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

THIRD SECTION

CASE OF KHONIAKINA v. GEORGIA

(Application no. 17767/08)

JUDGMENT

STRASBOURG

19 June 2012

FINAL

19/11/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Khoniakina v. Georgia**,**

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Ineta Ziemele,
Luis López Guerra,
Nona Tsotsoria,
Kristina Pardalos, *judges,*
and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 22 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 17767/08) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Mrs Adelina Khoniakina ("the applicant"), on 21 March 2008.

2. The applicant was granted leave to present her own case in the Georgian language in the written proceedings before the Court, in accordance with Rules 34 § 3 and 36 § 2 *in fine* of the Rules of Court. The Georgian Government ("the Government") were represented by their Agent, Mr Levan Meskhoradze, of the Ministry of Justice.

3. On 8 April 2009 the Court gave notice to the Government of the applicant's complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, concerning the allegedly biased participation of a judge in the examination of her case and the amount of her retirement pension as a Supreme Court judge. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

4. The Government requested an oral hearing. However, the Court decided that it was not necessary to hold a hearing before adopting the present judgment.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1926 and lives in Tbilisi.

A. Background

6. The applicant had served as a judge of the Supreme Court of Georgia since 1956, first when the country formed part of the Soviet Union and then after it became independent.

7. On 4 May 2000 the applicant retired on age grounds and was granted, under section 36 of the Act of 12 May 1999 on the Supreme Court of Georgia ("the Supreme Court Act"), a pension of 1,073 Georgian laris (GEL – 492 euros (EUR)[1.]), corresponding to her final salary.

8. The original version of section 36 of the Supreme Court Act, in force at the time of the applicant's retirement, stated that, upon retirement, a Supreme Court judge was entitled to a life-long pension in an amount equal to his or her final salary and adjustable in line with changes in the salary scales of serving Supreme Court judges.

9. Section 36 of the Supreme Court Act was later amended on several occasions. Thus, by an amendment of 16 March 2001, its second clause concerning the adjustment requirement ("the adjustment clause") was removed.

10. By an amendment of 10 March 2005, the adjustment clause was reintroduced to the Supreme Court Act in a slightly altered form, extending the adjustment benefit to cover, in addition to retired Supreme Court judges, those who agreed to relinquish office between 1 January and 31 December 2005, providing they had served for at least three years (sections 36 and 40(7) of the Act, as of 23 June 2005).

11. Finally, by an amendment of 23 December 2005, which entered into force on 1 January 2006, section 36 was rephrased as follows:

> "A Supreme Court judge who has retired either on reaching pension age or on expiry of his or her term of office shall be entitled to State compensation in the amount of GEL 1,200 [EUR 551]".

12. Section 40(7) of the Act, which was amended at the same time, stated that Supreme Court judges who had relinquished office between 1 January 2005 and 1 January 2006 would receive State compensation in an amount equal to their final salary for the remainder of the term which they would have normally served if they had remained in office; after expiry of

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[1.] Here and elsewhere, approximate conversions are given in accordance with the exchange rate on 6 March 2012.

that term the compensation paid to judges who had resigned would be recalculated in accordance with the latest version of section 36.

13. Unlike previous amendments to that provision, the 23 December 2005 version of section 36 was given retroactive effect by virtue of section 40(7)(1), inserted in the Supreme Court Act on the same day.

B. First pension dispute

14. On 3 September 2004 the applicant, dissatisfied with the procedure for payment of her pension, brought an action against the State seeking compensation for pecuniary damage, challenging, in particular, the lawfulness of the application of the amendment of 16 March 2001 to the Supreme Court Act. Relying on the original version of section 36 of the Act, she requested that her pension be adjusted in line with the Supreme Court judges' pay rise which had occurred after her retirement, and that she be compensated for the resulting arrears. The Georgian State Social Insurance Fund ("the Fund") was a respondent in the proceedings.

15. On 27 December 2004 the Krtsanisi-Mtatsminda District Court in Tbilisi allowed her claim in part, reasoning, *inter alia*, that the amendment of 16 March 2001 could not be given retroactive force under Article 6 of the Civil Code in so far as, by removing the adjustment clause, it worsened the applicant's situation.

16. On 23 May 2005 the Tbilisi Court of Appeal overturned the lower court's decision, stating that there were no signs of a worsening of the applicant's pre-existing situation.

17. Finally, in a judgment of 21 February 2006 following a cassation appeal, adopted by a majority vote, a three judge bench of the Administrative Division of the Supreme Court ("the majority") quashed the appeal decision of 23 May 2005 and allowed the applicant's claim in full.

18. At the outset, the majority noted that, in so far as the Fund had paid the applicant, by error, her January 2006 pension in an amount corresponding to the latest salary of a serving Supreme Court judge (GEL 3,000 – EUR 1,378), the applicant's claim should be limited in time up to and including December 2005.

19. The majority then stated that the amendment of 16 March 2001 could not have retroactive force because it did not contain any indication to that effect as required by section 47(1) of the Act on Normative Acts (see 38 below). In the absence of such an explicit indication, it could not legitimately be inferred that the legislature had intended to deprive judges who had already retired of their "adjustment right" *ex post facto*; the respondent administrative authority's decision to do so had therefore been arbitrary.

