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

SECOND SECTION

**CASE OF KJARTAN ÁSMUNDSSON v. ICELAND**

*(Application no. 60669/00)*

JUDGMENT

STRASBOURG

12 October 2004

**FINAL**

*30/03/2005*

**In the case of Kjartan Ásmundsson v. Iceland,**

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,
Mr DAVID THÓR BJÖRGVINSSON, ad hoc *judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 14 September 2004,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 60669/00) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Icelandic national, Mr Kjartan Ásmundsson ("the applicant"), on 31 May 2000.

2. The applicant was represented by Ms Lilja Jonasdottir, a lawyer practising in Reykjavik. The Icelandic Government ("the Government") were represented by their Agent, Mrs Björg Thorarensen.

3. The applicant complained under Article 1 of Protocol No. 1, taken alone and in conjunction with Article 14 of the Convention, of a decision, taken under new legislation, to cease payment of a disability pension which he had received from the Seamen's Pension Fund for nearly twenty years after a work accident he had sustained in 1978 on board a trawler.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 28 January 2003, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations. Mr Gaukur

Jörundsson, the judge elected in respect of Iceland, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr David Thór Björgvinsson to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1949 and lives in Reykjavik.

In 1969, at the age of 20, the applicant completed his training as a navigation officer at the Icelandic College of Navigation and started work as a seaman. This he continued to do until 1978, when he sustained a serious work accident on board a trawler. His right leg was struck by a 200 kg stone object, causing a compound fracture of his ankle. As a result, he had to give up work as a seaman. His disability was assessed at 100%, which made him eligible for a disability pension from the Seamen's Pension Fund ("the Pension Fund"), to which he paid premiums intermittently from 1969 until 1981. The assessment was made on the basis of the criteria that applied under section 13(1) and (4) of the Seamen's Pension Fund Act (Law no. 49/1974 – "the 1974 Act"), notably that the claimant was unable to carry out the work he had performed before his disability, that his participation in the Fund had been intended to insure against this contingency, and that he had a sustained loss of fitness for work (of 35% or more).

The applicant underwent regular disability assessments by a physician accredited by the Pension Fund and was each time assessed as 100% disabled in relation to his previous job.

9. After his accident the applicant joined a transport company, Samskip Ltd, as an office assistant, and is still employed there as head of the claims department.

### A. Legislative amendments leading to the applicant's loss of his disability pension entitlements

10. In 1992 the 1974 Act was amended by sections 5 and 8 of Law no. 44/1992 ("the 1992 Act"), which considerably altered the basis for the assessment of disability in that the assessment was to be based not on the Pension Fund beneficiaries' inability to perform the same work but work in general. The new provisions had been enacted on the initiative of the Pension Fund and in view of the Fund's financial difficulties (according to an audit, at the beginning of 1990 the Pension Fund had a deficit of at least

20,000,000,000 Icelandic krónur (ISK)). The Pension Fund applied the new provisions not only to persons who had claimed a disability pension after the date of their entry into force but also to persons who were already in receipt of a disability pension before that date.

11. Under an interim provision in section 5, the above change to the reference criteria was not to apply for the first five years after the commencement of the 1992 Act to a person who, before its entry into force, was already receiving a disability pension.

12. Under the new rules, a fresh assessment of the applicant's disability was carried out by an officially accredited Pension Fund physician, who concluded that the applicant's loss of capacity for work in general was 25%, and thus did not reach the minimum level of 35%. As a result, from 1 July 1997 onwards the Pension Fund stopped paying the applicant the disability pension and related child benefits he had been receiving for nearly twenty years since the accident in 1978.

