a request for pre-legislative review of constitutionality concerning sections 17-22 of Law no. 329/2009. The Constitutional Court gave its decision on 4 November 2009, finding that the impugned legal texts were in compliance with the Romanian Constitution.

While stating from the outset that the provisions of the impugned law could not apply to persons whose mandates were provided for by the Constitution (for example, high-ranking officials), the court mainly stated, on the issue of concurrent pension and salary entitlements, that no constitutional provision prevented the legislature from prohibiting the concurrent receipt of both pension and salary, provided that such a measure was applied in an equal manner for all citizens, and that any potential

differences in treatment were proved to have a legitimate aim. At the same time, the context in which the impugned measure was taken was an exceptional one, having regard to the global crisis on a financial and economic level.

The Constitutional Court further stated that the legislation allowed, as a rule, the concurrent receipt of pension and salary, if the pension was lower than a certain level; the level taken into account was expressly prescribed by law, and was thus predictable and determinable, while at the same time reasonable. The exception to the rule of combining both incomes was justified by the exceptional economic circumstances and applied only to those who were employed or appointed in the public sector, for the purpose of rationalising public expenditure, while also securing a certain level of income – estimated as reasonable – for everyone. In so far as the measure applied equally to all those concerned by the legal instrument, it could not be regarded as discriminatory.

In conclusion, the court held that the legislature had full discretionary power to institute such measures as imposing a certain level of secured income, in so far as they were reasonable, proportionate and justified by a public interest.

12. Subsequently, the Constitutional Court was seised of several other complaints regarding the alleged unconstitutionality of sections 17-22 of Law no. 229/2009. In its decisions of 1 and 22 March 2011, 7 and 12 April 2011, 17 May 2011 and 12 July 2011, the Constitutional Court upheld its previous reasoning and confirmed that the law was in compliance with the Constitution. At the same time, the court reiterated that the measure could not be regarded as discriminatory, in so far as the employees in the public sector were not in a similar situation to those working for private employers, essentially owing to the fact that their incomes were dependent on the State budget.

COMPLAINTS

13. The applicant complained under Articles 6 and 14 of the Convention, Article 1 of Protocol No. 1 to the Convention and Article 1 of Protocol No. 12 to the Convention about the obligation imposed on him from 9 December 2009 onwards to choose between having his pension suspended while he worked for a State-run institution or having his employment terminated. He alleged that by applying section 17-22 of Law no. 329/2009, the courts had deprived him of his right to receive concomitantly a pension and a salary, even though this was an “acquired right”; at the same time, the application of the above-mentioned texts led to an indirect discrimination, having regard to the fact that those who had a

pension that was lower than the level of the national average gross salary, or those whose pension was higher than that level but were employed in the private sector, could still concurrently receive a pension and a salary.

The impugned legal instruments, as applied in his case, also breached the principle of legal certainty as the domestic legislation was not sufficiently foreseeable and accessible. The applicant contended that the legislation in force at the time of his early retirement allowed him to be employed or appointed in the public sector, which represented a strong motivation for his decision to retire early; for this reason, any amendment of the legislation could not affect his situation without breaching the legal certainty principle, bearing in mind also that his right to receive a pension and a salary was an acquired right which could not be subject to reassessment.

THE LAW

A. Article 1 of Protocol No. 1 to the Convention

14. The applicant complained that the application of the new legislative measures prescribed in Law no. 329/2009 deprived him of his income, which had been made up of a pension and a salary. Such deprivation, he alleged, was in breach of Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

1. General principles

15. At the outset, the Court reiterates that the principles which apply generally in cases under Article 1 of Protocol No. 1 are equally relevant when it comes to pensions (see *Stummer v. Austria* [GC], no. 37452/02, § 82, 7 July 2011) or to salaries (see, among many others, *Mihăieş v. Romania and Senteş v. Romania* (dec.), no. 44232/11; 44605/11, 6 December 2011). Among these, especially relevant for the present case is the fact that this provision does not guarantee, as such, any right to a pension of a particular amount (see *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, § 55, 31 May

2011), nor the right to continue to be paid a salary of a particular amount (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 94, ECHR 2007-II), it being entirely at the State's discretion to determine what benefits are to be paid to its employees out of the State's budget (see *Kechko v. Ukraine*, no. 63134/00, § 23, 8 November 2005).

At the same time, however, where the amount of a benefit is reduced or discontinued, it may constitute interference with possessions which needs to be justified (see *Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009).

16. An essential condition for interference to be deemed compatible with Article 1 of Protocol No. 1 is that it should be lawful. Any interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public (or general) interest. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures interfering with the peaceful enjoyment of possessions (see *Terazzi S.r.l. v. Italy*, no. 27265/95, § 85, 17 October 2002, and *Wieczorek v. Poland*, no. 18176/05, § 59, 8 December 2009). Furthermore, the Court considers that States enjoy quite a wide margin of appreciation in regulating their social policy (see *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X and *Kuna v. Germany* (dec.), no. 52449/99, ECHR 2001-V (extracts))

Article 1 of Protocol No. 1 also requires that any interference be reasonably proportionate to the aim sought to be realised (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, §§ 81-94, ECHR 2005-VI). The requisite fair balance will not be struck where the person concerned bears an individual and excessive burden (see *Maggio and Others v. Italy*, cited above, § 57).

