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THE RIGHT TO APPEAL FOR THE SOCIAL INSURANCE AS A HUMAN AND CONSTITUTIONAL RIGHT

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ABSTRACT

Magna Carat is a highly significant document that found the way into the rights and the constitutions. Magna Carat is a symbol of human and constitutional rights. Social insurance is part of the social security and the recognition of social security as a basic human right is enshrined in the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris and furthermore the European Conventions on Human Rights, specially the article 6.

Magna Carat demonstrated the limitations from the arbitrarily. Magna Carat is a foundation of the powers of Parliament and the legal principles, as the rule of law, the rule that everybody has equality before the law. It promised the access to justice. In that respect Magna Carta is still a challenge for many states and officials. The myth of Magna Carta is the protection of the personal rights and is held in great respect by the legal communities against the arbitrary of the authority

In respect of the aim of this international conference *to see the way how these principles have found their implementation in contemporary legislations as well as to identify the problems that occur regarding these rights*, an overview of the Albanian right to appeal for the social insurance rights. The right to appeal to higher authorities against any decisions and the judicial review against the unfavorably resolved appeals.

INTRODUCTION

The main issue under consideration is the application of the right to appeal for a social insurance decision.

The aim is to see the way how the principles of appeal are implemented in contemporary legislations as well as to identify the problems that occur regarding these rights. The inspiration comes from Magna Carta as a highly significant document as a symbol of human and constitutional rights as well as the Universal Declaration of Human Rights, the European Conventions on Human Rights, specially the article 6, which provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....."

The paper is composed of two parts and the conclusions. The current Albanian system of social security and social insurance, a brief description is part one of the paper. The right to appeal as a human and constitutional right, an analyses of Albanian social insurance appeal and judicial review is part two of the paper. The second part starts with the social insurance benefit decision making and then the appeal system, including appeals to commissions and courts and the procedures for review of cases.

At the end of the paper are the conclusions relating the Albanian right to appeal to higher authorities against any decisions and the judicial review against the unfavorably resolved appeals.

1. ALBANIAN SOCIAL SECURITY AND SOCIAL INSURANCE SYSTEM

1.1. SOCIAL SECURITY

The Albanian social security consists of social assistance and services, social insurance, health services and health care insurance.

In the social objectives of the constitution are declared that the State within the constitutional competencies and the probable means as well as in the fulfillment of private initiatives and responsibilities, aims to higher possible standards of health, physical and mental; social care and services of elderly, orphan and invalids; medical rehabilitation, special education and integration in the community, of disabled persons. Article 52 of the Constitution foreseen that everyone has the right of social insurance when retired or in case of incapacity of work under a certain system established by a law. Everyone, when is unemployed for any reasons independent on individual will and when there is no living means, has the right of need under the conditions foreseen by law. In article 54 it is declared the right of a special state protection of children, young people, pregnant women and young mother. According the article 54 of the Constitution, the citizens have the equal right to medical care by the state. Everyone has the right of health insurance under a certain procedure established by a law.

Social security in Albania is regulated by acts of the Parliament, which are supported by sub legal acts of the Government or of the Administrative Councils (tripartite bodies).

According to the Social Insurance Law the compulsory social insurance is non-profit making scheme, protecting by benefits employed persons in respect of temporary incapacity due to sickness, maternity, old-age, disability and loss of breadwinner, employment accidents/occupational diseases, unemployment, and other economically active persons (employers and self-employed people) in respect of maternity, old-age, disability, and loss of breadwinner.

1.2. SOCIAL INSURANCE

Social insurance consists of compulsory and supplementary schemes.

Basic legislation of the compulsory scheme is the Law No.7703, dated 11.5.1993 “On Social Insurance in Republic of Abania” (amended).

The risks covered by the compulsory scheme are sickness, unemployment, maternity, employment injury, pensions (old age, invalidity, survivors).

Sickness Cash sickness benefit for the employed person, will be provided if the following documents are presented by the employer to the regional social insurance office: an written request of interested person, filling in a form approved by SII; medical report of temporary incapacity; certificate of the assessment basis; certificate of insurance period.

Medical report on temporary incapacity on work is delivered by the doctors where the sick person is registered. Such a doctor has the right to award 1 to 14 days of leave. The specialist doctor or dentist has the right to give incapacity medical reports in all cases when a sick person is incapable to work and recommended to him by his/her doctor. Medical Expert Committee based on the recommendation of the doctor who possesses the filling-card of the insured person, has the right to deliver a medical report on incapacity as well as when such a person has spent the 14 days of leave.