13. According to information obtained by the Government from the Pension Fund and submitted to the Court, the applicant had been one of 336 Fund members who were receiving disability pensions in June 1992 under the interim provision in section 5 of the 1992 Act (see paragraph 21 below). On 1 July 1997 the total number of disability pension recipients was 689. This included Fund members who had not become entitled to a disability pension until after the commencement of the 1992 Act in June 1992. The cases of the aforementioned 336 persons receiving disability pensions from the Fund, who had acquired their entitlement before that time and were still drawing disability pensions in 1996, were reviewed in late 1996 and early 1997 in the light of their capacity for work in general. Altogether, 104 members of this group of disability pensioners had their benefits reduced in July 1997 as a result of the new rules on disability assessment under the 1992 Act. In the case of 54 Fund members, including the applicant, the disability rating for work in general did not reach the level of 35% required under the Act to retain entitlement to disability benefit, and so benefit payments were discontinued. The disability ratings of 29 members were reduced from 100% to 50% and those of 21 members from 100% to 65%.

14. The applicant instituted proceedings against the Pension Fund and, in the alternative, against both the Fund and the Icelandic State, challenging the Fund's decision to discontinue the payments to him. In a judgment of 12 May 1999, the Reykjavik District Court found for the defendants.

15. The applicant appealed to the Supreme Court, which by a judgment of 9 December 1999 upheld the judgment of the District Court.

16. The Supreme Court accepted that the applicant's pension rights under the 1974 Act were protected by the relevant provisions of the Icelandic Constitution as property rights. However, it considered that the measures taken by virtue of the 1992 Act had been justified by the Pension Fund's financial difficulties. The Supreme Court stated:

"The pension rights that the appellant had earned under Law no. 49/1974 were protected under what was then Article 67 of the Constitution (currently Article 72 of the Constitution – see section 10 of the Constitutional Law Act, Law no. 87/1995). Under the constitutional provision referred to above, he could not be deprived of those rights except under an unequivocal provision of law. The Court does not consider that section 8 of Law no. 49/1974 provided authorisation for the [Pension Fund] Board to curtail the benefit provisions; this could only be done under an unequivocal provision of law. Nor can the Court accept that the wording of subsection (1) of section 13 of Law no. 49/1974 meant that the Fund member did not have an unequivocal right to have his disability assessed in terms of his capacity to do his previous job.

The evidence in the case shows that the Pension Fund was operated at a considerable deficit, and that at the end of 1989 more than ISK 20,000,000,000 would have been needed for the principal of the Fund, together with the premiums that it could expect, to cover its commitments, this estimate being based on an annual interest rate of 3%. In order to tackle this large deficit, the Fund's Board asked for amendments to be made to the Act under which the Fund operated. It is clear that the reduction of the pension rights that resulted from Law no. 44/1992 was based on relevant considerations. Even though that Act was repealed by Law no. 94/1994, this does not change the fact that the appellant's legal position had already been determined by Law no. 44/1992. The Court concurs with the District Court's view that Law no. 94/1994 did not constitute a valid legal authorisation for making amendments to the rights that the Fund member had earned during the period of validity of the former legislation.

The reduction according to Act no. 44/1992 was of a general nature as it treated in a comparable manner all those who enjoyed or could enjoy pension rights. An adaptation period of five years applied to all pensioners, as stated above. All those who can be considered to be in a comparable situation have been treated equally ..."

## B. Details of the applicant's loss of income

17. On 1 July 1997 the applicant lost pension rights (disability and children's annuity benefits) amounting to ISK 12,637,600. He presented the following breakdown of this figure:

Value of the principal, based on disability pension payment of ISK 61,356 per month until he reached the age of 65: ISK 9,373,300

Value of the principal of child benefit based on the same premises, until the children reached the age of 18:

| | | |
|---|---|---|
| Kristinn | July 1997-March 1998 | ISK 136,100 |
| Anna Margrét | July 1997-August 2006 | ISK 1,469,600 |
| Asmundur | July 1997-January 2009 | ISK 1,658,600 |
| Total | | ISK 12,637,600 |

18. The applicant has supplied the following information about his income from 1997 onwards:

| | |
|---|---|
| 1997 | ISK 2,789,995 |
| 1998 | ISK 3,305,268 |
| 1999 | ISK 3,454,445 |
| 2000 | ISK 3,774,248 |
| 2001 | ISK 4,187,987 |
| 2002 | ISK 4,558,248 |
| Total | ISK 22,050,191 |

