

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

SECOND SECTION

DECISION

Application no. 40210/09
İbrahim ŞAHİN
against Turkey

The European Court of Human Rights (Second Section), sitting on 17 April 2012 as a Committee composed of:

Dragoljub Popović, *President,*
András Sajó,
Paulo Pinto de Albuquerque, *judges,*

and Françoise Elens-Passos, *Deputy Section Registrar,*

Having regard to the above application lodged on 15 July 2009,

Having regard to the declaration submitted by the respondent Government on 31 March 2011 requesting the Court to strike the application out of the list of cases and the applicant's reply to that declaration,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr İbrahim Şahin, is a Turkish national who was born in 1933 and lives in Ankara. The Turkish Government ("the Government") were represented by their Agent.

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

On 1 March 1998 the applicant retired from his position as the governor of Giresun upon having reached the mandatory retirement age. He was subsequently informed by the Retirement Fund (*Emekli Sandığı*, "the Fund") that he would start receiving his pension as of 15 March 1998,

which would be calculated on the basis of his period of pensionable service and his grade as a civil servant.

On 16 March 1998 the applicant sent a letter in reply to the Fund, requesting the recalculation of his pension, which he deemed had been miscalculated. He claimed in particular that the Fund had omitted to take into account the special increment granted to persons who had served as governors for a minimum period of six years, as envisaged under Additional Article 66 of the Law no. 5434 on Retirement Fund.

The Fund rejected the applicant's request.

The applicant subsequently brought a case before the Ankara Administrative Court against the Fund and the Ministry of Finance, requesting the annulment of the Fund's decision and the payment of the increased amount of pension.

On 28 October 1998 establishing that the applicant had served in civil service for forty one years in total, more than six years of which in a position of a governor, the administrative court held that he was entitled to the special increment in accordance with the relevant provision of Law no. 5434. Subsequently, the court granted the applicant's request retrospectively and ordered that the due difference in his pension be paid to the applicant with interest. On 24 October 2003 the Supreme Administrative Court upheld that judgment.

In the meantime, Law no. 4839 came into effect on 17 April 2003 amending certain provisions of Law no. 5434 and revoking Additional Article 66 of the same law.

The applicant was consequently informed by the Fund that this legislative amendment would be applied to him with effect from 1 May 2003.

The applicant's monthly pension was 2,031,270,000 Turkish liras (TRL) in April 2003, which was reduced to TRL 1,886,940,000 after the change of legislation, indicating a monthly reduction of TRL 144,330,000 (approximately 85 euros) in his pension.

The applicant instituted proceedings before the Ankara Administrative Court against the Fund and the Ministry of Finance, challenging the administrative decision to discontinue the payment of the special increment, which, in his opinion, amounted to usurpation of his acquired rights. He also requested this court to apply to the Constitutional Court against the relevant provision of Law no. 4839, which, he argued, was unconstitutional.

By a judgment dated 26 April 2004 the administrative court dismissed the applicant's case, as well as his arguments regarding the unconstitutionality of the relevant provision of Law no. 4839. It held that Law no. 4839 had revoked Additional Article 66 of Law no. 5434 for all effects and purposes, without providing an exception for persons who had formerly benefited from that provision. In that regard, the administrative court rejected the applicant's argument of having possessed an acquired

right, asserting that the legal basis of the special increment had ceased by the adoption of the new law which was applied respectively without obliging the applicant to reimburse the payments he had received while the former law was in force.

On 27 March 2007 the Supreme Administrative Court upheld the judgment of the first-instance court and on 27 May 2009 it rejected the applicant's rectification request. The written opinions of the principal public prosecutors submitted to this court prior to the delivery of the decisions, were not communicated to the applicant.

COMPLAINTS

The applicant complained under Article 6 § 1 of the Convention that the written opinions submitted by the principal public prosecutors to the Supreme Administrative Court during the appeal and rectification stages had not been communicated to him, which had denied him the opportunity to reply, and that the administrative proceedings had not been concluded within a reasonable time.

He maintained under Article 13 of the Convention that he had not been provided with any effective remedies for the alleged violations of his rights under Article 6 of the Convention.

He further argued under Article 6 § 1 of the Convention that the administrative court had failed to entertain his objection on the unconstitutionality of the relevant provision of Law no. 4839 and to follow the legal precedents on the principle of protection of acquired rights.

The applicant claimed that the revocation of Additional Article 66 of Law no. 5434 without due respect for his acquired rights under that provision had breached his right to property under Article 1 of Protocol No. 1.

In additional letters submitted on 20 January and 13 September 2010, the applicant also complained that the diminution of his pension on account of legislative change had violated his rights under Articles 3 and 17 of the Convention.