20. The majority also stated that, in so far as section 8 of the Act of 25 June 1996 on Supreme Court Judges' Social Security Entitlements ruled

out the possibility of a reduction in a Supreme Court judge's salary, it was logical to assume that the adjustment clause was, in principle, meant to protect the right to an increase in pension.

21. The majority further ruled that, when deciding on a dispute, the courts must apply the statute in force at the time material to the critical event, even if the legal consequences of that event only emerged later under a different statutory regime. To hold otherwise, in the opinion of the cassation court, "would undermine legal certainty ... and ... allow the legislature's arbitrariness to replace a stable legal order." Despite the fact that the applicant's pension rights were obviously of a continuous nature, those rights had arisen, in the opinion of the Supreme Court, as a result of the material fact of the applicant's retirement in May 2000, when she had been granted a pension for life under the original version of section 36 of the Supreme Court Act.

22. In view of the above, the majority concluded that the impugned amendment of 16 March 2001 should apply only to those judges who had voluntarily relinquished office or retired on reaching pensionable age or on expiry of their term of office, and had thus acquired their pension rights after its entry into force. In no way could that amendment be understood to replace the original section 36 of the Supreme Court Act and to apply to retired judges who had already obtained their pension rights.

23. The majority also noted that the original version of section 36 of the Supreme Court Act set a very high standard of retirement benefit for Supreme Court judges. It stated in this regard that "the creation of generous pension benefits is not only a question of providing social protection for any particular retired judge, it also aims to maintain the independence and impartiality of the judiciary in general, by providing serving judges with the expectation of obtaining the same benefits upon their future retirement..."

24. One of the members of the Supreme Court, Judge S., expressed a dissenting opinion. He reasoned, in so far as relevant, that the removal of the adjustment clause from the original version of section 36 of the Supreme Court Act could not be said to have necessarily caused the applicant's situation to deteriorate, as the pension might equally have been reduced and not just increased. Contrary to the majority's opinion, he stated that section 8 of the Act of 25 June 1996 on Supreme Court Judges' Social Security Entitlements had nothing to do with the protection of judges' retirement pensions. As to the question whether a Supreme Court judge's pension could be reduced, Judge S. replied in the affirmative, arguing that such a mechanism existed under section 81(4) of the Act on the Courts of Common Jurisdiction. In his opinion, the amendment of 16 March 2001 could be held applicable to the applicant's situation because it did not affect her right to receive the pension as such, but simply redefined its amount.

25. Judge S. also stated that "neither the amendment of 16 March 2001 nor the amendment of 23 December 2005, which fixed the pension for

judges who had already retired at GEL 1,200, breached ... the principle of legal certainty”. He concluded that the applicant’s pension should be adjusted in line with the Supreme Court judges’ pay rise only between 10 March 2005, when the adjustment clause had been reintroduced into section 36 of the Supreme Court Act, and 1 January 2006, when the *ex post facto* amendment of 23 December 2005 had entered into force.

26. The judgment of 21 February 2006 ordered the Fund to compensate the applicant for all the arrears accumulated as a result of the failure to adjust her pension in line with the Supreme Court judges’ pay rises up to and including December 2005, as required by the original version of section 36 of the Supreme Court Act.

27. The Fund discharged the judgment debt of 21 February 2006 in the applicant’s favour in due time.

C. Second pension dispute

28. With effect from February 2006, the Fund, relying on the amendment of 23 December 2005 to the Supreme Court Act, fixed the applicant’s pension at GEL 1,200 (EUR 551).

29. In view of the above, on 31 May 2006 the applicant brought another action for damages against the Fund, challenging the lawfulness of the application of the amendment of 23 December 2005 to her situation.

30. On 19 September 2006 the Tbilisi City Court dismissed the applicant’s action as manifestly ill-founded. Its reasons mostly corresponded to those given by Judge S. in his dissenting opinion on the judgment of 21 February 2006. The first-instance court added that the impugned amendment of 23 December 2005, unlike the previous amendments to section 36 of the Supreme Court Act, contained a clear indication of its retroactive effect and was, consequently, compatible with section 47(1) of the Act on Normative Acts.

31. The applicant lodged an appeal against the judgment of 19 September 2006, which was dismissed by the Tbilisi Regional Court on 6 March 2007. Referring to paragraphs 39 and 45 of the Court’s judgment in the case of *Kjartan Ásmundsson v. Iceland* (no. 60669/00, ECHR 2004-IX), the appellate court stated that Article 1 of Protocol No. 1 did not guarantee the right to receive a pension of a particular amount. In reply to the applicant’s complaint that the first-instance court had disregarded the findings of the Supreme Court’s judgment of 21 February 2006, the Regional Court stated that the scope of that judgment had been limited to resolving her pension dispute arising out of the amendment of 16 March 2001; the judgment of 21 February 2006 had never addressed the issue of payment of her pension on the basis of the amendment of 23 December 2005.

