



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

FOURTH SECTION

CASE OF KAPEL v. POLAND

(Application no. 16519/05)

JUDGMENT

STRASBOURG

2 October 2012

FINAL

02/01/2013

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

In the case of Kapel v. Poland,

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

David Thór Björgvinsson, *President*,

Lech Garlicki,

Päivi Hirvelä,

George Nicolaou,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 11 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 16519/05) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Wiesław Kapel (“the applicant”), on 18 April 2005.

2. The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the *ex officio* reopening of the social security proceedings concerning his right to an early-retirement pension, which resulted in the quashing of the final decision granting him a right to a pension, was in breach of Article 1 of Protocol No. 1 to the Convention.

4. On 20 May 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1953 and lives in Wadowice Górne.

6. The applicant is married with two children. Prior to his early retirement he had been employed for twenty-eight years and had paid social security contributions to the State.

A. Proceedings concerning the grant and revocation of the EWK pension

7. On 28 May 2001 the applicant filed an application with the Rzeszów Social Security Board (*Zakład Ubezpieczeń Społecznych*) to be granted the right to an early-retirement pension for persons raising children who, due to the seriousness of their health condition, required constant care, the so-called “EWK” pension.

8. Along with his application for a pension, the applicant submitted, among other documents concerning his daughter’s health condition, a medical certificate issued by a specialist doctor on 24 May 2001. The certificate stated that his daughter M (born in 1990) had suffered from chronic asthma (*przewlekła astma oskrzelowa*) and chronic allergy sinusitis (*całoroczny alergiczny nieżyt nosa*) and that she was in need of her parent’s constant care.

9. On 16 July 2001 the Rzeszów Social Security Board (“the SSB”) issued a decision granting the applicant the right to an early-retirement pension as of 1 May 2001 in the net amount of 880.99 Polish zlotys.

10. The Social Security Board initially suspended the payment of the pension due to the fact that the applicant was still working on the date of the decision. On 31 July 2001 the applicant resigned from his full-time job as a driver at the road and bridge construction company (*Przedsiębiorstwo Drogowo-Mostowe*) in Dębica.

11. Consequently, on 21 August 2001 the Rzeszów Social Security Board issued a new decision authorising the payment of the previously awarded retirement pension starting from 1 August 2001.

12. On 27 August 2002 the Rzeszów Social Security Board asked the Main Social Security Board’s doctor (*Główny Lekarz Orzecznik*) to inform it whether the applicant’s daughter required the permanent care of a parent. On an unknown date the doctor stated that, on the basis of the medical documents, the child could not be considered as ever having required such care.

13. On 4 September 2002 the Rzeszów Social Security Board issued simultaneously two decisions in respect of the applicant.

14. By virtue of the first decision, the payment of the applicant’s pension was discontinued with immediate effect. By virtue of the other decision, the Board reopened the proceedings and revoked the initial decision granting a pension and eventually refused to award the applicant the right to an early-retirement pension under the scheme provided for by the 1989 Ordinance.

15. The applicant appealed against the respective decisions divesting him of the right to an early-retirement pension.

16. On 28 November 2002 the Tarnobrzeg Regional Court (*Sąd Okręgowy*) ordered that the case be remitted to the Social Security Board

and that the applicant's child be examined by the Social Security Board's doctor.

17. On 31 March 2003 the Social Security Board's doctor, who had examined the applicant's child, stated that M suffered from asthma (*astma oskrzelowa*) and allergy sinusitis (*alergiczny nieżyt nosa*) but did not require the permanent care of a parent.

18. On 25 February 2004 the Tarnobrzeg Regional Court dismissed the appeal. The Regional Court concluded on the basis of the evidence that the applicant's child did not require her father's permanent care, since her health condition did not significantly impair her bodily functions. The domestic court held that the applicant had been rightfully divested of his right to a pension under the scheme provided by the 1989 Ordinance as he did not satisfy the requirement of necessary permanent care.

