

Republic of Iraq
Federal Supreme Court
Ref 102/ federal/2024



Kurdish text

The Federal Supreme Court (F S C) has been convened on 15/4/2024 headed by Judge Jassim Mohammed Abood and membership of Judges Sameer Abbas Mohammed, Ghaleb Amir Shunain, Hayder Jaber Abid, Hayder Ali Noori, Khalef Ahmed Rajab, Ayoob Abbas Salih, Dyar Mohammed Ali, and Munther Ibrahim Hussain who are authorized in the name of the people to judge and they made the following decision:

The Plaintiff: Abdulrahman Suleiman Ali- retired judge.

The Defendant: Speaker of the Council of Representatives / being in this capacity –His agent the Director General of the Legal Affairs Department Sabah Juma Al-Bawi.

The Claim:

The plaintiff claimed in his petition that the defendant legislated the Unified Retirement Law No. (9) of 2014 amended and in force on 1/1/2014 based on Article (42) thereof, and item (fourth) of Article (35) thereof stipulated ((as an exception to the provisions of Article (21/2nd) of this law: The judge and the member of the Public Prosecution or his successor shall be entitled to a retirement salary of eighty percent (80%) of the last salary and allowances he received in the service upon his retirement (provided that the allocations do not exceed 150% of the functional salary) in one of the following cases: 1. If he is referred to retirement to complete the legal age for retirement, 2. If he is referred to retirement for health reasons due to his inability to perform his duties by deciding to complete the legal age for retirement, 3. If he dies while in service, regardless of the period of his service or age, 4. If he is referred to retirement at his request and he has a service in the judiciary or in the Public Prosecution for not less than (30) thirty years)), the phrase (in the judiciary or in the public prosecution) contained in Article

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(35/4th/Alif/4) violates two of the principles stipulated in the Constitution of the Republic of Iraq for the year 2005, on the one hand, it violates the principle of equality stipulated in (14) of the Constitution, as the requirement for the period of service of the judge who submits a request for referral to retirement (30) years are all in the judiciary or in the Public Prosecution, that is, he has held the position of judge or member of the Public Prosecution in which the principle of equality between equal legal and functional positions, it necessarily leads to discrimination in the financial positions of judges referred to retirement under each paragraph of Article (35/4th/Alif) of the law, and on the other hand, the contested phrase violates the principle of equal opportunities stipulated in Article (16) of the Constitution, whereas the application of item (4th/Alif) in the presence of the contested phrase will lead to the imbalance of this principle, and grant those covered by each of the aforementioned paragraphs (1,2,3,4) unequal opportunities in terms of their retirement benefits, and whereas the interest condition necessary to file this lawsuit is achieved in accordance with the requirements of Article (20) of the Internal Regulations No. (1) of 2022, as the plaintiff was referred to retirement according to the judicial order issued by the Federal Supreme Court No. (160/Ta/2024/643) on 17/3/2024 and the Presidential Decree No. (17) issued on 28/3/2024 and did not promote the treatment of his retirement salary, article (35/IV/A/4) is intended to be applied to him, which will negatively affect his financial position and his retirement salary percentage will be less than the rest of the judges and members of the Public Prosecution covered by the other paragraphs of Article (35/4th/Alif), when the plaintiff requested this court to rule on the unconstitutionality of the phrase (in the judiciary or in the public prosecution) contained in Article (35/4th/Alif/4) of the Unified Retirement Law, and to charge the defendant judicial fees and expenses.