32. On 9 July 2007 the applicant lodged a cassation appeal against the appellate judgment of 6 March 2007. Amongst other arguments, the applicant affirmed, referring to the case of *Zielinski and Pradal and Gonzalez and Others v. France* ([GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII), that legislative interference retroactively affecting a civil right was incompatible with the Convention. In support of the admissibility of her cassation appeal, the applicant, comparing the Supreme Court's judgment of 21 February 2006 with the Tbilisi Regional Court's judgment of 6 March 2007, pointed out that the two decisions had resolved an analogous situation differently, and argued that an examination of her cassation appeal on the merits was indispensable for the consistent development of the domestic case-law on the subject.

33. On 10 October 2007 a bench of the Administrative Division of the Supreme Court, composed of Judge S. (see paragraph 24 and 25 above) and two other judges who had not participated in the examination of the applicant's first pension dispute, declared the cassation appeal of 9 July 2007 inadmissible. The decision was delivered without an oral hearing, under the written procedure. Without specifically addressing any of the applicant's cassation arguments, the cassation court stated that none of the conditions of admissibility envisaged by the relevant provision of the General Administrative Code had been met.

34. The applicant then requested the setting-aside of the decision of 10 October 2007 on the basis of Article 422 § 1 (a) of the Code of Civil Procedure. She complained that Judge S. should not have participated in the examination of her cassation appeal of 9 July 2007, in so far as he had already expressed his opinion on the same issue; that constituted a ground for his exemption or withdrawal under Articles 31 § 1 (d) and 32 of the Code of Civil Procedure.

35. In a final decision of 26 December 2007 the Supreme Court rejected as unsubstantiated the applicant's request to have the impugned decision set aside. The fact that Judge S. had expressed a dissenting opinion on the judgment of 21 February 2006 could not, in the cassation court's view, be accepted as evidence of bias, actual or implied, against the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Codes of Civil and Administrative Procedure as they stood at the material time

36. The relevant provisions of the Code of Civil Procedure read as follows:

Article 29 – Exclusion of a judge from repeated examination of a case

“1. A judge who participated in the examination of a case in the court of first instance shall not participate in the examination of the same case in appellate or cassation proceedings.

2. A judge who participated in the examination of a case by the appellate court shall not participate in the examination of the same case in a court of first instance or in cassation proceedings.

3. A judge who participated in the examination of a case at cassation level shall not participate in the examination of this case in a court of first instance or in appellate proceedings.”

Article 31 § 1 (d) – Grounds for a judge’s exemption from the case

“1. A judge may not participate in the examination of the case if: ...

(d) he or she is believed to be personally, directly or indirectly interested in the outcome of the case or there exist other reasons which cast doubt on his or her impartiality.”

Article 32 – Withdrawal of a judge

“If there exists a ground for exempting a judge from sitting in the case, the judge concerned must withdraw. The court shall deliver a decision explaining the reason for the withdrawal.”

Article 422 §§ 1 (a) – Request to render a final judgment (decision) null and void

“1. A final and binding judgment (decision) may be quashed at the request of the party concerned if:

(a) A judge who participated in the determination of the case has been barred from doing so by law...”

37. Article 7 of the Code of Administrative Procedure reads as follows:

Article 7 – Exclusion of a judge from repeated examination of a case

“A judge shall not participate in the hearing of a case if he or she previously participated in administrative proceedings in connection with the case.”

B. The Act of 29 October 1996 on Normative Acts

38. Section 47(1) reads as follows:

“1. A normative act can have retroactive force only if this is explicitly stated.”

C. The Act of 27 December 2005 on State Compensation

39. This Act, which entered into force on 1 January 2006, consolidated, under a single legal regime for State compensation, the payment of pensions for retired civil servants, including those who had previously been entitled, under various distinct statutes, to a life-long pension in an amount permanently adjustable in line with changes in the salary scales of the corresponding posts (such as retired public prosecutors, retired officials of the Defence, Interior and Security Ministries and former members of Parliament).

40. Section 7 of the Act fixed the maximum level of such State compensation for all the retired civil servants concerned, irrespective of the number of years they had served and in which part of the public service, at GEL 560 (EUR 260).

D. The Act of 13 June 1997 on the Courts of Common Jurisdiction

41. The relevant provisions read as follows:

Section 81(4)

"4. Funds allocated in the State budget for current expenditure of the courts of common jurisdiction may be reduced in relation to the previous year's allocation only by consent of the general conference of judges."

Section 82(2) (*in fine*, as amended on 21 December 2004)

"2. It is forbidden to reduce a judge's salary throughout the entire term of his or her office."

E. The Act of 25 June 1996 on Supreme Court Judges' Social Security Entitlements

42. The relevant provision reads as follows:

Section 8 (as amended on 23 December 2005)

"It is forbidden to reduce a Supreme Court judge's salary throughout the entire term of his or her office."

F. The Supreme Court judges' pay rise of 1 January 2006 and the composition of the Administrative Division of the Supreme Court

43. On 23 December 2005 the Act on Salary Benefits for Judges of the Courts of Common Jurisdiction was adopted, fixing a Supreme Court

judge's salary at GEL 3,000 (EUR 1,378). The Act entered into force on 1 January 2006.