19. The applicant appealed against the first-instance judgment.

20. On 22 July 2004 the Rzeszów Court of Appeal (*Sąd Apelacyjny*) dismissed the appeal.

21. On 24 January 2005 the Supreme Court refused to entertain a cassation appeal lodged by the applicant's lawyer.

B. The applicant's current financial situation

22. Following the revocation of his right to the early-retirement pension the applicant was not ordered to return his early-retirement benefits paid by the Social Security Board.

23. As from 1 September 2002 the applicant was unemployed and has been covered by the social insurance scheme for farmers.

24. The Government submitted that between 6 January 2005 and 11 May 2010 the applicant received sickness benefits in a total amount of PLN 7,183. They stressed that the applicant and his wife own a farm with an area of 1.83 hectares which was an additional source of income for them. Furthermore, a farm with an area of at least 1 hectare entitles the owner to receive support payments for farmers from European Union funds.

25. In addition, the Government submitted information as regards various types of social benefits available in Poland. However, they did not specify which of those benefits, if any, were available in the applicant's situation.

26. The applicant did not provide details about his financial situation after the revocation of his EWK pension. He only submitted that he was unemployed and although he ran a small farm it did not generate much income.

27. Under the relevant laws currently in force, it appears that the applicant will qualify for a regular retirement pension when he turns sixty-five in 2018.

C. Other EWK cases pending before the Court

28. Some 130 applications arising from a similar fact pattern have been brought to the Court. The majority of the applicants form the Association of Victims of the SSB (*Stowarzyszenie Osób Poszkodowanych przez ZUS*) (“the Association”), an organisation monitoring the practices of the Social Security Board in Poland, in particular in the Podkarpacki region.

29. Out of all applications lodged with the Court, about twenty-four applicants decided not to lodge a cassation appeal against the judgment of the Court of Appeal given in their case.

30. One hundred-and-four applicants lodged cassation appeals against the final judgments given in their cases. The Supreme Court entertained and dismissed on the merits fifteen appeals. In eighty-one applications the Supreme Court refused to entertain cassation appeals on the ground that they did not raise any important legal issues or require the Supreme Court to give a new interpretation to legal provisions which raised serious doubts or gave rise to ambiguity in the jurisprudence of the domestic courts. In the remaining eight cases cassation appeals were rejected for failure to comply with various procedural requirements.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Social security system

31. The legal provisions applicable at the material time and questions of practice are set out in the judgment in the case of *Moskal v. Poland*, no. 10373/05, § 31-34, 15 September 2009.

32. The social security scheme for farmers is regulated by the Farmers’ Social Security Act of 20 December 1990 (“the 1990 Act”; *ustawa o ubezpieczeniu społecznym rolników*).

33. The reopening of the proceedings concerning the early-retirement pension is regulated in section 114 (1) of the Law of 13 October 1998 on the system of social insurance (*Ustawa o systemie ubezpieczeń społecznych*), which at the relevant time read as follows:

“The right to benefits or the amount of benefits will be re-assessed upon application by the person concerned or, *ex officio*, if, after the validation of the decision concerning benefits, new evidence is submitted or circumstances which had existed before issuing the decision and which have an impact on the right to benefits or on their amount are discovered.”

On 1 July 2004 a new subparagraph 114 (1) a was added, which reads as follows:

“Section 1 shall apply respectively, if, after the validation of the decision it is discovered that the evidence that had been submitted did not give the right to a pension, disability pension or its amount.”

B. Cassation appeal

34. A party to civil proceedings could, at the material time, lodge a cassation appeal with the Supreme Court against a judicial decision of a second-instance court. A party had to be represented by an advocate or a legal adviser.

35. Article 393¹ of the Code of Civil Procedure as applicable at the material time listed the grounds on which a cassation appeal could be lodged. It read as follows:

“The cassation appeal may be based on the following grounds:

- 1) a breach of substantive law as a result of its erroneous interpretation or wrongful application;
- 2) a breach of procedural provisions, if that defect could significantly affect the outcome of the case.”