Maternity Cash maternity benefit is in case of self employed or employer women, will be provided if the following documents are presented by herself to the social insurance office: an written request of interested person, filling in a form approved by SII; medical report; certificate of insurance period; certificate of childbirth. The maternity cash benefit is foreseen in the article 13 of the law no.104/2014 “On some amendments on the Social Insurance Law no.7703, date 11.05.1993”

In case of an employed women the following documents, will be present by the employer to the social insurance office: an written request of interested person, medical report; certificate of the assessment basis of one year before; certificate of insurance period; certificate of childbirth.

A medical report 35 days long in respect of pregnancy is given by the gynecologist doctor or the midwife when the former is absent. Women with more than one child in pregnancy benefit calendar days of medical report. Medical reports of 390 calendar days long concerning after-child birth leave starts on the day of the childbirth. Such a report for the first 60 days before and 63 days after childbirth is delivered by gynecologist doctor at once, with separate 15 days' reports, or midwife in case of his absence. After this term, the report is given by the doctor of the health institution where the personal filling-card is. In such a case the report is delivered monthly in separate 15 days' portions. After the confinement period or 63 days, women have the right to go on with the medical report regarding to the after-childbirth leave. Child consulting centers treat mothers with medical reports regarding to after-childbirth leave, irrespective of her home in another centre, provided she has consigned here the child's personal filling-card. Adoptive mother has the right to receive an after-childbirth leave starting on the day in which the adoption is done, excluding the first days that belongs to the real mother. If the adoption is done within the period of after-childbirth leave, the adoptive mother shall profit the rest of days up to the day of 330. If the delivery happens abroad or mother goes abroad after childbirth, Health Institution, that posse's mother and child's personal filling-card shall deliver a medical report basing on the respective medical document issued by the Health Institution that has meanwhile supervised mother and child. If the insured woman changes the employment after a MEC (Medical Expert Committee) decision, because of pregnancy, she shall have the right to benefit maternity allowance to reimburse the loss of incomes caused by such an exchange, after she has spent the 14 days awarded by the health institution that possesses her personal filling-card.

Under the new law on social insurance the period after child birth is 63 days instead of 42 days which was in the past

The new social insurance law foreseen the paternity leave, so far the child care is a benefit provided to mother or father of the child.

Invalidity Invalidity pension because of a general illness is delivered if the following documents are provided: an application form for the invalidity pension filling in a form approved by SII; family status certificate; certificate for insurance period; competent Medical Expert Committee decision that determines the ability to work as well as, for physical or mental disabled persons, the need for a permanent care of someone else; certificate of the assessment base. Person presents himself to the MEC solely on the check-up date to be determined by the social insurance general practitioner as well as on the re-examination date to be determined by the MEC. Rechecking up of the disabled by MEC for determining the ability to work shall depend on their health state and always occur two months before the deadline determined in the latest decision.

On reaching pensionable age the disability pensioner shall have the right to opt for an old-age pension, if that shall be more favorable for him.

A disability pension shall be suspended for periods the pensioner refuses to visit the competent medical expert committee. It shall also be suspended when he refuses to participate in training/retraining courses or undergo medical rehabilitation or treatment against alcohol and drugs, which aim to retrieve his capacity for work.

Employment accident/occupational disease Long term benefit because of employment, accident and occupational, will deliver if the following documents are presented to the local social insurance office: family status certificate; certificate for insurance period (the same as for an old-age pension); competent Medical Expert Committee decision that determines the ability to work as well as, for physical or mental disabled persons, the need for a permanent care of someone else; certificate of the assessment base; employment accident report.

Old age The request for old age pension shall be done to the Local Social Insurance Agency. The documents to be present including the written request of interested person filling in a form approved by SII, are: family status certificate; certificate of insurance period (work-book etc); certificate of the assessment base. The decision of old age pension is taken by the regional social insurance office within 30 days from the acceptance of documents. Pensioners with a right to more than one pension, may choose only one of them.

The right to a pension shall not be forfeitable. The right to an individual monthly installment of a pension shall be forfeited in a year from the date of the commencement of a right. In other cases, the right to a monthly pension instalment shall be forfeited from the date of claim submission. The acknowledged but not drawn pensions shall be paid any time, but only for three years. The rest of the pensions, which have been acknowledged, but less paid, shall be paid any time, but only for three years. The reimbursement of overpayments is requested to be done not later than three years from the execution, and not later than 6 months from the date those were verified. The persons benefiting through illegal means and manners, or having not informed on their change or abolition shall pay all sums back.