44. By an amendment of 20 June 2007 to that Act, a Supreme Court judge's salary was raised to GEL 3,100 (EUR 1,424). An amendment of 28 December 2007 further raised the salary to GEL 4,200 (EUR 1,929).

45. Finally, by virtue of a further amendment of 19 December 2008, which is still in force, the current salary of a Supreme Court judge was set at GEL 4,400 (EUR 2,020).

46. The Administrative Division of the Supreme Court of Georgia, which was the highest cassation court in all types of judicial proceedings concerning administrative disputes, was composed of six judges at the time of the examination of the applicant's pension disputes.

G. European Charter on the Statute for Judges

47. The Charter was adopted during the second multilateral meeting concerning the status of judges in Europe, organised by the Council of Europe in Strasbourg on 8-10 July 1998. Its relevant parts read as follows:

> "**1. General Principles**
>
> 1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. The present Charter is composed hereafter of the provisions which are best able to guarantee the achievement of those objectives. Its provisions aim at raising the level of guarantees in the various European States. They cannot justify modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned. ...
>
> **6. Remuneration and Social Welfare**
>
> 6.4 [The Charter] specifies in this context that judges who have reached the age of judicial retirement after the requisite time spent as judges must benefit from payment of a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

48. The applicant complained that Judge S.'s participation in the examination of her second pension dispute had breached the impartiality

principle set forth in Article 6 § 1 of the Convention. This provision reads, in its relevant part, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an ... impartial tribunal ..."

A. Admissibility

49. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

50. The Government submitted that the mere fact that Judge S. had been a member of the bench of the Supreme Court of Georgia that had dealt with the applicant's two different cases could not constitute, according to the relevant domestic law, a ground for the withdrawal of that judge from the second dispute. The two distinct pension disputes had concerned different factual circumstances and legal problems and could not thus be considered as one continuing case. The fact that Judge S. had maintained a similar point of view concerning the issue in general, expressing his opinions on the matter in two disconnected sets of proceedings, was not sufficient basis for claiming that he had a personal interest in the result of the second set of proceedings.

51. In reply, the applicant maintained that the principle of impartiality had been violated on account of the participation of Judge S. in her second pension dispute, which concerned the amendment of 23 December 2005, owing to the fact that he had already expressed his opinion on the same amendment during the first case.

2. The Court's assessment

52. The Court reiterates that Article 6 § 1 of the Convention requires a court to be impartial. Impartiality denotes the absence of prejudice or bias. The Court has determined the existence or absence of impartiality of a judge according to a subjective test, that is, on the basis of the personal conviction or interest of a particular judge in a given case, and also according to an objective test, that is, by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII). In deciding whether in a given case there is a legitimate reason to fear that

these requirements are not met, the standpoint of a party is important but not decisive. What is decisive is whether this fear can be held to be objectively justified. In this respect even appearances are of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, §§ 191 and 194, ECHR 2003-VI).

53. Turning to the present case, the Court notes that, under the relevant subjective test, there existed a presumption in favour of the personal impartiality of Judge S., a member of the Supreme Court of Georgia, with respect to his role in the examination of the applicant's two pension cases (see, for instance, *Indra v. Slovakia*, no. 46845/99, §§ 49 and 50, 1 February 2005). The mere fact that Judge S. had expressed a separate, unfavourable opinion concerning the applicant's first pension dispute cannot be considered, in the eyes of the Court, as sufficient proof of the subsequent emergence of any personal bias on his part against the applicant during the examination of her second dispute.

54. As to the objective test, the Court, subscribing to the Government's arguments, attaches importance to the fact that the applicant's two pension disputes, albeit related thematically to each other, could not be considered as proceedings involving "the same case" or "the same decision" (see *Kleyn and Others*, cited above, § 200), as they concerned different factual circumstances and legal provisions. Furthermore, given the limited number of judges sitting in the relevant Division of the Supreme Court of Georgia (see paragraph 46 above), it may often prove to be unavoidable, and it would indeed be only natural, for the same judges to be involved in the examination of an issue on which they have already expressed an opinion in a previous set of unrelated but similar proceedings at the cassation level. Consequently, the fact that Judge S. was involved in both of the applicants' unconnected but similar pension disputes, first acting in the minority and then forming part of the majority of the cassation court, cannot justify, from an objective standpoint either, the applicant's apprehension that the judge lacked the necessary impartiality in the course of her second dispute.

55. Consequently, there has been no violation of Article 6 § 1 of the Convention as regards the requirement of an impartial tribunal.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

56. The applicant complained that the *ex post facto* amendment of 23 December 2005 had deprived her of the right to receive a pension under the adjustment clause of the original version of section 36 of the Supreme Court Act, in breach of Article 1 of Protocol No. 1. This provision reads, in its relevant part, as follows:

> "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 ..."

A. Admissibility

57. The Government submitted that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. They stated that the applicant should have applied to the Constitutional Court of Georgia and requested that the impugned amendment of 23 December 2005 be repealed as being unconstitutional.

58. The applicant disagreed.

59. The Court reiterates that it has already found the lodging of an individual constitutional complaint in Georgia to be an ineffective remedy for the purposes of Article 35 of the Convention, mainly on account of the Constitutional Court's inability to set aside individual decisions by the public authorities or courts which directly affect the complainant's rights (see *Apostol v. Georgia*, no. 40765/02, §§ 41-47, ECHR 2006-XIV).

