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

SECOND SECTION

DECISION

Application no. 11944/16
Radosav MILIVOJEVIĆ
against Serbia

The European Court of Human Rights (Second Section), sitting on 5 July 2022 as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Egidijus Kūris,
Branko Lubarda,
Pauliine Koskelo,
Jovan Ilievski,
Gilberto Felici,
Saadet Yüksel, *judges,*
and Hasan Bakırcı, *Section Registrar,*

Having regard to the above application lodged on 24 February 2016,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Radosav Milivojević, is a Serbian national, who was born in 1955 and lives in Smederevo. He was represented before the Court by Mr R. Kojić, a lawyer practising in Belgrade.

2. The Serbian Government ("the Government") were represented by their Agent, Mrs Z. Jandrijević Mladar.

The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. The applicant was a colonel in the Army of the Republic of Serbia for thirty years until 16 April 2005, when he retired due to his permanent inability

to perform professional military service. At the time of termination of his service, he had a total of thirty years, nine months and four days of service. His disability pension was calculated on the basis of recognised benefitted (increased) years of service and amounted to thirty-eight years, nine months and twenty-eight days. According to the applicant, at the time of retiring, he was able to choose whether to start receiving an early old-age pension or a disability pension, and he chose the latter.

5. On 16 April 2005 the applicant was appointed Deputy Public Prosecutor in the Republic Public Prosecutor's Office-Military Department, a position in which he stayed until 30 June 2010. During that time, he was paying compulsory contributions to the Pension and Disability Insurance Fund of the Republic of Serbia (hereinafter "the Fund") for a total of five years, two months and fifteen days.

6. After termination of his public service, on 20 March 2012 the applicant requested the Fund to recalculate his pension taking into account his years of service as a Deputy Public Prosecutor.

7. On 18 September 2012 the Fund dismissed his request stating that, pursuant to section 121 of the Pension and Disability Insurance Act, only beneficiaries of an old age pension, but not a disability pension, had the right to request recalculation of their pension on account of subsequent employment, provided that they had been insured for at least one year.

8. On 12 November 2012 the applicant's appeal against the first-instance decision was dismissed on the same grounds. The Administrative Court dismissed the applicant's subsequent administrative action on 7 February 2013.

9. On 20 March 2013 the applicant lodged a constitutional appeal, complaining that he had been discriminated against on the basis of his disability in comparison to old age pension beneficiaries. On 19 October 2015 the Constitutional Court dismissed his appeal. The relevant parts of that decision read as follows:

> "...[T]he Constitution does not recognise the principle of equality as a general, abstract concept that applies equally to different legal entities in every legal situation, but guarantees equality within the same category of legal entities, namely the same type of rights...
>
> The Constitutional Court further notes that at its ... meeting of 22 December 2014 it dismissed a request for constitutional review of section 121(1) of the PIO... finding that the said Act did not establish a separate category of 'military disability pension beneficiaries', but instead only section 21 of the Act, which relates to determination of disability, provides that disability exists when an insured person suffers from a total loss of ability to work, or when a professional military officer loses the ability to perform professional military service ... It has also been pointed out that the Constitutional Court can only assess the constitutionality of existing legal provisions but not the failure of the National Assembly to regulate certain issues by law, because adoption of laws is a part of the legislative power which, according to the Constitution, is within the exclusive competence of the National Assembly..."

RELEVANT LEGAL FRAMEWORK

A. The Constitution of the Republic of Serbia (*Ustav Republike Srbije*; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06)

10. Article 21 provides that "everyone shall be equal before the Constitution and the law" and "shall have the right to equal legal protection, without discrimination". All "direct or indirect discrimination based on any ground, particularly on grounds of race, sex, national or social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited". Special measures which may be introduced in order to achieve full equality of individuals or group of individuals who are otherwise in a substantively unequal position compared to other citizens shall not be deemed as discrimination.

11. Article 170 provides that "a constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers that violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies [for the protection of those rights or freedoms] have already been exhausted or have not been prescribed".

B. The Old-Age Pension and Disability Act (*Zakon o penzionom i invalidskom osiguranju*, published in the Official Gazette of the Republic of Serbia – OG RS – no. 34/2003, as amended)

12. Article 5 provides that pension and disability insurance rights shall be acquired and exercised based on the years of service and contribution base rate, in compliance of the solidarity principle.

13. Article 21 provides that a person shall be deemed disabled under this Act if he or she suffers of a total loss of working ability, or when a member of professional military personnel suffers a total loss of capacity for professional military service, or when a police officer suffers a complete loss of ability to perform professional police duties, due to changes in his or her health condition caused by a workplace injury, occupational disease, non-work related injury or disease, which do not respond to treatment or medical rehabilitation.