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After registering the case with this court No. (102/Federal/2024), and collecting the legal fee for it, and informing the defendant of its petition and documents based on Article (21/1st and 2nd) of the court's internal regulations No. (1) of 2022, his agent replied with the reply regulation dated 4/4/2024, which concluded that the text of the paragraph - the subject of the challenge - was legislated by the Council of Representatives, based on its constitutional competence to enact federal laws under Article (61/1st) of the Constitution, this text represents a legislative will that is irreproachable because it deals with a case of referral of a judge or a member of the Public Prosecution to retirement on the basis of the service he performs in these two job corps, in addition to the other three cases mentioned in the text of Article (35/4th/Alif) in paragraphs (1, 2 and 3), the text should benefit the inclusion of all those who worked in the judiciary or in the public prosecution, whether as a judge or prosecutor or any other judicial capacity, it should be covered by the provision of the text and the text should not be limited in its enforcement to the judge exclusively and the member of the Public Prosecution exclusively, and this is the correct understanding of the text, but if the National Pension Authority applies another understanding of the text, it is an incorrect understanding, this is due to the general phrase (in the judiciary or in the public prosecution) contained in the legal paragraph, as the text did not indicate that the capacity of the judge or the capacity of the public prosecutor are the two qualities to which the implementation of this text is limited, the challenged text does not represent a violation of the principles of equality or equal opportunities, because equality is between people with similar circumstances and does not mean absolute equality that is not controlled by conditions and determinants, the text also does not affect the principle of equal opportunities, as the text allows everyone who has

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spent thirty years of service in the judiciary and the Public Prosecution to request referral to retirement at his request, which includes by virtue of everyone who meets this condition without discrimination or prejudice to equal opportunities between people with similar circumstances, so he requested to reject of the lawsuit and the plaintiff to charge judicial fees, expenses and attorneyship fees. After completing the procedures required by the rules of procedure of the court, the court set a date for considering the lawsuit without pleading in accordance with Article (21/3rd) thereof, in which the court was formed and began to consider the case, the court scrutinized the plaintiff's requests and his supports and the defenses of the defendant's agent, and after completing the scrutinies, the end of the minutes has been made clear and the court issued the following decision:

The Decision:

Upon scrutiny and deliberation by the Federal Supreme Court, it was found that the plaintiff (Abdul Rahman Suleiman Ali) this lawsuit was filed by the Head of the Council of Representatives/ being in this capacity, claiming that the Council of Representatives had previously enacted the Unified Retirement Law No. (9) of 2014, as amended and currently in force, and item (fourth/a) of Article (35) thereof stipulates ((Fourth: Exception to the provisions of Article (21/Second) of this law: The judge and the member of the Public Prosecution or his successor shall be entitled to a retirement salary of eighty percent (80%) of the last salary and allowances he received in service upon his retirement (provided that The allowances exceed 150% of the functional salary) in one of the following cases: 1- If he is referred to retirement for completing the legal age for retirement. 2. If he is referred to retirement for health reasons due to his inability to perform his duties in the report

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of the medical committee. 3. If he dies while in service, regardless of the period of his service or age. 4. If he is referred to retirement at his request and has a service in the judiciary or in the Public Prosecution of not less than (30) thirty years.)) he claimed that the phrase "in the judiciary or in the public prosecution" contained in Article (35/IV/A/4) violates two of the principles stipulated in the Constitution of the Republic of Iraq for the year 2005, as it violates on the one hand the principle of equality before the law stipulated in Article (14) of the Constitution, whereas the requirement that the aforementioned service be all in the judiciary or in the Public Prosecution, i.e. that the service of the judge who submits the application for referral to retirement is all in his occupation of the position of judge or member of the Public Prosecution, and that this necessarily leads to discrimination in the financial positions of judges referred to retirement under each paragraph of Article (35/4th/Alif) of the said Law, and on the other hand, the said statement violates the principle of equal opportunities stipulated in Article (16) of the Constitution, as their application creates unequal opportunities in terms of retirement entitlement between those mentioned in paragraphs (1.2.3) on the one hand, and those covered by the provisions of paragraph (4) on the other hand, whereas he was referred to retirement under the judicial order issued by the Federal Supreme Court No. (160/Ta/643/2024) on 17/3/2024 and the Republican Decree No. (17) issued on 28/3/2024 and did not promote his retirement treatment, and that the application of the aforementioned text will negatively affect his financial position, as his retirement salary percentage will be less than the rest of the judges and members of the Public Prosecution covered by the other paragraphs, so he requested a ruling on the unconstitutionality of the phrase (in the judiciary or in the Public Prosecution) contained in Article (35/4th/Alif/4) of the Unified