60. Consequently, the Court, dismissing the Government's objection of non-exhaustion, notes that the complaint under Article 1 of Protocol No. 1 is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further notes that the complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) The Government

61. At the outset, the Government described the general context of the Georgian social security system. The system, as a vestige of the Soviet era, was based on the principle of solidarity rather than the contributory principle, as a result of which, they argued, the margin of appreciation of the respondent State in regulating and fixing the specific amounts of pensions was particularly wide. The Government further submitted that a major reform of the social security system had been initiated in Georgia in the last few years. That process required complex planning of financial policy, consideration of the potential of the public budget and a careful review of a large number of other factors, including the need to avoid the imposition of an additional heavy burden on taxpayers.

62. The Government explained that the adjustment clause, as initially contemplated by the respondent State, had been aimed at providing a special

standard of welfare for persons of special merit because of their services to the country, such as former members of the Supreme Court of Georgia. They emphasised that at the time of the introduction of that clause salaries in the public sector, in line with which the life-time pension was intended to be adjustable, had been very low. Thus, relying on the official statistical data, the Government stated that the average monthly salary in the public sector at that time had been roughly equal to GEL 85 (EUR 39). However, over a period of several years thereafter, salaries had increased significantly. By 2004 the average salary in the public sector had risen to GEL 192 (EUR 88), while in 2008 it was GEL 870 (EUR 399).

63. The State, facing a budget deficit due to the rise in public salaries, had either to maintain the resulting increase in pensions for the special category of persons while on the other hand leaving the most vulnerable category with miserable pensions, or to set a decent and fair pension for the special category while starting a gradual but steady and rapid increase in the pensions of ordinary senior citizens. The second option had been chosen. The Government added that, in addition to reducing the life-time and adjustable pension of retired Supreme Court judges to GEL 1,200 (EUR 551), a move which concerned 21 individuals overall, the respondent State had also concurrently adopted, on 27 December 2005, a new Act on State Compensation (see paragraphs 39 and 40 above), which similarly discontinued the application of the same adjustment principle to the pensions of 850 retired civil servants (former officials of the Defence, Interior and Security Ministries (191 individuals), former public prosecutors (98 individuals) and former members of Parliament (561 individuals)).

64. However, despite repealing the adjustment clause, the State had maintained the general idea of a special life-time pension for meritorious individuals, by fixing the maximum amount at a fair level which had been and continued to be well beyond the amount of the average regular pension. In particular, the applicant's current allowance of GEL 1,200 (EUR 551) was almost twelve times the amount of the average pension, which currently amounted to approximately GEL 100 (EUR 46). This meant that the applicant, a former Supreme Court judge, was provided with a level of financial support reflecting her merit, and enjoyed a far better standard of living than the average senior citizen in Georgia. In other words, the State, whilst exercising its sovereign power to reform its social and economic policy, had implemented legislative amendments that were reasonably proportionate to the interest pursued.

65. The Government further submitted that when the amendment of 23 December 2005 had repealed the adjustment clause and granted retired Supreme Court judges a pension of GEL 1,200 (EUR 551), it had not deprived the judges of their right to receive a pension as such, but rather had regulated the question anew by changing the amount. They reiterated that the determination of social policy fell, according to the relevant case-law of

the Court, within the wide margin of appreciation of the national authorities, and that Article 1 of Protocol No. 1 should in no way be interpreted as entitling a person to receive a pension of a particular amount.

(b) The applicant

66. The applicant replied that in so far as the adjustment clause had first been repealed as far back as 16 March 2001, that is, several years before the salaries in the public sector had started to rise in 2004-2005, it was scarcely possible to establish any causal link between the two events. Consequently, the Government's argument that the removal of the clause had been a necessary austerity measure, aimed at avoiding an added burden for taxpayers when State expenditure increased owing to the payment of higher public salaries, was illogical. The applicant also maintained that the argument about the State budget deficit could not be a genuine reason for the removal of the adjustment clause, as it had been voiced by the State for the first time in the proceedings before the Court. No such reason had ever been cited, even in approximate terms, whether in the official explanatory memorandum to the amendment of 23 December 2005, by the legislature during the examination of that amendment in Parliament or in the respondent authority's submissions during the relevant judicial proceedings at domestic level.

67. Furthermore, pointing out that only 21 retired Supreme Court judges, including herself, were concerned by the removal of the adjustment clause, the applicant stated that it was incongruous to claim that the funds saved by reducing the pension of such a small number of persons could make any meaningful contribution to the financing of pensions for ordinary senior citizens. The supposed causal link between the two events was further undermined by the fact that, while the removal of the clause had occurred in December 2005, the pension of ordinary senior citizens had started to rise only several years later, in 2008. If the State budget deficit was the real reason for the annulment of the life-long and adjustable pension of the twenty-one retired senior Supreme Court judges, the applicant wondered how it had become possible to increase significantly in a rather short period of time the salary of acting judges of the Supreme Court, which was currently fixed at GEL 4,400 (EUR 2,020). As further proof of the manifestly unfair distribution of public funds between acting senior public servants and retired judges' pensions, the applicant also commented on the fact that Ministers' salaries had recently reached approximately GEL 5,000 (EUR 2,305); the salary of the Chief Public Prosecutor had risen to GEL 4,000 (EUR 1,844) and that of the regional public prosecutors was set at GEL 2,580 (EUR 1,190). Thus, the applicant complained that she and her fellow retired judges of the Supreme Court were being required to bear an excessive burden, incompatible with the proportionality test under Article 1 of Protocol No. 1.