THE LAW

A. Complaints under Articles 6 § 1 and 13 of the Convention

The applicant complained under Article 6 § 1 of the Convention that the written opinions submitted by the principal public prosecutors to the

Supreme Administrative Court during the appeal and the rectification stages had not been communicated to him and that the administrative proceedings had not been concluded within a reasonable time. He further claimed under Article 13 that there had been no effective remedies in domestic law to complain of the length of the proceedings.

After unsuccessful friendly-settlement negotiations, by letter dated 31 March 2011 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving the issues raised by the application concerning the excessive length of administrative proceedings, the lack of effective domestic remedies to challenge the length of these proceedings and the non-communication to the applicant of the written opinion of the principal public prosecutor. They further requested the Court to strike out this part of the application in accordance with Article 37 of the Convention.

The declaration provided as follows:

> "Je déclare que le Gouvernement de République de Turquie offre de verser au requérant M. İbrahim Şahin la somme de 3 000 EUR (trois mille euros) couvrant tout préjudice matériel et moral, plus tout montant pouvant être dû à titre d'impôt par le requérant, somme qu'il considère comme appropriée à la lumière de la jurisprudence de la Cour.
>
> Cette somme sera convertie en livres turques au taux applicable à la date du paiement, et exempte de toute taxe éventuellement applicable. Elle sera payée dans les trois mois suivant la date de la notification de la décision de la Cour rendue conformément à l'article 37 § 1 de la Convention européenne des droits de l'homme. A défaut de règlement dans ledit délai, le Gouvernement s'engage à verser, à compter de l'expiration de celui-ci et jusqu'au règlement effectif de la somme en question, un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne, augmenté de trois points de pourcentage. Ce versement vaudra règlement définitif de l'affaire.
>
> Le Gouvernement considère que la procédure interne engagée par le requérant a connu une durée excessive au sens de la jurisprudence bien établie de la Cour (*Daneshpayeh c. Turquie*, n° 21086/04, 16 juillet 2009). Le Gouvernement estime en outre que l'absence de communication au requérant des observations du procureur général prés le Conseil d'Etat a enfreint son droit à un procès équitable, à la lumière de la jurisprudence bien établie de la Cour (*Meral c. Turquie*, n° 33446/02, 27 novembre 2007). Il invite respectueusement la Cour à dire qu'il ne se justifie plus de poursuivre l'examen de la requête et à la rayer du rôle conformément à l'article 37 de la Convention. "

In a letter of 20 May 2011 the applicant expressed the view that the sum mentioned in the Government's declaration was unacceptably low and asked the Court to continue its examination of the case.

The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified,

under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

It also recalls that in certain circumstances, it may strike out an application under Article 37 § 1(c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued.

To this end, the Court will examine carefully the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment (*Tahsin Acar v. Turkey*, [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI; *WAZA Spółka z o.o. v. Poland* (dec.) no. 11602/02, 26 June 2007; and *Sulwińska v. Poland* (dec.) no. 28953/03).

The Court has established in a number of cases, including those brought under Articles 6 and 13 of the Convention against Turkey, its practice concerning complaints about the violation of one's right to a hearing within a reasonable time, the lack of effective domestic remedies to challenge the length of proceedings and the non-communication to the applicant of the written opinion of the principal public prosecutor (see, for example, *Kudła v. Poland* [GC], no. 30210/96, §§ 132-160, ECHR 2000-XI; *Meral v. Turkey*, no. 33446/02, §§ 32-39, 27 November 2007; and *Daneshpayeh v. Turkey*, no. 21086/04, §§ 26-38, 16 July 2009).

Having regard to the nature of the admissions contained in the Government's declaration, as well as the amount of compensation proposed – which is consistent with the amounts awarded in similar cases – the Court considers that it is no longer justified to continue the examination of this part of the application under Articles 6 and 13 of the Convention (Article 37 § 1(c)).

Moreover, in light of the above considerations, and in particular given the clear and extensive case-law on the topic, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of this part of the application under Article 6 and 13 of the Convention (Article 37 § 1 *in fine*).

It should therefore be struck out of the list in accordance with Article 37 § 1 (c) of the Convention.

B. Remaining complaints

1. Article 1 of Protocol No. 1

The applicant complained that the discontinuation of the payment of a special pension increment on the basis of a legislative amendment that came

into force five years after his retirement had disregarded his acquired rights and violated his right under Article 1 of Protocol No. 1.