Survivors The request for survivor's pension shall be addressed to the Local Social Insurance Agency. The documents required are an written request of interested person, filling in a form approved by SII; family status certificate; death certificate of the insured person; documentation needed to prove the insurance period and length of service, which is the same as for the old-age pension; certificate of the wage/insurance period of the deceased when has or is eligible to profit an old-age pension; certificate on school attending, needed for the orphans of the employed or self-employed age proving that fact; Medical Expert Committee decision on work disability needed for the family members dependent on the deceased when they are at an employment age; certificate delivered by the Local Government needed to prove that the widow looks after a child up to 8 years old who used to be dependent upon the deceased; certificate delivered by the Local Authorities that proves grandparents have no obligations to look after them as well as that they used to share the same household with the deceased for more than a year before the death occurred. Interested person has to declare he is not an economically active person (employed or self-employed one). Orphan who has reached the employment legal age, but is yet under 18 years of age, as well as is not attending the school, must declare in his own pension's request the fact of not being employed or self-employed. Also a certificate from Employment Office proves he is not working or receiving an unemployment insurance benefit.

2. ALBANIAN SOCIAL INSURANCE APPEALS AND JUDICIAL REVIEW

2.1. LEGAL GUARANTEES

The Albanian legislation guarantees the right to appeal adverse decisions taken by the social insurance administration.

The right to appeal against decisions regarding the award of benefits is laid down in Article 86 of the Law no.7703, dated 11.05.1993 “On social insurance in Republic of Albania”.

Article 86 of the Law no.7703, dated 11.05.1993 “On social insurance in Republic of Albania”, amended, stipulates:

1. Appeals against decisions on benefits shall be submitted to the appeal committee of regional social insurance office.
2. Appeals against decisions of the appeal committee of regional social insurance office shall be submitted to the appeal committee of the central office of SII (Social Insurance Institute).
3. Appeals not favorably resolved shall be submitted to the courts for final solution.
4. The Administrative Council shall determine the structure, composition, number and functioning procedure of the appeal committees in the regional and central offices of SII.

Albania has ratified the Convention of ILO (International Labour Organization) no.102, “On minimum standards of social security”. In article 70, paragraph 1 of such convention is foreseen that: Every claimant shall have a right of appeal in case of refusal of the benefit or complaints as to its quality or quantity.”

2.2. SOCIAL INSURANCE APPEAL PROCEDURE AND ARRANGEMENTS

Social insurance appeal procedure and arrangements are in the Regulation no.6, dated 25.05.2009 of the Administrative Council of the Social Insurance Institute “On structure, composition, number and procedure related to the functioning of the Appeal Commissions to Regional and Central Social Insurance Directorates”.

Based on article 86 and article 74 of the law no.7703, dated 11.05.1993, is the Administrative Council of SII the competent authority to approve the regulation proposed by General Director of SII. So, the Administrative Council of SII has approved the regulation of the appeal commissions.

Items regulated by such act are the form of appeal, acknowledgement of an appeal, time limits, legal effect of an appeal, prior examination of an appeal, composition of the regional appeal committee, meetings of the regional appeal committee, decisions of the regional appeal committee. Regulation foreseen as well as the appeal to the central appeal committee, composition of central appeal committee, decisions of such committee.

Appeals against social insurance decisions have the following procedures. First level of appeals is in the regional appeal offices, second level is in the central office of Social Insurance Institute at the high central commission. Unfavorably resolved appeals shall definitely be settled in tribunals. Each of the 12 Regional Offices of SII have its Regional Appealing Committee and it is one Central Appealing Committee for the Central Office of SII.

The regional appeal committees are composed of a chairman and three social insurance specialists. A specialist for pensions, a contributions specialist and a financial specialist.

The way how those specialists are became members of the commission is as follow, fist it is the proposal of the Director of Regional Directorate, than is the approval of the General Director. The same procedure is for the chairman of the commission.

Appeals against decisions of the regional appeal committee can be lodged within 30 days to the central appeal committee established at the level of the central office of the social insurance institute in Tirana. This is composed of a chairman and four specialists of SII, a pension specialist, a contributions specialist and a financial specialist and a lawyer, who are released by the Administrative Council of SII upon proposal of the Director General of the SII. The same procedure is for the chairman of the commission

The following points comprise the competences of the appealing committees to accept the request to appeal, to cancel the request to appeal and turn it back to be revised, to turn down the request to appeal. Appeals consider the circumstances of each case.

Decisions are taken by simple majority. When the votes of the members of the commission are equal, the vote of the chairman is decisive.

Decisions of the central appeal committee can be challenged before the administrative court within 30 days.