68. The applicant also complained that, by adopting the amendment of 23 December 2005 which discontinued the application of the adjustment clause to her situation, the legislative authority had interfered, with retrospective effect, in her pending judicial dispute with the Fund, in breach of the principle of legal certainty and other principles of the rule of law enshrined in the Convention (she referred to *Zielinski and Pradal and Gonzalez and Others*, cited above, § 53, and *Smokovitis and Others v. Greece*, no. 46356/99, § 34, 11 April 2002). The applicant then pointed to the provision of the European Charter on the Statute for Judges according to which the level of social protection for judges could not be downgraded once it had been established (see paragraph 47 above). She emphasised in that respect that not only the social well-being of individual judges was at stake but also the protection of the judicial system in the form of the guarantees for its independence from outside pressure. The applicant also submitted opinions issued by the Constitutional Court of Georgia and various State and independent legal experts, all of which warned the Georgian Parliament that the removal of the adjustment clause in relation to the pensions rights of retired judges would be incompatible with the relevant international standards on the protection of judges and might undermine the guarantees of stability, irremovability and independence of the judiciary.

2. *The Court's assessment*

(a) General principles

69. The Court reiterates that Article 1 of Protocol No. 1 does not guarantee, as such, any right to a pension of a particular amount (see, amongst other authorities, *Kjartan Ásmundsson*, cited above, § 39). However, where a Contracting State has in force legislation providing for the payment as of right of a pension – whether or not conditional on the prior payment of contributions – that legislation has to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 64, ECHR 2010). The reduction or the discontinuance of a pension may therefore constitute interference with possessions that needs to be justified (see, for instance, *Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009).

70. Indeed, the principles which apply generally in cases under Article 1 of Protocol No. 1 are equally relevant when it comes to pensions (see, as a recent authority, *Stummer v. Austria* [GC], no. 37452/02, § 82, 7 July 2011). Thus, the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful and that it should pursue a legitimate aim "in the public interest". Any interference must also be reasonably

proportionate to the aim sought to be realised. In other words, a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden (see, amongst many other authorities, *The Former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 79 and 82, ECHR 2000-XII).

71. Whilst Article 1 of Protocol No. 1 cannot restrict a State's freedom to choose the type or amount of benefits that it provides under a social security scheme (see *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 53, ECHR 2006-VI), it is also important to verify whether an applicant's right to derive benefits from the social security scheme in question has been infringed in a manner resulting in the impairment of the essence of his or her pension rights (see *Wieczorek v. Poland*, no. 18176/05, § 57, 8 December 2009). In addition, any measure reducing the amount of pensions normally payable to the qualifying population must be implemented in a non-discriminatory manner (see *Lakićević and Others v. Montenegro and Serbia*, nos. 27458/06, 37205/06, 37207/06 and 33604/07, § 59, 13 December 2011).

(b) Application of the above principles to the present case

(i) Whether there was interference with the applicant's possessions

72. Turning to the present case, the Court considers that the applicant's right to receive a life-long retirement pension in an amount equal to her final salary and adjustable in accordance with changes in the salary of serving Supreme Court judges under the original version of section 36 of the Supreme Court Act, as that provision stood at the time of her retirement on 4 May 2000, created a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 (see, for instance, *Stec and Others v. the United Kingdom* (dec.), no. 65731/01 and 65900/01, § 39 ECHR 2005-X). Furthermore, the subsequent discontinuation of the adjustment requirement since 1 January 2006, as a result of which the applicant became unable to claim a higher pension despite the significant rise in the salary of acting Supreme Court judges, a statutory change which clearly reduced the initial scope of the applicant's pension entitlement, must be regarded as interference with her right to the peaceful enjoyment of her possessions. This interference thus requires to be justified under the relevant "lawfulness", "public interest" and "proportionality" principles contained in Article 1 of Protocol No. 1 (see, for instance, *Lakićević and Others*, cited above, § 59).

(ii) Lawfulness of the interference

73. The Court first notes that the applicant's complaint about the legislative interference with the pending judicial proceedings concerning her pension rights (see paragraph 68 above) is misconceived. At the time of the adoption of the amendment of 23 December 2005 only the applicant's first pension dispute, calling into question the lawfulness of the separate amendment of 16 May 2001, was pending (compare *Torri and Others v. Italy* (dec.), nos. 11838/07 and 12302/07, 24 January 2012). That first dispute, it must be noted, was then finally determined in the applicant's favour by the Supreme Court's final decision of 21 February 2006. It was only after the relevant State agency had started implementing the new pension scheme under the impugned amendment of 23 December 2005 that she brought, on 31 May 2006, a second action against the State, unrelated to the previous set of pension proceedings (see paragraphs 11 and 26-29 above).

