



RS  
US

REPUBLIKA SLOVENIJA  
USTAVNO SODIŠČE

U-I-67/14  
19 January 2017

## **ORDER**

At a session held on 19 January 2017 in proceedings to assess the petition of Almir Talić, Ljubljana, the Constitutional Court

**decided as follows:**

**The petition for the initiation of proceedings for the review of the constitutionality of Article 2 of the National Holidays and Non-Working Days in the Republic of Slovenia Act (Official Gazette RS, No. 112/05 – official consolidated text, 52/10, 19/15, and 83/16) is dismissed.**

**REASONING**

**A**

1. The petitioner challenges the provision of the National Holidays and Non-Working Days in the Republic of Slovenia Act mentioned in the operative provision (hereinafter referred to as the NHNWDA), which determines non-working days. The petitioner, a member of the Islamic religious community, alleges that the challenged regulation only takes into account Christian religious holidays. He is of the opinion that the challenged regulation discriminates against him in comparison with members of the Christian religious community and prevents him from exercising his right to profess his religious beliefs. The challenged regulation allegedly also discriminates against the members of other religious communities and atheists. Therefore, the petitioner opines that the challenged regulation is inconsistent with the constitutional principle of a secular state and the equality of religious communities referred to in Article 7 of the Constitution, with the constitutional principles of the general prohibition of discrimination and equality before the law determined by Article 14 of the Constitution, and the human right to profess religious beliefs determined by Article 41 of the Constitution. He also alleges that the challenged regulation is inconsistent with Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR), which regulates freedom of thought, conscience, and religion. The petitioner substantiates his legal interest by alleging that as a citizen of the Republic of Slovenia he is forced to obtain permission from his employer to use annual leave days in order to celebrate his religious holidays.

2. The petitioner alleges that by observing religious holidays [i.e. holy days, which are not national holidays] of the Christian religious community the state identified therewith, as during these non-working days the state administration offices are closed and hence they act in the same manner as during [national] holidays. In his view, such entails that the state is no longer separate from religious communities, contrary to the first paragraph of Article 7 of the Constitution. The petitioner alleges that by such a regulation, the state forces the members of other religious communities to celebrate Christian religious holidays and thus carries out the assimilation of immigrants.

3. In the petitioner's opinion, by treating the Christian religious community in a preferential manner, by the challenged regulation the legislature violated the general prohibition of discrimination determined by the first paragraph of Article 14 of the Constitution, which allegedly also results in disrespect for the principle of the equality of religious communities determined by the second paragraph of Article 7 in conjunction with the second paragraph of Article 14 of the Constitution. Allegedly, it follows from the legislative file that the legislature had the intention to ensure the Christian religious community a better position as regards the profession of faith, despite the fact that differentiation based on religious belief should be prohibited. The reason for the legislature's privileging of the Christian religious community is allegedly unknown. Therefore, in the case at issue there was allegedly an arbitrary manner of legislation, which allegedly resulted in institutional and systematic indirect

discrimination against other religious communities and the members thereof, as well as against those of different beliefs.

4. The petitioner alleges that the challenged regulation forces the members of other religious communities to use their annual leave in order to celebrate their religious holidays. Consequently, they are entirely dependent on the will of the employer as regards the celebration of their religious holidays. This allegedly renders the exercise of the human right to the free profession of faith in private and public life, as determined by the first and second paragraphs of Article 41 of the Constitution, significantly difficult. Allegedly, for all the other religious communities except the Christian religious community the state made the right to celebrate [religious holidays] jointly dependent on the decision of one's employer. The petitioner substantiates his allegation as to discrimination based on religious belief by also referring to a number of decisions of the Constitutional Court,[1] to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2 December 2000), and to the judgment of the European Court of Human Rights in *Marckx v. Belgium*, dated 13 June 1979.