14. According to Article 69, *inter alia*, in calculating the amount of disability pension caused by a work-related injury, a period of forty years shall be taken into account. In calculating a disability pension caused by a non-work-related injury or disease, the following years of service shall be added as of the date of the termination of insurance: to an insured person under 53 years of age, two-thirds of the missing years of service shall be added until he or she turns 53 and half of the missing years of service shall

be added to a woman between 53 and 58, and to a man between 53 and 63 years of age. For insured persons older than 53, one half of the missing years of service shall be added to a woman until 58, and to a man until 63 years of age.

15. According to Article 121, *inter alia*, beneficiaries of an old-age or early old-age pension who become employed for at least one year shall have the right to recalculation of pension and shall be attributed the more favourable amount of pension.

COMPLAINT

16. The applicant complained that he had been discriminated against in that, unlike old-age pensioners, he could not have his disability pension recalculated in order to include a subsequent period of five years during which he had contributed to the compulsory pension insurance system.

THE LAW

17. The applicant relied on Article 14 of the Convention, Article 1 of Protocol No. 1 and Article 1 of Protocol No. 12 thereto. As master of the characterisation to be given in law to the facts of the case before it (see, for example, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018), the Court considers that the applicant's complaint falls to be examined under Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention, which read as follows:

Article 14

"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."

Article 1 of Protocol No. 1

"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."

A. The parties' arguments

1. The Government

18. The Government explained that under domestic law only professional military and police officers were able to obtain a disability pension when they suffer a loss of ability to perform their military or police service, but not a total loss of the ability to work in other jobs. For all other persons, disability meant that they were unable to perform any employment at all. The relevant legislation thus already contained a positive discrimination in favour of military personnel, allowing them, unlike all other persons qualifying for a disability pension, to find other employment.

19. The Government further pointed out that a disability pension was not a standard pension and that its amount was not exclusively based on the years of service or the sum of paid insurance contributions. Instead, a disability pension was calculated applying a special formula defined in the law (see paragraph 14 above), as a result of which its amount was determined more favourably than other pensions. There had thus been no basis for providing the possibility of subsequently recalculating the amount of disability pensions. In the situation where military officers were already treated more favourably by being eligible for re-employment, it was not justified that such persons also have the possibility of increasing their already favourably calculated disability pension. The contrary would put all other disability pension beneficiaries in an unequal position.

20. The Government further stressed that in Serbia the rights to pension and disability insurance were exercised based on the principle of solidarity. That meant that payment of pensions was mainly provided from contributions by currently employed generation and that the specific insured person did not pay contributions from which his or her pension was subsequently paid out. No employee could be absolved from paying compulsory contributions, despite their possible status of disability pension beneficiary. Otherwise, other employees would be put in an unequal position as the employment of pension beneficiaries would be more favourable for employers.

21. The Government concluded that for the foregoing reasons disability and old age pensioners were not comparable categories as these two rights significantly differed in the manner of determining their respective pension benefits.

2. The applicant

22. The applicant maintained that at the time when he retired on account of his disability, the law had allowed for a recalculation of disability pensions. However, once military pensions had become regulated by the legislation governing civilian pensions, he, unlike old age pensioners, no longer enjoyed such right to include his subsequent period of employment.

23. The applicant further noted that at the time of his retirement in 2005 he had fulfilled both requirements for an early old age pension and for a disability pension and was able to choose under which regime to retire. He also provided information concerning a colleague military officer who had retired under the early retirement scheme and who had been allowed to have his pension recalculated on account of subsequent years in civilian employment, resulting in a significant increase in his monthly pension amounts, although they both had virtually the same number of years of military service and subsequent civilian employment.

24. The applicant contended that, despite having paid significant compulsory contributions to the Fund during his service as a civilian for over five years, he was subsequently unable to benefit from those contributions as a result of his disability for military service.

25. Finally, the applicant also submitted that certain categories of disability pension beneficiaries were also entitled to specific rights under domestic law, but that the State never adopted a law in this respect. It was thus unacceptable for the State to now claim that the applicant had been positively discriminated in comparison to persons of reduced capacity to work. The applicant should not be compared to other persons of reduced capacity to work but instead to other persons who had contributed to the Fund.

B. The Court's assessment

1. General principles

26. In order for an issue to arise under Article 14, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see, amongst many authorities, *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017). In other words, the requirement to demonstrate an analogous position does not require that the comparator groups be identical. An applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relevantly similar situation to others treated differently (see *Clift v. the United Kingdom*, no. 7205/07, § 66, 13 July 2010).

27. However, not every difference in treatment will amount to a violation of Article 14. Firstly, the Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010, and *Molla Sali v. Greece* [GC], no. 20452/14, §§ 134, 19 December 2018). Secondly, a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be

realised (see *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013 (extracts); and *Weller v. Hungary*, no. 44399/05, § 27, 31 March 2009).

28. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of the margin will vary according to the circumstances, the subject matter and the background (see *Stummer v. Austria* [GC], no. 37452/02, § 88, ECHR 2011), but the final decision as to the observance of the Convention's requirements rests with the Court (see, among other authorities, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 126, ECHR 2012 (extracts). First and foremost, the nature of the status upon which differential treatment is based weighs heavily in determining the scope of that margin (see *Bah v. the United Kingdom*, no. 56328/07, § 47, ECHR 2011). The Court has recently reiterated that the margin of appreciation will be considerably wider, and the justification required will not be as weighty, if the status in question is subject to an element of personal choice (see *Savickis and Others v. Latvia* [GC], no. 49270/11, § 183, 9 June 2022).

29. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see *Fábián*, cited above, § 115). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see *Carson and Others*, cited above, § 61). Any measures taken on such grounds, including the reduction of the amount of pension normally payable to the qualifying population, must nevertheless be implemented in a non-discriminatory manner and comply with the requirements of proportionality (see *Lakićević and Others v. Montenegro and Serbia*, nos. 27458/06 and 3 others, § 61, 13 December 2011, and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 55, ECHR 2005).

30. Lastly, as regards the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see *Popović and Others v. Serbia*, no. 26944/13 et al, § 73, 30 June 2020).

2. Application in the present case

31. The Court will first examine whether the applicant can be considered as being in an analogous or relevantly similar situation to the group he sought to compare himself with, namely pensioners in receipt of an old-age pension. The Court has already held that the elements which characterise different situations and determine the comparability of the two groups that are being compared must be assessed in the light of the subject matter and purpose of

the measure which makes the distinction in question (see *Fábián*, cited above, § 121; see also *Špoljar and Dječji vrtić Pčelice v. Croatia* (dec.), no. 68320/13, § 39, 22 September 2020).

32. In that connection, the Court notes at the outset that the applicant belongs to a rather narrow group of persons who, despite qualifying for a disability pension, were entitled under Serbian law to subsequently take up new employment. As explained by the Government, only former military and police personnel were able to qualify for a disability pension without being fully unable to work and thus only they could take up new employment while at the same time keeping their entitlement to a disability pension (see paragraphs 13 and 18 above). In this context, it is irrelevant whether or not the State has adopted specific legislation regulating possible additional rights of other (non-military) disability pension beneficiaries, as claimed by the applicant (see paragraph 25 above), as he himself was not in that position.

33. Secondly, the Court attaches importance to the fact that, when retiring from military service in 2005, the applicant qualified both for an early old-age pension and for a disability pension. As he himself admitted, he was allowed to choose under which regime he wished to retire, and he chose the latter (see paragraphs 4 and 23 above). Whatever the reasons behind his choice of the disability scheme at the material time, the applicant can hardly now compare, as he sought to do, his situation to that of another retired military officer with similar work experience, but who had chosen a different retirement scheme (see paragraph 23 above).

34. Thirdly, and perhaps most significantly, the Court notes that under Serbian law disability and old age pensions are not calculated in the same manner. As explained by the Government, a disability pension is normally more favourable for the person concerned as it already contains a more generous calculation of the benefit in question (see paragraph 19 above). Accordingly, the applicant already benefitted from such a favourable calculation (see paragraph 4 above). In such circumstances, the Court considers that it would be difficult, if not impossible, to combine the method of calculating both a disability and an old-age pension in respect of the same person.

35. In so far as the applicant argued that he would never receive in return the significant amounts of compulsory contributions which he had paid during his five years of service as a Deputy Prosecutor, the Court observes that the Serbian pension system is based on the solidarity principle and that in any event persons insured under such a scheme do not have an automatic entitlement to receive in benefits the equivalent amount of contributions they had paid to the system during their employment. The Court has already examined similar pension systems based on the principle of solidarity between contributors and beneficiaries, and concluded that the obligation to contribute to the statutory old-age insurance was not disproportionate nor did it amount to discriminatory treatment (see *Ackermann and Fuhrmann*

v. Germany (dec.), no. 71477/01, 8 September 2005). It sees no reasons to depart from that conclusion in the present case.

36. Bearing in mind the foregoing, the Court considers that the purpose of the measure that makes the distinction between the old-age and disability pensioners in the present case is not to put one category in a less favourable position, or to discriminate a particular group of persons on the basis of their disability, but instead to reflect the different nature of the two pensions, and to contribute to the careful balancing of the amounts of benefits provided to the various groups of beneficiaries in the State's social security system.

37. In sum, the Court is not convinced that the applicant has succeeded in showing that he was in a relevantly similar or analogous position to the group he sought to compare himself with.

38. It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 and has to be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 8 September 2022.

Hasan Bakırcı Registrar	Jon Fridrik Kjølbro President