2. Application of the principles to the present case

17. The Court notes that the applicant's complaint refers mainly to his inability to receive concurrently a military pension and a State-paid salary, following the entry into force of Law no. 329/2009, which introduced new rules concerning the circumstances permitting such a combination. The applicant thus considered that such limitations impaired his right to work and to be paid accordingly, in spite of the fact that when he had applied for early retirement he had envisaged continuing in gainful employment in accordance with the law in force at the time.

18. In this context, the Court reiterates that the Convention does not guarantee a right to work (see *Sobczyk v. Poland*, nos. 25693/94 and 27387/95, (dec.), 10 February 2000; *Dragan Cakalic v Croatia*, (dec.), 15 September 2003; and *Torri and Others v. Italy and Bucciarelli v. Italy*

(dec.), nos. 11838/07 and 12302/07, 24 January 2012). Nor does it guarantee, as already mentioned above, the right to a pension or a salary of a particular amount.

19. The Court further considers that the limitations introduced by the impugned legislation are not to be regarded as a "deprivation of possessions", as alleged by the applicant, but rather as an interference with his right to the peaceful enjoyment of his possessions, within the meaning of the first sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention.

20. From that viewpoint, the Court notes that the impugned interference was prescribed by law, namely by the newly introduced provisions of Law no. 329/2009 regarding certain measures to be taken by the State in the context of the economic and financial crisis.

21. In its assessment of the public interest of the impugned measures, the Court takes account of the Constitutional Court's reasoning, which confirmed that the Romanian legislature had imposed new rules in the field of public-sector salaries for the purpose of rationalising public expenditure, as dictated by the exceptional context of a global crisis on a financial and economic level (see paragraph 11 above). Having also regard to the fact that this is a matter that falls to be decided by the national authorities, who have direct democratic legitimation and are better placed than an international court to evaluate local needs and conditions, the Court sees no reason to depart from the Constitutional Court's finding that the contested measures pursued a legitimate aim in the public interest (see, *mutatis mutandis*, *Valkov and Others v. Bulgaria*, nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, § 92, 25 October 2011).

22. It remains therefore to be established whether a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights was struck, knowing that the requisite balance will not be found if the person concerned had to bear an individual and excessive burden (see, among many others, *Lakićević and Others v. Montenegro and Serbia*, nos. 27458/06, 37205/06, 37207/06 and 33604/07, § 62, 13 December 2011).

23. In that connection, particular emphasis needs to be placed on the fact that the applicant was obliged to choose between continuing to receive his monthly military pension and terminating his employment, or having the pension payment suspended while continuing to work for the State. The Court thus notes that, unlike the situation in the case of *Kjartan Ásmundsson* (cited above, §39), the applicant did not suffer a total deprivation of his entitlements, nor was he divested of all means of subsistence, considering that he would still receive a full monthly pension, whose level was higher than the level of the national gross average salary (see also paragraph 6 above). From the same viewpoint, the applicant cannot be regarded as

having lost substantial amounts of his income, since his pension, which he will continue to receive, is substantially higher than the monthly salary he would have received.

24. Against this background and also bearing in mind the State's wide margin of appreciation in regulating the area of social legislation (see also *Frimu v. Romania* (dec.), no. 45312/11, 7 February 2012) and the legitimate aim of rationalising public expenditure (see paragraph 21 above), the Court considers that the applicant can hardly be regarded as having to bear an individual and excessive burden, or as having suffered an impairment of the essence of his pension or salary rights.

25. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

B. Article 14 of the Convention

26. The applicant complained that the impugned legal instruments instituted discrimination between different categories of people, some being allowed to continue to receive concurrently a salary and a pension, and others being prevented from doing so. More specifically, he could not continue to receive both a salary and a pension, on the ground that he was employed in the public sector, compared to those employed in the private sector, on the one hand, and on the ground that he had a pension higher than the gross national average salary, compared to those who had a pension lower than that level, on the other hand.

Article 14 of the Convention reads as follows:

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

27. The Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV). However, not every difference in treatment will amount to a violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory (see *Unal Tekeli v. Turkey*, no. 29865/96, § 49, 16 November 2004).

Moreover, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them, the Contracting State enjoying a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. A wide margin is usually allowed to the State under the Convention in respect of general measures of economic or social strategy (see *Stec and Others v. the United Kingdom* [GC], no. 65731/01, §§ 51-52, ECHR 2006-VI).

28. Turning to the present case, the Court considers that the criticised legal instrument did institute a difference in treatment between retired persons who were still active in the private sector and those who worked in the public sector, like the applicant; however, the two categories of persons can hardly be regarded as being in an analogous or relevantly similar situation within the meaning of Article 14, since the essential distinction, relevant to the context in which the impugned measures were taken, is that they draw their incomes from different sources, namely a private budget and the State budget respectively. It should also be noted in that connection that the Court has on a number of occasions countenanced the distinctions that some Contracting States draw, for pension purposes, between civil servants and private employees (see *Valkov and Others*, cited above, § 117, and the citations therein).

Concerning the difference in treatment based on the personal monthly income level, the Court considers, in line also with the Romanian Constitutional Court's decision, that the level referred to was foreseeable and reasonable (see paragraph 11 above), and was established in relation to objective factors by the legislature, which acted within its discretionary power in the field of budgetary decisions, without transgressing the principle of proportionality (see, *mutatis mutandis*, *Valkov and Others*, cited above, § 114).

29. The Court thus holds that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. Other alleged complaints

30. The applicant also raised further complaints under Article 6 of the Convention and Article 1 of Protocol No. 12 to the Convention (see paragraph 13 above).

31. The Court, having examined the remainder of the applicant's complaints, considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or Protocols thereto.

It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President