5. The National Assembly opines that it is not possible to agree with the petitioner's allegation as to the unconstitutionality of Article 2 of the NHNWDA. The selection of non-working days indeed corresponds with some religious holidays; however, their religious content was not key in their determination as non-working days. Namely, the legislature allegedly assessed that those days possess a significant traditional, family, historical, and cultural dimension and that they simultaneously symbolically reflect the most cherished values of the majority of the citizens. The regulation of national holidays and non-working days is allegedly comparable with that in other European states. The National Assembly stresses that in the procedure for adopting the NHNWDA broad discussions were held in which the intention to observe the principle of the separation of the state and religious communities was clearly demonstrated, as well as the intention to treat the members of other religions and atheists in a non-discriminatory manner. This intention is allegedly demonstrated in the normative distinction between national holidays and non-working days. The celebration of religious holidays on non-working days has thus allegedly lost the formal meaning of a holiday, and the decision to celebrate [these holidays] is allegedly left to each individual. Therefore, the challenged provision allegedly does not mean that the state identifies with some religious communities. The National Assembly explains that in the legislative procedure it also considered the solution of providing one non-working day that workers could choose freely, which would allow people of other religious beliefs to use that one day of annual leave on the day of their most important religious holiday, but ultimately it was assessed that such a statutory provision was unnecessary, as substantively such is already included in labour law legislation. In the Employment Relationship Act (Official Gazette RS, No. 21/13, 78/13 – corr. and 52/16 – ERA-1) in force, the third and fourth paragraphs of

Article 163 allow workers to take one day of their annual leave on a day that they determine themselves, which the employer may only refuse if the worker's absence would be seriously detrimental to the work process. The National Assembly opines that the challenged provision does not affect in any way the functioning of religious communities or the possibility of participation in religious matters.

6. Also the Government opines that the challenged provision is not inconsistent with Articles 7, 14, and 41 of the Constitution. The regulation of national holidays and non-working days is allegedly based on tradition and on the support of the majority of the citizens and is allegedly comparable with the regulation of holidays in other European states. In the procedure for adopting the Act at issue, a survey was allegedly taken into consideration regarding days that have general importance for all citizens or for the majority thereof. Certain dates with religious importance for Christianity are merely determined to be non-working days, which allegedly is a reflection of the fact that the difference between religious and philosophical beliefs is taken into account, as in such a manner the legislation does not force citizens to celebrate. The Government draws attention to the fact that also labour law legislation is connected to the determination of national holidays and non-working days, and the challenged regulation allegedly also ensures uniformity regarding absence from work and thus the easier planning of work processes and simpler coordination of work with family obligations. The Government opines that the constitutional case law to which the petitioner refers does not apply to decision-making in the case at issue.

7. The petitioner made a statement concerning the reply of the National Assembly and the opinion of the Government, in which he dismissed their allegations. In his view, the classification of religious holidays among non-working days only entails covert and indirect discrimination, as this distinction makes no difference in real life. Allegedly, it is also a matter for each individual whether he or she will celebrate national holidays or not, and the state allegedly functions in the same way on non-working days and on national holidays, i.e. state administration offices are closed. The petitioner reiterates the claim that the determination of non-working days in fact means the identification of the state with the Christian religious community. He opines that the allegation of the National Assembly that these days represent historical and family values to the majority of citizens is not substantiated in any way. The mere fact that a certain religious community is numerous should not entail a reason to discriminate against other communities. The petitioner labelled the comparability of the regulation of national holidays and non-working days with other European states a pretence. Allegedly, the legislature is supposed to observe the Constitution and not blindly follow discriminatory regulations in other states. The petitioner alleges that the additional annual leave days that individuals can take at their discretion do not affect the planning of work process any more than, e.g., sick leave, maternity leave, etc. He opines that the school system unnecessarily follows the determination of non-working days, and the objective of observing these days in the school calendar is, in his view, to pursue the assimilation of the members of other

religious communities. The petitioner is of the opinion that the existing non-working days that are based on the celebration of [holidays of] Christian origin are indeed a traditional custom in the European area; however, the values of the EU allegedly greatly exceed the values of medieval Christian Europe. Allegedly, the European Union is based on a multicultural society, which allegedly shapes and enriches the European cultural identity.

### **B – I**

8. The petitioner substantiates his legal interest by alleging that he is discriminated against when invoking his rights determined by Article 41 of the Constitution (freedom of conscience) because he must obtain his employer's authorisation to use annual leave in order to celebrate his religious holidays. However, the allegations in the petition as to the unconstitutionality of the challenged regulation are broader and also refer to the position of religious communities.