19. The applicant has also submitted certain figures from a survey of seamen's salaries obtained from the Icelandic Merchant Navy and Fishing Vessels Officers' Guild:

| | "Ordinary seaman" | Second mate | First mate | Master |
|---|---|---|---|---|
| 1997 | 5,153,424 | 6,441,780 | 7,730,137 | 10,306,849 |
| 1998 | 5,580,795 | 6,975,994 | 8,371,193 | 11,161,590 |
| 1999 | 6,166,029 | 7,707,537 | 9,249,044 | 12,332,059 |
| 2000 | 5,949,075 | 7,436,344 | 8,923,613 | 11,898,150 |
| 2001 | 6,415,252 | 8,019,064 | 9,622,877 | 12,830,503 |
| 2002 | 5,654,756 | 7,068,445 | 8,482,134 | 11,309,513 |
| Total | 34,919,332 | 43,649,164 | 52,378,997 | 69,838,663 |
| Income derived by the applicant from office work: | | | | |
| | 22,050,191 | 22,050,191 | 22,050,191 | 22,050,191 |
| Difference | 12,869,141 | 21,598,973 | 30,328,806 | 47,788,472 |

## II. RELEVANT DOMESTIC LAW

20. Section 13(1) and (4) of the Seamen's Pension Fund Act (Law no. 49/1974 – "the 1974 Act") read:

> "(1) Each Fund member who has paid premiums to the Fund for the past three calendar years, and for at least six of the past twelve months, shall be entitled to a disability pension if he suffers a loss of fitness for work that the senior consulting physician assesses at 35% or more. This disability assessment shall be based mainly on the Fund member's incapacity to do the job in which he was engaged and on which his membership of the Fund is based. Despite being disabled, no person shall be entitled to a disability pension while retaining full wages for the job that he used to do, or while receiving equally high wages for another job which grants pension rights, and the pension shall never be higher than the equivalent of the loss of income demonstrably incurred by the Fund member as a result of his disability.
>
> ...
>
> (4) A disabled person who applies for a disability pension from the Fund or receives such a pension shall be obliged to provide the Board of the Fund with all the

information on his health and earned income that is necessary to determine his right to receive the pension."

Under section 15(3) of the 1974 Act the applicant was eligible to receive child benefits.

21. Section 5 of Law no. 44/1992 ("the 1992 Act") read:

"For the first five years after the commencement of this Act, the disability assessment of disability pensioners who already receive benefit due to loss of working capacity before the commencement of the Act shall be based on their incapacity for the job in which they were previously engaged and on which their membership of the Fund is based, but after that time it shall be based on their incapacity for work in general. Furthermore, the change in the child benefit entitlement of the recipients of disability pensions resulting from section 8 of this Act shall not take effect until five years after the commencement of the Act."

22. The 1974 Act, as amended by the 1992 Act, was replaced by Law no. 94/1994 ("the 1994 Act") when it came into force on 1 September 1994. All the provisions covering the basis of disability pensions and child benefit payments were removed from the Act and included in the Regulations on the Seamen's Pension Fund, which also came into force on 1 September 1994. According to the Government, this did not affect the applicant specifically, since the interim provision of the 1992 Act still applied to his situation until 1 July 1997. The applicant contended that the interim provision had been repealed on 1 September 1994.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 AND OF ARTICLE 14 OF THE CONVENTION

23. The applicant complained that the discontinuation of his disability pension had given rise to a violation of Article 1 of Protocol No. 1, taken on its own and in conjunction with Article 14 of the Convention. Those Articles provide:

**Article 1 of Protocol No. 1**

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance

with the general interest or to secure the payment of taxes or other contributions or penalties."

**Article 14 of the Convention**

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

24. The Government disputed the applicant's allegation and invited the Court to find that no violation had occurred in the present case.

## A. Alleged violation of Article 1 of Protocol No. 1

### *1. The applicant*

25. The applicant argued that his pension rights fell within the scope of protection of Article 1 of Protocol No. 1 and that the national measures depriving him of these rights entailed an interference with the peaceful enjoyment of his possessions within the meaning of this provision.