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Retirement Law No. (9) For the year 2014 amended and charging the defendant fees and expenses. The court reviewed the answer of the defendant's agent/ being in this capacity under its regulation dated 4/4/2024, according to which he requested to reject of the plaintiff's lawsuit because the text - the subject of the challenge - means the inclusion of all those who worked in the judicial service or in the public prosecution service, whether in the capacity of a judge, prosecutor or any other judicial capacity, and the text should not be limited in its enforcement to judges and members of the Public Prosecution exclusively, and thus does not prejudice the principles of equality and equal opportunities, as it reviewed the court on the plaintiff's list, which came in response to what was stated in the defendant's agent draft/ being in this capacity under his response list dated 14/4/2024, which included that uniformity in circumstances is achieved in all cases of paragraphs mentioned in Article (35/4th/Alif) because they all deal with cases of retirement of judges with different reasons, all those cases were grouped into one item and given a single provision, since all those covered were holders of similar positions, and the hypothesis of asymmetry in circumstances would be realized if another segment of non-judges were to be measured for the application of the provision to them, such as directors-general or advisers, upon careful consideration of the plaintiff's requests, his supports and the defendant's defences and through his agent, the Federal Supreme Court finds the following:

1.The plaintiff's claim is formally admissible because the plaintiff and the defendant are / being in their capacity two legal litigants who meet the conditions of litigation and have the legal capacity to litigate, and the lawsuit enters in the jurisdiction of this court in accordance with the provisions of item (1st) of Article (93) of the Constitution of the Republic of Iraq of 2005, and item (1st) of Article (4) of the Federal

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Supreme Court Law No. (30) of 2005 as amended by Law No. (25) of 2021, and the court also finds that the plaintiff's interest is realized in this lawsuit in accordance with the provisions of Article (6) of the Civil Procedure Law No. (83) of 1969, as amended, and the provisions of Article (20) of the Rules of Procedure of the Federal Supreme Court No. (1) of 2022.

2. The judiciary is an independent authority from other authorities in the state and has received special constitutional attention has been allocated by the constitutional legislator texts of its own and members of judges did not concern the other two authorities (legislative and executive) has been mentioned in Article (87) of the Constitution of the Republic of Iraq for the year 2005, that (The judicial authority is independent and is exercised by courts of all types and degrees, and their rulings are issued in accordance with the law) Article (88) of the Constitution stipulates that (judges are independent and have no authority over them in their judiciary other than the law.)no authority may interfere in the judiciary or in the affairs of justice) and the Constitution did not describe either the legislative and executive authorities as independent, as stated in article (19/1st) of the Constitution that (the judiciary is independent there is no authority over it other than the law) i.e. neither the legislative nor executive authorities may interfere in the work of the judiciary or even its monitoring, as the supervision of judges is from one of the judicial bodies, which is the judicial supervision authority, the control over the decisions of judges is through the courts that hear appeals against their decisions, while the executive authority is subject to the control of the legislative authority in accordance with the provisions of Article (61/2nd) of the Constitution, to the Federal Supreme Court's oversight through constitutional oversight of laws promulgated by the legislature and regulations issued by the executive authority in accordance with the

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provisions of the Constitution, or issued by authorities or bodies, or other institutions in implementation of their laws or to regulate their work, as well as by adjudicating cases arising from the application of laws, regulations, instructions, decisions and procedures issued by the federal authorities, and neither the legislative and executive authorities may establish special courts in accordance with the prohibition contained in Article 95 of the Constitution, neither of them shall grant any part of the jurisdiction of the judiciary that the courts alone and no other party in accordance with the provisions of Article 87 of the Constitution shall be vested in any other party, nor shall any of the said authorities prevent the judiciary from hearing, in any dispute because this is contrary to the principles established by the Constitution, namely the independence of the judiciary and the separation of powers, and in the face of all this, the judges who exercise these competencies cannot be considered mere employees of a public facility, they cannot be subject to the legal system of public service to which other State officials are subject.