74. In so far as the above-mentioned complaint by the applicant can also be understood as challenging the amendment of 23 December 2005 as an attempt to thwart the general interpretation adopted by the domestic courts in the course of her first pension dispute regarding comparable statutory regulations with retrospective effect, the Court has already ruled on previous occasions that statutory pension regulations are liable to change, that the legislature cannot be prevented from regulating, via new retrospective provisions, pension rights derived from the laws in force and that a final judicial decision on a comparable matter cannot be validly used as a shield against such changes in the future (see, *mutatis mutandis*, *Arras and Others v. Italy*, no. 17972/07, § 42, 14 February 2012; see also *Sukhobokov v. Russia*, no. 75470/01, § 26, 13 April 2006).

75. The Court thus concludes that the interference with the applicant's pension rights, which was effected on the basis of the clearly and precisely formulated legislative amendment of 23 December 2005 and was not tainted by any manifest arbitrariness in the course of the application of that amendment by the relevant domestic authorities (see *Torri and Others*, cited above, § 42, and *Moskal v. Poland*, no. 10373/05, § 56, 15 September 2009), satisfied the lawfulness requirement under Article 1 of Protocol No. 1.

(iii) Legitimate aim and proportionality of the interference

76. Reiterating that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest", and that that notion is particularly extensive when the implementation of social and economic policies is at stake, the Court accepts the Government's argument that the amendment of 23 December 2005, which removed the adjustment clause from section 36 of the Supreme Court Act, pursued the legitimate

aim of maintaining the sustainability of the public budget, thereby rationalising public expenditure (see, *mutatis mutandis*, *Panfile v. Romania* (dec.), no. 13902/11, 20 February 2012; *Šulcs v. Latvia* (dec.), no. 42923/10, §§ 25 and 29, 6 December 2011; *Leinonen v. Finland* (dec.), no. 33898/96, 7 June 2001; *Moskal*, cited above, § 61; and *Arras and Others*, cited above, § 81).

77. As to whether the interference in the instant case was proportionate to the legitimate aim pursued, the Court notes that the State's rationale for granting the applicant entitlement to a life-long pension equivalent, as a minimum, to her final salary and also adjusted in accordance with the salary rises of acting judges, was the public recognition of her merit on account of her services to the State as a Supreme Court judge. It further notes that, whilst discontinuing the adjustment requirement, the amendment of 23 December 2005 entitled the applicant instead to a sum of GEL 1,200 (EUR 551). It is significant that the new amount of the applicant's retirement benefit slightly exceeded the amount of her final salary before retirement (see paragraph 7 above). It therefore preserved, in substance, the initial equivalence requirement of her special pension entitlement and, as the Government demonstrated, was still much higher than the average retirement pension in Georgia, thus maintaining the idea of a special, more generous welfare scheme for retired Supreme Court judges. That being so, the Court finds that the amendment of 23 December 2005 cannot be said to have impaired the very essence of the applicant's special retirement benefit as it was initially contemplated by the respondent State (contrast, for instance, *Lakićević and Others*, cited above, § 72, and *Kjartan Ásmundsson*, cited above, § 45).

78. The Court further observes that the amendment of 23 December 2005 to the Supreme Court Act was not a single isolated statutory change but formed part of a much wider legislative reform of the pension system for retired civil servants. In particular, the concurrently enacted Act on State Compensation similarly discontinued the application of the same adjustment to the pensions of 850 retired civil servants (see paragraphs 39, 40 and 62 above). Consequently, it cannot be said, contrary to the applicant's assertion, that the general reform of retired civil servants' pension entitlements made the applicant bear an individual and excessive burden as one of the small number of retired judges of the Supreme Court.

79. All in all, the Court, having regard to the respondent State's wide margin of appreciation in balancing the rights at stake in relation to economic policies in situation of complex transitional processes and observing the overall public interests (see, for instance, *Frimu and Others v. Romania* (dec.), nos. 45312/11, 45581/11, 45583/11, 45587/1 and 45588/11 7 February 2011; *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, § 63, 31 May 2011; *Lenz v. Germany* (dec.), no. 40862/98, ECHR 2001-X; and also *Šulcs*, cited

above, § 26), concludes that the discontinuation of the adjustment requirement in relation to the applicant's special retirement benefit was not disproportionate to the legitimate aim pursued.

80. It follows that there has been no violation of Article 1 of Protocol No. 1.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

81. Lastly, the applicant complained that the incorrect reading and application of the relevant domestic law to her situation by the courts in the course of her second pension dispute amounted to a violation of her rights under Articles 6 § 1 and 14 of the Convention.

82. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 concerning, respectively, the participation of Judge S. in the examination of her case and the amount of her retirement pension admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been no violation of Article 6 § 1 of the Convention;

3. *Holds* by six votes to one that there has been no violation of Article 1 of Protocol No. 1.

Done in English, and notified in writing on 19 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Gyulumyan is annexed to this judgment.

J.C.M.
S.Q.

DISSENTING OPINION OF JUDGE GYULUMYAN

I am unable to share the view of the majority of the Chamber that the applicant's rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 were not violated in the present case.