26. The applicant further submitted that, contrary to former Article 67 (currently Article 72) of the Icelandic Constitution, the deprivation of his pension rights had not been based on any clear and unequivocal national legal provision. Indeed, the measure had been taken without any legal authority. The retroactive application of the new rules had been founded on an interim provision which had been repealed three years before the authorities decided to cease payment of his pension in June 1997. Thus, the interference with the peaceful enjoyment of his possessions had been unlawful.

27. In the applicant's view, there was no reasonable relationship between the interference and the interests pursued. According to figures supplied by the Government, at the material time there were 689 persons receiving disability pensions from the Pension Fund. The applicant was one of 54 individuals who had lost their entitlement in similar circumstances, a tiny group constituting only about 0.1% of the Fund's total membership, which last year comprised 38,584 members. On any analysis, the restrictions imposed affected only a very small minority and could by no means be regarded as having been of any significant financial advantage to the Fund or as having served the purpose of the Fund.

28. No comparable restrictions had been imposed on the pension rights of other Fund members. The contested measure could not be described as a general measure aimed at an unspecified group of persons in accordance with the principle of equality. In Iceland there was no legal tradition of

depriving active pensioners of annuity rights without the payment of compensation.

29. The applicant refuted the Government's suggestion that his disability rating of 100% in terms of loss of fitness for work as a seaman did not affect his chances of earning income to support himself through work on shore. The applicant stated that he had been employed on shore since 1978, but as his disability had substantially reduced his employment possibilities, he had been employed in office work for a transport company on a salary which was only a fraction of what he would have earned as a seaman. Even if he had continued to receive a pension, his total income would have been considerably less than he would have earned as a seaman.

30. The applicant stressed that his income was irrelevant. As a result of the impugned measures, he had been totally deprived of his disability pension entitlements. This would have happened even if he had been unemployed. His subsistence had become completely dependent on his maintaining his office job on shore.

31. Finally, the applicant strongly objected to the Government's contention that he had not suffered any financial loss in that, by reason of the level of his income from employment, the payment of a disability pension would normally have been discontinued under section 13 of the 1974 Act according to the rules operated by the Fund. However, to the applicant's knowledge no such rules had been in force and accessible at the material time. Indeed, any such rules would have been inconsistent with the applicable legislation. The fact was that he would have received a much higher salary had he continued to work as a seaman. He had neither retained a full salary for the job that he used to do nor an equally high salary for another job. This was amply demonstrated by the figures he had presented to the Court and to which the Government had not objected.

*2. The Government*

32. The Government disputed the applicant's submissions. It was clear that the legislative amendments in question were the logical and necessary consequences of the financial position of the Pension Fund at the material time. Their aim was to serve the general interest of its members and the amendments had been made in accordance with the law. The Government emphasised that the decision to adopt new criteria for the assessment of disability applied in an objective manner to all those who were in the same position. The changes made had been instigated by the Fund's Board, composed of representatives of employers and employees, including those of the employees' organisation of which the applicant was a member.

The purpose of a disability pension paid from the Fund was indisputably to provide financial assistance to those who had had their working capacity reduced and who had need of special assistance in order to ensure their subsistence. In instances where this mattered, recipients of a disability

pension would be given time to adapt themselves to changed conditions, notably through the provision of retraining, irrespective of whether they had started to receive a disability pension before or after the entry into force of the new legislation.

33. The Government accepted that the impugned measure constituted an interference with the applicant's peaceful enjoyment of his possessions for the purposes of the first paragraph of Article 1 of Protocol No. 1. However, they maintained that the interference was justified under the second paragraph of that Article. The measure was provided for by law, it was in accordance with the general interests of the community and there was a reasonable relationship of proportionality between the interference and the interests pursued.

34. The Government stressed that the applicant retained his full right to receive a retirement pension from the Pension Fund.

35. The right to disability pension benefits should be subject to the ordinary considerations of compensation, namely the basic principle in the law on liability that the claimant should receive full compensation, but not more. It had been noted that a considerable number of former seamen who had paid premiums to the Pension Fund and who were no longer considered capable of working at sea due to disability had been receiving disability pensions from the Fund, notwithstanding the fact that they were in full employment on shore. The applicant was such a person. He was in full employment on shore and thus earned income to support himself, but under the former rules he also received a full disability pension.