9. Anyone who demonstrates legal interest may lodge a petition for the initiation of a procedure for the review of constitutionality (the first paragraph of Article 24 of the Constitutional Court Act, Official Gazette RS, Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA). In accordance with the second paragraph of the cited Article, legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his [or her] rights, legal interests, or legal position. The petitioner must demonstrate his or her own legal interest, and cannot substantiate it with the position of others.[2] At first sight, this would indicate that the petitioner can only demonstrate that which refers to his or her legal position relating to the use of annual leave, but cannot invoke that which is connected with the position of religious communities. However, also individual adherents of a religion are entitled to invoke the equality of all religious communities, proportionally with the state of the facts.[3] In view of that, the Constitutional Court granted the petitioner legal interest to make the allegations and to present his reasoning in the petition.

### **B – II**

10. The petitioner challenges the regulation that determines non-working days in the Republic of Slovenia. National holidays and non-working days in the Republic of Slovenia are determined by law, the Constitution does not contain provisions thereon. Holidays are days of special importance in the life of an individual or community and are generally celebrated every year, each one in its own manner.[4] Through holidays, communities and institutions commemorate important historical events and special local, state, or national, religious, and other cultural values, thus

emphasising their own identities.[5] Holidays have an important sociological and integrative role in the lives of individuals and families, as well as for local, professional, and national communities; they legitimise the organisation and ideology of a society and of the state.[6] The national holidays and non-working days in the Republic of Slovenia, as determined by the NHNWDA, are hence an outward expression of the identities of individuals – i.e. the citizens, who, in accordance with the first paragraph of Article 3 of the Constitution, constitute the Republic of Slovenia, which is founded on the permanent and inalienable right of the Slovene nation to self-determination.

11. From the legislative file it follows that the NHNWDA establishes a legal regulation that is a reflection of the decision that the Slovene nation is sovereign and has the capacity to create its own state.[7] The adopted regulation reflects the differentiation between national holidays and the non-working days that are not national holidays. The dates of the non-working days that are not national holidays are an expression of the traditionally accepted values that are historically connected to life in the territory of the present Republic of Slovenia. They are intended to be celebrated by individuals, which is also what the National Assembly stressed. The state is excluded from these celebrations. The state only commemorates national holidays, irrespective of whether or not they are non-working days.

12. Five non-working days are determined by the challenged Article 2 of the NHNWDA. These days include dates that are celebrated as holidays by the Catholic and Protestant religious communities and their members. The reason the legislature chose these non-working days lies in the meaning they have in commemorating important historic events or some religious holidays where such commemoration is established by tradition. The non-working days that are not national holidays are therefore selected not due to their religious content but because of their heritage in the territory of the Republic of Slovenia.

13. The petitioner alleges that the challenged regulation is inconsistent with Articles 7, 14, and 41 of the Constitution. With reference to his allegations, the petitioner refers to a number of decisions of the Constitutional Court; however, the positions adopted therein do not concern comparable cases. The petitioner does not refer to Decision of the Constitutional Court No. U-I-92/07, dated 15 April 2010 (Official Gazette RS, No. 46/10, and OdlUS XIX, 4), in which the Constitutional Court reviewed the Freedom of Religion Act (Official Gazette RS, No. 14/07 and 100/13) and adopted a position as to the extent of constitutional protection and the interconnectedness of the content of Articles 7, 14, and 41 of the Constitution. Since in the case at issue the petition is being reviewed from the viewpoint of the same constitutional provisions, the Constitutional Court took into account the positions stated in the cited Decision when reviewing the petition.

14. In the mentioned Decision, the Constitutional Court adopted the position that the constitutional protection determined by Article 41 of the Constitution only extends to conduct that is reasonably connected with the essence of religious belief and without which individuals' freedom of religion would be significantly compromised (see Paragraph 83 of the reasoning). The Constitutional Court also included protection of the constitutional principle of the free functioning of religious communities determined by the second paragraph of Article 7 of the Constitution (see Paragraph 105 of the reasoning) within the framework of the constitutional protection of this human right. In the cited Decision, the Constitutional Court stressed that the principle of the equality of religious communities (the first paragraph of the text of the second paragraph of Article 7 of the Constitution) is not an independent component of Article 41 of the Constitution, but a special expression of the general principle of equality determined by Article 14 of the Constitution. In this respect, the Constitutional Court held that the different treatment of religious communities when exercising a human right or fundamental freedom that is based on religion should be assessed under the strict test of proportionality, as required by the first paragraph of Article 14 of the Constitution. Other types of differentiation between religious communities, i.e. whereby the reason for differentiation is either not religion (or any other personal circumstance) or where the differentiation does not refer to the exercise of human rights, are constitutionally admissible, provided that they are not inconsistent with the general principle of equality before the law determined by the second paragraph of Article 14 of the Constitution. In conformity with the established constitutional case law, this constitutional principle prohibits the legislature, *inter alia*, from regulating essentially equal positions in an arbitrarily different manner without reasonable grounds that follow from the nature of the matter (Paragraph 109 of the reasoning of the cited Decision).