The Court recalls at the outset that although no right to a pension as such is guaranteed by the Convention, the payments of contributions to a social security fund may create a property right protected by Article 1 of Protocol No. 1 (see *Docevski v. the Former Yugoslav Republic of Macedonia* (dec.), no. 66907/01, 10 November 2005). Moreover, having regard to the pecuniary nature of the entitlement to a given social security benefit, Article 1 of Protocol No. 1 may be applicable without it being necessary to rely solely on the link between the entitlement and the obligation to "pay taxes or other contributions" (see the *Gaygusuz v. Austria,* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1142, § 41, and *Walden v. Liechtenstein* (dec.), no. 33916/96, 16 March 2000). However, even if it is assumed that Article 1 of Protocol No.1 guarantees a person's certain social insurance benefits, including the right to a pension, it cannot be interpreted as entitling that person to a pension of a particular amount (see *Müller v. Austria*, 5849/72, Commission Report of 1 October 1975, DR 43, pp. 25, 31).

In the present case, the Court observes that the applicant's entitlement to a special pension increment under Additional Article 66 of Law no. 5434 was established by the administrative court's decision of 28 October 1998. The Court notes that where the amount of a benefit is reduced or discontinued by national authorities, this may constitute an interference with possessions which requires to be justified (see *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 40, ECHR 2004-IX, and *Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009).

The Court observes, in the instant case, that the legislation having conferred a special pension increment to high-level civil servants under the social security scheme was revoked by Law no. 4839, which came into force on 17 April 2003 following its publication in the official newspaper. Subsequently, the reduction of EUR 85 from the applicant's monthly pension took effect as of May 2003. In this regard, the Court notes that the disputed measure, which amounted to an interference with the applicant's possession, was prescribed by the domestic law in a sufficiently clear way.

Next, the Court is called upon to ascertain whether the interference achieve a "fair balance" between the demands of the general interest of the community and requirement of the protection of the individual's fundamental rights. In order to be compatible with Article 1 of Protocol No. 1, an interference should not impose a disproportionate or excessive individual burden on the applicant (see, among many others, *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 167, ECHR 2006-VIII).

In the examination of cases involving the legislature's policy choice, the Court is mindful of the fact that 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. In particular, the decision to enact laws concerning social insurance benefits will commonly involve consideration of economic and social issues and the Court finds it natural that the margin of appreciation available to the legislature in implementing those policies should be a wide one (see, *mutatis mutandis*, *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII, and *Wieczorek v. Poland*, no. 18176/05, § 59, 8 December 2009).

The Court further notes that the social security benefits are not absolute in nature and subject to the national authorities' regular assessment of public needs. The authorities are under a constant responsibility for reconciling various interests, in particular, among the groups who contribute to those public funds and the groups of beneficiaries.

Turning to the facts of the present case, the Court observes that by ceasing the award of a special pension increment for a certain group of high-level civil servants, the national authorities appear to have pursued the legitimate aim of allocating the public funds in a more effective way according to the changing needs of the society and managing the financial stability of pension scheme in general.

Under these considerations, the Court further observes that the new legislation was not applied retroactively in a way as to oblige the applicant to return the additional payments he had legitimately received in the past. The Court also notes that this special increment was a benefit to which the applicant was entitled due to the position he held and for which he did not have to contribute. Nor had the new law been applied to the applicant in a way which put him in a disadvantaged position or which was discriminatory. Similarly, the Court notes that the applicant's principal social security entitlements remained intact. In this regard, the Court considers that the monthly reduction of the applicant's special pension increment of EUR 85 did not affect his property right, stemming from the social insurance system, in a disproportionate or arbitrary manner contrary to Article 1 of Protocol No. 1 to the Convention (see, *mutatis mutandis, Skorkiewicz v. Poland* (dec.) no. 39860/98, 1 June 1999, and *Iwaszkiewicz v. Poland*, no. 30614/06, § 57, 26 July 2011).

In view of these considerations, the Court is of the opinion that the applicant was not left with an excessive individual burden on account of the discontinuation of the special pension increment.

It follows that this complaint should, therefore, be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. Articles 3, 6 § 1 and 17 of the Convention

The applicant alleged under Article 6 § 1 of the Convention that the administrative courts had delivered erroneous decisions which failed to take into account the constitutional rules and the settled jurisprudence on the

principle of acquired rights. He further complained that the revocation of his special pension increment had violated his rights under Articles 3 and 17 of the Convention.

In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court does not find that these complaints disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols (as regards the complaint concerning the erroneous interpretation and evaluation by domestic courts of the facts and the relevant domestic law, see *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I).

It follows that these complaints must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Takes note of the terms of the respondent Government's declaration and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases in so far as it relates to the complaints concerning the non-communication to the applicant of the written opinions of the principal public prosecutors, the length of the proceedings and the lack of effective domestic remedies to challenge the length of the proceedings in accordance with Article 37 § 1 (c) of the Convention;

Declares the remainder of the application inadmissible.

Françoise Elens-Passos
Deputy Registrar

Dragoljub Popović
President