36. After it had been established by the methods prescribed by law, according to section 8 of the 1974 Act, that there was an operational deficit in the Seamen's Pension Fund, the first obligation of the Board of the Fund was to reduce or stop expenditure such as the payment of disability pensions to those who had not suffered any loss of income through their loss of fitness for work, as they were demonstrably able to perform work other than as seamen.

These measures, which curtailed the applicant's rights to disability benefit, were no more extensive than was necessary in terms of the aim they were intended to achieve. Admittedly they only curtailed the rights of those Fund members who were no longer able to work as seamen, but this was done in such a way that this group had the full possibility of earning income on shore, and the majority of them were in fact already earning such income.

37. The Government strongly contested the applicant's view that he could lawfully expect to receive an undiminished disability pension from his pension fund for the next twenty years in addition to the income he received from full employment, and that his financial plans for the future had been based on this premise. They pointed out that at no time was the applicant's right unconditional in the way he maintained, and the 1974 Act

gave him no grounds for harbouring any such expectations. Even if no amendments had been made to that Act, the applicant had already become ineligible to receive a pension, having regard to the terms of the condition stated in the final sentence of section 13(1). This clearly stated that no person was entitled to a disability pension if he received equally high wages for another job which granted pension rights, and that the pension could never be higher than the equivalent of the loss of income demonstrably incurred by the Fund member as a result of his disability. During the period until 1 July 1997 when it was making pension payments to him, the Seamen's Pension Fund had no information about the applicant's employment earnings, despite pension beneficiaries' duty under section 13(4) of the Act to provide such information. At the time when the Act was in force, the Pension Fund did not actively monitor whether disability pensioners received wages from paid employment at the same time as drawing compensation payments; for example, disability pensioners were not required to submit tax returns to the Fund. In all likelihood, the applicant's right to receive compensation had actually expired before 1 July 1997; judging by the information submitted by the applicant regarding his income as a head of department at Samskip after 1 July 1997 (see his letter to the Court dated 12 June 2003), it could be stated with certainty that he was no longer entitled after that date.

38. The Government rejected the view that other Fund members had been treated differently from the applicant when it came to the restriction of their benefit rights, thus resulting in a violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention. There were many Fund members in a similar or identical position to the applicant.

The Government stressed that Fund members already in receipt of disability pensions had certainly not been singled out as a small and isolated group of beneficiaries who were expected to shoulder the entire burden of the Fund's financial difficulties. Many other changes of various types had been made to the laws and regulations of the Fund as part of its measures to put its finances in order, the 1992 Act being a part of these, and they affected all Fund members in one way or another. Thus, in 1994, the 1994 Act and the regulations issued under it had made considerable changes to the rights of both current and potential beneficiaries of the Fund. The rights of Fund members aged 60 to 65 to receive old-age pensions had been altered, and considerably reduced. These changes also brought the rules of the Seamen's Pension Fund on old-age pensions into line with those of other Icelandic pension funds, where entitlement to draw an old-age pension generally began at the age of 65.

It was clear from the figures presented (see paragraph 13 above) that the new rules, which were based on general, objective and, not least, completely relevant considerations, had affected nearly 30% of all the members of the Fund who had acquired active disability pension rights prior to the

commencement of the 1992 Act, and had had exactly the same consequences for all those who were in a comparable position.

*3. The Court's assessment*

39. The Court reiterates that Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37). The first rule, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to the peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.