3- In dedication to the principle of the independence of the judiciary and the impartiality of judges when performing their work, preserving the integrity and justice of the decisions and rulings they issue, and keeping them away from all influences, and the great and dangerous role they play in settling disputes that occur between persons or between persons and other state institutions exercised by the ordinary judiciary, and through the constitutional judiciary's oversight of the work of the legislative and executive authorities and standing against the deviation of either of them from the provisions and principles of the Constitution, as well as the interpretation of the provisions of the Constitution that most of the legislation in comparative countries has been keen to determine for the judge the privileges and rights that he did not decide

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for other workers in other powers and in independent authorities and non-judicial institutions in all cases.

4-A large number of legal and judicial scholars, especially those specialized in law and the constitutional judiciary, agreed that the rights and privileges granted to judges alone are considered guarantees of the independence of the judiciary and judges working in it, including salaries, pensions or pensions, to continue or resign from his judicial work whenever he deems it unfit to perform that sacred mission, whether for personal reason or because of the pressures and interference he is subjected to from within the judicial institution or from other bodies or persons, with which he cannot maintain his independence and impartiality, and many comparative legislations have guaranteed him that right, and at the same time guaranteed him the pension and remuneration received by his peers who retired for other reasons, article 70 of the Egyptian Judicial Authority Law No. 46 of 1972, as amended, stipulates that "as an exception to the provisions of the Civil Servants Law and pension laws, the resignation of a judge shall not result in the forfeiture of his right to pension or gratuity, and the judge's resignation shall be deemed accepted from the date of its submission to the Minister of Justice, if it is not accompanied by a restriction or attached to a condition, and in all cases of termination of service, the judge's pension or remuneration shall be settled on the basis of the last linked position he occupied or the last salary he received, whichever is more suitable for him...) Article 48 of the Omani Judicial Authority Law promulgated by Decree No. 90/99, as amended by Decree 14/2001, stipulates that the judge's resignation shall be deemed accepted one month after the date of its submission to the Minister of Justice if it is not accompanied by a restriction or attached to a condition, and the same article includes that in all cases of termination of service the judge's pension or remuneration

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shall be settled on the basis of the last salary he received. therefore, all judges and members of the Public Prosecution in Iraq must be treated as judges also in accordance with the principle of equality, which must include all persons of equal legal status, which is what most comparative legislation has applied in the equality of rights and privileges for all judges in all cases of separation from service, and all judges must be treated in accordance with the principle of equal opportunities, which requires that all persons of equal legal status enjoy the same rights and privileges. Forcing the judge to continue working against his will and preventing him from using his right to resign is a clear violation of the principle of judicial independence and ensuring the impartiality of judges, and the requirement that the service for which the judge or member of the Public Prosecution is entitled to his retirement salary is the service he spent in the performance of his work as a judge or member of the Public Prosecution only without being counted for the service he spent in public office in one of the state departments and institutions, and without requiring this for the judge who is referred to retirement. For other reasons, in addition to not requiring any of the other state employees covered by the provisions of the Unified Retirement Law, the court considers that the phrase (in the judiciary or in the public prosecution) contained in Article (35/4th/Alif/4) of the Unified Retirement Law No. (9) of 2014, as amended, violates the provisions of Articles (14, 16, 19, 87 and 88) of the Constitution of the Republic of Iraq for the year 2005.