15. The challenged regulation does not concern the functioning of religious communities or the profession of religious beliefs by individuals. Irrespective of the challenged regulation, all religious communities and their members are autonomous and free with regard to the individual or collective profession of their religious beliefs. In view of the above, the challenged regulation does not interfere with the sphere protected by the right determined by Article 41 of the Constitution. The allegations of the petitioner as to the interference with and the inability to exercise the right to the individual and collective profession of religious beliefs as referred to in Article 41 of the Constitution are thus unfounded. The selection of the dates of the non-working days (which in accordance with the NHNWDA are not national holidays) is a matter falling within the legislature's margin of appreciation. The legislature may regulate non-working days as an expression of the identity of the persons who have historically lived in the territory of our present state and who are connected to the tradition of the European area. In accordance with the Preamble to the Constitution, national independence is one of the starting points for the establishment of the fundamental social rules of coexistence. The challenged regulation regulates a position that cannot be compared to any other position. Therefore, it does not

interfere with the sphere of the protection of human rights determined by the first paragraph of Article 14 of the Constitution and the general principle of equality before the law determined by the second paragraph of Article 14 of the Constitution. Consequently, the petitioner's allegations as to discrimination against and unequal treatment of religious communities and their members and the ensuing inconsistency of the challenged regulation with the first and second paragraphs of Article 14 of the Constitution are unfounded. The challenged regulation distinguished non-working days from national holidays and intended them to benefit individuals who may enjoy them as they see fit. The participation of the state is excluded. Therefore, the allegation that the challenged regulation is inconsistent with Article 7 of the Constitution is also unfounded. In view of the above, also the allegation of the petitioner as to the inconsistency of the challenged regulation with Article 9 of the ECHR is unfounded.

16. Since on the basis of these arguments the petition to initiate proceedings to review the constitutionality of Article 2 of the NHNWDA is manifestly unfounded, the Constitutional Court dismissed it.

### C

17. The Constitutional Court adopted this Order on the basis of the second paragraph of Article 26 of the CCA, composed of: Dr Jadranka Sovdat, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Dr Etelka Korpič – Horvat, Dr Špelca Mežnar, Dr Ernest Petrič, Jasna Pogačar, Marko Šorli, and Jan Zobec. The Order was adopted unanimously.

Dr Jadranka Sovdat  
President

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[1] The petitioner refers to Decisions of the Constitutional Court No. U-I-68/98, dated 22 November 2001 (Official Gazette RS, No. 101/01, and OdlUS X, 192), and No. U-I-92/01, dated 28 February 2002 (Official Gazette RS, No. 22/02, and OdlUS XI, 25), and to Opinion of the Constitutional Court No. Rm-1/02, dated 19 November 2003 (Official Gazette RS, No. 118/03, and OdlUS XII, 89). These decisions refer to the issue of religious activities on the premises of public and concessionary nursery schools and schools, the collection of data on religious beliefs by the census, and the Agreement between the Republic of Slovenia and the Holy See on Legal Issues.

[2] Cf. S. Nerad in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za državne in evropske študije, Ljubljana 2012, pp. 1524 and 1525.

[3] This is stated by L. Šturm in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2012, p. 125.

[4] On a holiday, people rest, i.e. do not work, they dress solemnly, express and accept congratulations, give and receive presents, treat themselves to holiday meals, and organise celebrations. For more, see A. Baš (Ed.), *Slovenski etnološki leksikon* [Slovene Ethnological Lexicon], Mladinska knjiga, Ljubljana 2004, p. 463.

[5] *Ibidem*.

[6] *Ibidem*.

[7] See Gazette of the Legislative Assembly RS, No. 18/91, pp. 11 and 12, and also No. 26/91, pp. 28 and 29.