According to the Convention institutions' case-law, the making of contributions to a pension fund may, in certain circumstances, create a property right and such a right may be affected by the manner in which the fund is distributed (see *Bellet, Huertas and Vialatte v. France* (dec.), nos. 40832/98, 40833/98 and 40906/98, 27 April 1999, and *Skorkiewicz v. Poland* (dec.), no. 39860/98, 1 June 1999). Moreover, the rights stemming from payment of contributions to social insurance systems are pecuniary rights for the purposes of Article 1 of Protocol No. 1 (see *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1142, §§ 39-41). However, even assuming that Article 1 of Protocol No. 1 guarantees benefits to persons who have contributed to a social insurance system, it cannot be interpreted as entitling that person to a pension of a particular amount (see *Müller v. Austria*, no. 5849/72, Commission's report of 1 October 1975, Decisions and Reports 3, p. 25, and *Skorkiewicz*, cited above). An important consideration in the assessment under this provision is whether the applicant's right to derive benefits from the social insurance scheme in question has been infringed in a manner resulting in the impairment of the essence of his pension rights (see *Domalewski v. Poland* (dec.), no. 34610/97, ECHR 1999-V).

40. In the instant case, the applicant had contributed to the Pension Fund from 1969 to 1981 under a system according to which he did not acquire any claim to an identifiable share in the Fund but only what could be characterised as a right to receive a pension subject to the fulfilment of certain conditions. It has not been contended that the measure amounted to a deprivation or a means of controlling the use of property. However, the parties agree that the termination of the applicant's disability pension

amounted to an interference with his right to the peaceful enjoyment of his possessions for the purposes of the first sentence of the first paragraph of Article 1 of Protocol No. 1. The Court sees no reason to hold otherwise.

However, the Government disputed the applicant's contention that the application of the new disability criteria to him was unlawful, discriminatory and disproportionate to the community interests pursued. As regards the issue of lawfulness, the Court notes that the applicant's argument was rejected by the Icelandic Supreme Court and sees no need to consider that aspect of the matter any further. It is the issue of proportionality which lies at the heart of the case under the Convention.

Accordingly, it will determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In this connection, regard will be had to whether unjustified differential treatment occurred in the instant case.

Whereas the Government viewed the case from a broad angle as raising issues of fundamental principles pertaining to the entire Icelandic pension system, the Court will confine its examination to the concrete circumstances of the applicant's case.

41. At the outset the Court takes note of the Government's argument, based on information provided by the Pension Fund on 14 July 2003, that even if no amendment had been made to the Seamen's Pension Fund Act 1974, the applicant had in all likelihood already become ineligible for a pension before 1 July 1997 by virtue of the last sentence of section 13(1) of that Act and thus did not have any legal ground for expecting to receive a full disability pension until the age of 65. The argument was not reviewed by the national courts, but was apparently developed for the first time at the merits stage of the proceedings under the Convention and was rejected by the applicant. The Court is not convinced by these submissions, which are based on facts that are both uncertain and unclear, and will not attach any weight to them in its examination of the case. In any event, whether the applicant, as argued by the Government, could have forfeited his entitlement to a disability pension under a different legal ground is a matter that falls outside the scope of the case, which concerns the effects of the legislative amendments that came into force on 1 July 1997.

42. Although the national authorities' decision to discontinue payment of the applicant's disability pension was taken without reference to his income from his office job, the Court will have regard to this income in its examination of the question of proportionality under Article 1 of Protocol No. 1.

In that connection, the Court notes that the introduction of the new pension rules had been prompted by legitimate concerns about the need to resolve the Fund's financial difficulties.

Furthermore, the changes made to disability entitlements were based on objective criteria, namely, an obligatory renewed medical assessment of each disability pensioner's ability to carry out not just the same work he had performed before his or her disability but work in general (see *Bucheň v. the Czech Republic*, no. 36541/97, § 75, 26 November 2002), the standard that already applied in other sectors in Iceland. According to the Government's submission, the new rules on disability assessment were intended to ensure that a considerable number of former seamen did not receive disability pensions from the Fund despite being in full employment on shore. The applicant fell within that group of disability pension recipients. One hundred and four – over 30% – of the 336 persons who were in receipt of a disability pension on 1 July 1997 experienced a substantial reduction in their entitlements. Sixty of these experienced a reduction ranging from 50% to 100%.

The Court is also mindful of the Government's submission that, concurrently with those changes, the Pension Fund's old-age pensions had also been considerably reduced by virtue of the 1994 Act.