Decisions on the award of benefits are taken in the first instance by the regional office. The appeal procedure in case of benefit decision goes via five instances, the regional appeal commission, central appeal commission, administrative court district, administrative appeal court and Supreme Court.

There is no time limit for an appeal against a benefit decision taken by the administration of Regional Directorate of SII. Time limit 30 days exists only for appeals to the court. The question raised is approximately how long it takes to decide appeals, at each stage from the time of application. This is another issue under consideration, but the maximum is 30 days for each commission to take the decision.

The Regional Directorate of Social Insurance (there are 12 Regional Directorates of Social Insurance) takes the decision on social insurance benefit. It may review any decision on benefit entitlement in certain circumstances, for example, where there has been an error of law, mistake as to material fact, or new facts come to light. In case of certain benefits the reviewing of the case by the Regional Commission of Appeals (there are 12 Regional Commissions of Appeals) is a compulsory procedure before it proceeds to appeal.

The beneficiary or the person to whom the benefit is refused, has the right to appeal to the regional commission of appeal from decisions made by the regional directorate on benefit entitlement. In the regional commission there are other specialists. The appeal may be on any grounds.

In case of a negative answer, the person has the right to appeal to the central appeal commission, it is only one Central Appeal Commission. The commission reconsiders the whole case. All aspects of the case may be considered and the commission reaches its own decisions on questions of facts and law applicable.

It is clear that the basic principles of any administrative appeal procedure are applied. The decisions are notified to the claimant in writing. There are reasons for the decision taken, date of delivering the decision, time limit to appeal and the body where the appeal should be addressed. A right of appeal in case of any adverse decisions of the administration of social insurance is done before an independent body, as the members of the regional commissions were not involved in the benefit decision making process.

The whole procedure relies heavily on expert commissions set up within the SII. Their independence is based on the expertise of the certain field and the appointment by the General Director of SII for the regional level and by the Administrative Council of SII for the central level of appeal.

2.3. JUDICIAL REVIEW

Article 86 of the law no.7703, dated 11.05.1993 provides for two tier administrative appeal procedure consisting of regional appeal commissions and a central appeal commission, before a case can be brought before the courts. This is the administrative review, under the law no.7703, dated 11.05.1993 “On Social Insurance in the Republic of Albania” and in respect of the Code of the Administrative Procedure in the Republic of Albania.

The judicial review starts when the preliminary procedure is consumed and in case of negative decisions from the central commission. In the past, before 2012, the court dealing the social insurance cases was the civil court and now it is the administrative court because of the law no. 49/2012 “On organization and functioning of the Administrative Courts and on the judgement of the administrative disputes”. In the first instance, this will be to the administrative court of first level (there are 6 administrative courts of first instance), then to the Court of Appeal, then to the Administrative Section of the Supreme Court.

All cases before the appeal commissions are not disposed of with oral hearings, the commission is satisfied that the case can be determined on the basis of the papers alone.

Hearings before the court are generally held in public.

The appellant is entitled to be represented at the hearing either by a legal representative or by another or body.

Court considers the whole case before them and reaches their own conclusions on questions of facts and issues of law.

The judicial system offered through independent tribunals is regarded as time consuming, less competent to deal with the social insurance issues which are very specific questions, too many details, but of course it is regarded as a human right the right to appeal.

Administrative court is headed by chair who is appointed under the rules of justice system.

CONCLUSIONS

- ❖ The legal process cover all formal stages in the process of deciding entitlement to social security benefits following the initial decision, including all references to appeal commissions, administrative courts and or other individuals or bodies, and any procedures for review or reconsideration of decisions which may apply.
- ❖ Any stage of the appeals hierarchy is not an oral hearing of the case.
- ❖ The issues which can be raised at each stage of the proceedings are question of facts, questions of procedure at the lower stage. The procedural rules apply at each stage.
- ❖ The status of the authority deciding the appeal at each stage. It is independent of authority dealing the appeal procedure. There are special rules governing constitution of and appointments to such bodies. The authorities handling appeals always consist of more than one person. The decision is by majority not unanimous.

Appeal Commissions are independent as:

- They are established by Law and Regulation of the Administrative Council of Social Insurance Institute (the Administrative Council is a tripartite body with the representative of Government, Tradeunions and Employers),
 - The regional commission is appointed by the General Director of SII and the central commission by the Administrative Council of SII,
 - the members of the commissions were not involved in the benefit decision making process.
- ❖ The administration concerned has the possibility to reconsider the decision based on arguments. The preliminary procedure before an administrative appeal committee is fundamental prerequisite of any legal procedure before a court.
 - ❖ The judicial system offered through independent tribunals.

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