1. The applicant, who was a judge of the Supreme Court of Georgia, retired on age grounds and was granted a pension under section 36 of the Act of 12 May 1999 on the Supreme Court of Georgia, according to which a Supreme Court judge was entitled to a life-long pension in an amount equal to his or her final salary and adjustable in line with changes in the salary scales of serving Supreme Court judges. Section 36 of the Supreme Court Act was later amended on several occasions.

The applicant brought two different actions against the State challenging the lawfulness of the application of the amendment of 16 March 2001, which removed the second clause concerning the adjustment requirement, and that of 23 December 2005, which fixed the pensions for judges who had already retired.

2. In the course of the applicant's first pension dispute, Judge S., overstepping the scope of that case, which should normally have been limited to the issue of the lawfulness of the amendment of 16 March 2001 to the Supreme Court Act, clearly expressed his opinion about the lawfulness of the subsequent amendment of 23 December 2005. Judge S.'s interpretation of the amendment of 23 December 2005 was not merely theoretical; on the contrary, he specifically suggested that the amendment in question should be held applicable to the applicant's particular situation (see paragraph 25 of the judgment).

3. In so far as the lawfulness of the application of the same amendment of 23 December 2005 to the applicant's pension rights was at the core of her second dispute, I consider that Judge S.'s participation for a second time in the examination of the same issue breached the relevant impartiality requirement under Article 6 § 1 of the Convention (compare *Kleyn and Others*, cited above, § 200; *Sacilor-Lormines v. France*, no. 65411/01, § 73, ECHR 2006-XIII; and *Mežnarić v. Croatia*, no. 71615/01, § 32). Indeed, the applicant's fear that, in the light of his previously expressed opinion on the same matter, Judge S. had a preconceived idea as to the outcome of her second pension dispute was objectively justified. His involvement in the second dispute could hardly be said to have been conducive to the level of confidence that the highest judicial body in the country should normally inspire in society (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86, and *Castillo Algar v. Spain*, 28 October 1998, § 32, *Reports of Judgments and Decisions* 1998-VIII).

4. These considerations lead me to conclude that there has been a violation of Article 6 § 1 of the Convention as regards the requirement of an impartial tribunal.

5. As regards compliance with Article 1 of Protocol No. 1, it is true that the latter does not guarantee, as such, the right to an old-age pension or to any social benefit in a particular amount (see, for example, *Aunola v. Finland* (dec.), no. 30517/96, 15 March 2001). However, the Court's case-law states that, if the right to receive a pension in a particular amount is established either by law or by a binding court decision, such a right clearly falls within the ambit of Article 1 of Protocol No. 1 (see, for example, *Andrejeva v. Latvia* [GC], n° 55707/00, §§ 77 and 78, 18 February 2009; *Pravednaya v. Russia*, no. 69529/01, §§ 37-41, 18 November 2004; *Smirnitskaya and Others v. Russia*, no. 852/02, §§ 33-37, 5 July 2007; and *Solodyuk v. Russia*, no. 67099/01, §§ 26-27, 12 July 2005).

The Chamber accepts that, on the basis of the original version of section 36 of the Act on the Supreme Court of Georgia, the applicant's right to receive a retirement pension in an amount adjustable in line with the salary of a Supreme Court judge was covered by Article 1 of Protocol No. 1 (see paragraph 72 of the judgment).

6. Furthermore, the retroactive application of a law which deprives a person of a pecuniary interest is to be regarded as a taking of property within the meaning of the first paragraph of Article 1 of Protocol No. 1 (see, for example, *Smirnitskaya*, cited above, §§ 49-53, and *Smokovitis and Others v. Greece*, no. 46356/99, §§ 32-34, 11 April 2002).

The judgment of the Administrative Division of the Supreme Court stated that the amendment of 16 March 2001 could not have retroactive force. Despite the fact that the applicant's pension rights were obviously of a continuous nature, those rights had arisen, in the opinion of the Supreme Court, as a result of the material fact of the applicant's retirement in May 2000, when she had been granted a pension for life under the original version of section 36 of the Supreme Court Act.

7. The majority of the Supreme Court also noted that the original version of section 36 of the Supreme Court Act set a very high standard of retirement benefit for Supreme Court judges. It stated in this regard that *"the creation of generous pension benefits is not only a question of providing social protection for any particular retired judge, it also aims to maintain the independence and impartiality of the judiciary in general, by providing serving judges with the expectation of obtaining the same benefits upon their future retirement..."* (see paragraph 23 of the judgment).

8. The majority of the Chamber attaches too much importance to reasons based on economic arguments relating to "the sustainability of the public budget" and "rationalising public expenditure". I am not disputing the value of these aims, but that does not mean that they should outweigh the independence of the judiciary.

Moreover, it has not been demonstrated by the respondent State how and to what extent the sustainability of the budget would in fact be jeopardised if some twenty-one individuals were to receive some increase in their pensions.

That being so, the applicant's inability to benefit from increases in her pension as of 1 January 2006, by virtue of the *ex post facto* amendment of 23 December 2005, calls for a finding that there has been a violation of Article 1 of Protocol No. 1.