43. However, the Court is struck by the fact that the applicant belonged to a small group of 54 disability pensioners (some 15% of the 336 persons mentioned above) whose pensions, unlike those of any other group, were discontinued altogether on 1 July 1997. The above-mentioned legitimate concerns about the need to resolve the Fund's financial difficulties seem hard to reconcile with the fact that after 1 July 1997 the vast majority of the 689 disability pensioners continued to receive disability benefits at the same level as before the adoption of the new rules, whereas only a small minority of disability pensioners had to bear the most drastic measure of all, namely the total loss of their pension entitlements. In the Court's view**,** although changes made to pension entitlements may legitimately take into account the pension holders' needs, the above differential treatment in itself suggests that the impugned measure was unjustified for the purposes of Article 14 of the Convention, which consideration must carry great weight in the assessment of the proportionality issue under Article 1 of Protocol No. 1.

44. The discriminatory character of the interference was compounded by the fact that it affected the applicant in a particularly concrete and harsh manner in that it totally deprived him of the disability pension he had been receiving on a regular basis for nearly twenty years. He had joined the Fund in 1969 and had contributed to it for nearly ten years when he had his accident, which left him 100% unfit for work as a seaman. Under section 13 of the Seamen's Pension Fund Act 1974, disability was to be assessed mainly on the basis of incapacity to perform the job occupied, and to which Fund membership related, at the time of the injury. According to the Icelandic Supreme Court, there was an unequivocal right to have disability so assessed. In the Court's view, the applicant could validly plead an

individual legitimate expectation that his disability would continue to be assessed on the basis of his incapacity to perform his previous job.

Regard should be had to the fact that, under the former rules, gainful employment was not incompatible with a Fund member's receipt of a full disability pension, provided that that pension did not exceed the member's loss of income. Understandably, after becoming unfit for work as a seaman, and encouraged by the pension system to which he had contributed over a number of years, the applicant, like many other disability pensioners, had pursued alternative employment whilst at the same time receiving a disability pension.

It is significant that, when the applicant lost his pension on 1 July 1997, this was not due to any circumstance of his own but to changes in the law altering the criteria for disability assessment. Although he was still considered 25% incapacitated to perform work in general, the applicant was deprived of the entirety of his disability pension entitlements, which at the time constituted no less than one-third of his gross monthly income, as can be deduced from the figures submitted to the Court.

45. Against this background, the Court finds that, as an individual, the applicant was made to bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation to be enjoyed by the State in the area of social legislation, cannot be justified by the legitimate community interests relied on by the authorities. It would have been otherwise had the applicant been obliged to endure a reasonable and commensurate reduction rather than the total deprivation of his entitlements (see *Müller* and *Skorkiewicz*, both cited above, and, *mutatis mutandis*, *James and Others*, cited above, p. 36, § 54, and *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, pp. 44-45, § 121).

Accordingly there has been a violation of Article 1 of Protocol No. 1 in the applicant's case.

### B. Alleged violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1

46. The applicant further alleged a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, relying essentially on the considerations underlying his complaint under the latter provision taken on its own.

47. The Court, having already taken those arguments into account in its examination of the complaint under Article 1 of Protocol No. 1, finds that no separate issue arises under Article 14 of the Convention and that, accordingly, it is unnecessary to examine the matter under these provisions taken together.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

#### *1. Pecuniary damage*

49. The applicant sought compensation for the pecuniary damage he had suffered as a result of the termination of his disability pension on 1 July 1997. He claimed sums totalling 39,524,772 Icelandic krónur (ISK) (currently corresponding to approximately 450,000 euros (EUR)), broken down as follows:

(a) ISK 12,637,600 (approximately EUR 143,000) for the loss of his disability pension entitlements, of which

(i) ISK 9,373,300 were for the loss of his own pension (ISK 61,356 per month until the age of 65), and

(ii) ISK 3,264,300 were for the loss of child benefits in respect of his three children (see paragraph 17 above);

(b) default interest in respect of the above from 1 July 1997 until the date of payment, which on 26 November 2003 amounted to ISK 26,887,172 (approximately EUR 305,000).