5-The judiciary of this court has settled on its competence to interpret the texts of laws when considering the challenge to their constitutionality, as this is one of the requirements for ruling on constitutionality or not, and since the Unified Retirement law no. (9) of 2014, as amended, has defined the retirement job in Article (1/18th) as:

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the job performed in the state and the retirement arrests are collected, and item (nineteenth) of the same article defines retirement service as: The period of service calculated for retirement purposes under the provisions of this law or any other law and for which retirement arrests are collected, so the word service mentioned in Article (35/4th/Alif/4) of the Unified Retirement Law No. (9) of 2014, as amended, means (service). performed by a judge or member of the Public Prosecution in the State, whether in the exercise of his work as a judge, a member of the Public Prosecution, an employee of the courts and institutions of the judiciary or in other institutions of the State, or any service paid for by retirement arrests in accordance with the provisions of the said Law), the argument of the defendant's agent, being in this capacity, that this phrase is meant to serve in the judiciary or in the Public Prosecution, whether he is a judge or an employee, increases the text in violation of the Constitution, because this means that the judge who was an employee of one of the courts or institutions of the judiciary is credited with all his job services, while those who worked in other state institutions before assuming the position of the judiciary are deprived of that, and this is a clear violation. On the one hand, the principles of equality and equal opportunities on the other hand, the plea of the defendant's attorney to limit work to the judiciary, whether in the capacity of a judge, plaintiff or any other judicial capacity, is covered by the provision of the text, and the text should not be limited in its enforcement to the judge exclusively and the member of the Public Prosecution exclusively, as this plea also does not remove the constitutional violation of the text challenged as unconstitutional, the text did not include the calculation of the service for which the retirement suspensions were paid to the judge, or to the Prosecutor outside the scope of the two posts mentioned and therefore that service is not counted whether it is functional or among

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the other professions for which retirement suspensions have been paid, as the judge or member of the Public Prosecution before his appointment as a judge or prosecutor may be an employee, lawyer or otherwise, and the employee is deducted from his salary retirement suspensions and the lawyer during his work in the legal profession is also obliged to pay retirement arrests, therefore, not counting that period of retirement service violates the provisions of Article (14) of the Constitution of the Republic of Iraq, which requires the equality of all before the law, which makes the contested text contrary to the Constitution.

6-The principle is that the decisions of the Federal Supreme Court that determine the unconstitutionality of any legislative text shall apply from the date of issuance of the judgment unless the decision provides otherwise in accordance with the provisions of Article (37) of the Rules of Procedure of the Federal Supreme Court No. (1) of 2022, and since the validity of the judgment of unconstitutionality of the contested phrase from the date of issuance of the judgment differentiates between those who were referred to retirement one day before the issuance of the judgment, and those who are referred to retirement after its issuance, even one day, Considering the judgment effective from the date of enactment of the text is a burden on the State budget because of the financial rights that will result from it for all judges who retired before the date of its issuance, therefore, setting the beginning of the current financial year as the date of its entry into force in accordance with the Court's authority to determine the effective date of the judgement, is an enshrinement of the principle of justice in judicial decisions, which must be observed even during the periods of their validity.

Accordingly, and for all of the above, and by request, the Federal Supreme Court decided to rule as follows:

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First: The unconstitutionality of the phrase (in the judiciary or in the Public Prosecution) contained in Article (35/4th/Alif/4) of the Unified Retirement Law No. (9) of 2014, as amended, so that the text is as follows ((If he is referred to retirement at his request and has a service of not less than (30) thirty years)).

Second: The provision mentioned in item (first) above shall be effective as of 1/1/2024.

Third: Charging the defendant the Speaker of the Council of Representatives, being in this capacity, all fees and expenses.

The decision has been issued unanimously, final and binding on all authorities based on the provisions of Articles (93 and 94) of the Constitution of the Republic of Iraq of 2005 and Article 4 of the Federal Supreme Court Law No. 30 of 2005, as amended by Law No. 25 for the year 2021, and it has been made clear in the session dated 6 / Shawwal /1445 A.H. corresponding to 15/4/2024 AD.

Judge
Jasem Mohammad Abbood
President of the Federal Supreme Court

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