50. The Government disputed the above claim, arguing that, irrespective of the legislative changes that had taken effect on 1 July 1997, the applicant's disability pension entitlements ought to have been discontinued before that date anyway, because of his income from his office job (last sentence of section 13(1) of the Seamen's Pension Fund Act 1974).

51. The Court is satisfied that the applicant has suffered pecuniary damage as a result of the violation found and considers that he should be awarded compensation in an amount reasonably related to any prejudice suffered. It cannot award him the full amount claimed, precisely because a reasonable and commensurate reduction in his entitlement would have been compatible with his Convention rights (see paragraph 45 above). Deciding in the light of the figures supplied by the applicant and equitable considerations, the Court therefore awards him EUR 60,000 in respect of item (a) above and EUR 15,000 for item (b), plus any tax that may be chargeable on those amounts.

*2. Non-pecuniary damage*

52. The applicant further asked the Court to award him ISK 3,000,000 (currently corresponding to approximately EUR 34,000) in compensation for non-pecuniary damage on account of the suffering and distress caused by the discriminatory deprivation of his disability pension entitlements and the financial insecurity in which he had been left.

53. The Government asked the Court to reject any claim for non-pecuniary damage.

54. The Court considers that the applicant must have suffered anxiety and distress as a result of the violation that cannot be compensated solely by the Court's finding in his case and awards him EUR 1,500 under this head.

### B. Costs and expenses

55. The applicant requested the reimbursement of legal fees and expenses incurred during the period from 15 January 1997 to 25 November 2003, totalling ISK 3,610,392 (currently corresponding to approximately EUR 41,000), broken down as follows:

(a) ISK 2,837,100 for his lawyer's work (111.25 hours before the District Court, 67 hours before the Supreme Court and 111.25 hours before the European Court, at ISK 9,800 per hour);

(b) ISK 695,090 in value-added tax (VAT) in respect of the above;

(c) ISK 78,202 in miscellaneous expenses.

56. The Government did not dispute the above claim.

57. The Court is not convinced that all the costs were necessarily incurred. Deciding on an equitable basis, it awards the applicant EUR 20,000 (inclusive of VAT).

### C. Default interest

58. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

2. *Holds* that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 and that it is not necessary to examine the matter under these provisions;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 75,000 (seventy-five thousand euros) in respect of pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage;

(iii) EUR 20,000 (twenty thousand euros) in respect of costs and expenses;

(iv) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 October 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| S. DOLLÉ | J.-P. COSTA |
| Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mrs Thomassen is annexed to this judgment.

J.-P.C.
S.D.

# CONCURRING OPINION OF JUDGE THOMASSEN

I agree with the majority that in the present case Article 1 of Protocol No. 1 has been breached.

However, my conclusion is based on different grounds.

In a situation of limited financial resources and in the interest of upholding a fair social insurance system, a State must be free to change the conditions for entitlement to a disability pension. In this respect, the majority's approach does not seem to be different from mine.

The majority attach much weight to the discriminatory character of the measure. They note in this context that the applicant lost his disability pension completely, whereas 85% of the disability pensioners continued to receive disability benefits.

I have difficulty in following this reasoning since, in my view, the fact that only 15% of the pensioners lost their whole pension cannot in itself lead to the conclusion that the measure was tainted with unjustified differential treatment. The applicant lost his pension after his disability was assessed anew by a physician who found him fit for work in general. This means that his situation cannot be compared with that of other disability pensioners whose loss of capacity for work was considered to be more serious and who therefore continued to receive a full or limited disability pension.

Nevertheless, I agree with the majority that the application of the new rules affected the applicant in such a harsh manner that he suffered an excessive burden as a result of the changes to the social security system. It is true that he earned a salary from full-time employment and that he retained his full right to receive a retirement pension. However, after a physician in 1997 had established the percentage of his disability under the new rules, the applicant lost the pension which he had been receiving over a period of twenty years immediately after that assessment. It is this lack of an appropriate transitional period, which could have allowed the applicant to adapt his situation to the new circumstances, which amounts in my view to a violation of Article 1 of Protocol No. 1.