36. Pursuant to Article 393¹³ the Supreme Court, having allowed a cassation appeal, could quash the challenged judgment in its entirety or in part and remit the case for re-examination. Where the Supreme Court failed to find non-conformity with the law, it dismissed the cassation appeal. According to Article 393¹⁵ if the cassation appeal was well-founded the Supreme Court could also amend the impugned judgment and adjudicate on the merits.

C. Constitutional Court’s judgments

1. Judgment no. K 18/99

37. On 22 June 1999 the Ombudsman made an application to the Constitutional Court, asking for section 186 (3) of the Law of 17 December 1998 on retirement and disability pensions paid from the Social Insurance Fund (*Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*) (“the 1998 Law”) to be declared unconstitutional in so far as it restricted the application of the 1989 Ordinance to persons born before 1 January 1949. More specifically, the Ombudsman submitted that the introduction of an age-limit in respect of persons taking care of a child, which in essence amounted to a deprivation of the right to a benefit,

constituted a violation of the principle of equality set forth in Article 32 § 1 of the Constitution.

38. On 4 January 2000 the Constitutional Court (K18/99) declared the impugned section 186 (3) of the 1998 Law unconstitutional in so far as it restricted the application of the 1989 Ordinance to persons born before 1 January 1949. The Constitutional Court reiterated among other things the constitutional principle of acquired rights which guarantees particularly strong protection for the right to receive social welfare benefits.

2. Judgment no. K5/11

39. On 10 February 2011 the Ombudsman made an application to the Constitutional Court, asking for section 114 (1)(a) of the 1998 Law to be declared unconstitutional in so far as it allowed the SSB to reopen *ex officio* proceedings relating to the grant of a pension or a disability pension on the basis of a new assessment of evidence which had already been submitted.

40. On 28 February 2012 the Constitutional Court (K5/11) declared the impugned section 114 (1)(a) of the 1998 Law unconstitutional in so far as it allowed the SSB to reopen such proceedings following a new assessment of evidence which had already been submitted.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

41. The applicant complained that divesting him, in the circumstances of the case, of his acquired right to an early-retirement pension amounted to an unjustified deprivation of property. This complaint falls to be examined under Article 1 of Protocol No. 1 to the Convention, which reads 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 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.”

A. Admissibility

1. *The Government's preliminary objections*

(a) **Non-exhaustion of domestic remedies**

(i) *The parties' submissions*

42. The Government argued that the applicant had not exhausted the domestic remedies available to him, as required by Article 35 § 1 of the Convention.

43. They submitted that the applicant should have made an application to the Constitutional Court challenging the compatibility of the relevant social security provisions with the Constitution. They relied on a judgment delivered by the Constitutional Court on 4 January 2000 (see paragraphs 37 and 38 above).

44. In their further submissions, the Government referred to the Constitutional Court's judgment of 28 February 2012 (see paragraphs 39 and 40). They maintained that even though the decisions issued in the EWK cases had been based on section 114 (1) of the 1998 Law and not on section 114 (1)(a), the applicant should nevertheless have availed himself of the possibility of lodging a constitutional complaint.

45. The applicant did not comment on this objection.

(ii) *The Court's assessment*

46. The Court reiterates that it has already held that in Poland a constitutional complaint was an effective remedy for the purposes of Article 35 § 1 of the Convention only in situations where the alleged violation of the Convention resulted from the direct application of a legal provision considered by the complainant to be unconstitutional (see, among other authorities, *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003).

47. Furthermore, Article 35 of the Convention, which sets out the rule on exhaustion of domestic remedies, provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available not only in theory but also in practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V, and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII).

48. In so far as the Government referred to the Constitutional Court's judgment of 4 January 2000, the Court observes that the Government failed

to indicate which provision of the 1998 Law should have been challenged by the applicant before the Constitutional Court. They have merely stated that the applicant could have contested “the relevant social security provisions” without specifying any constitutional provision that could have been relied on in the applicant’s situation. Furthermore, they have not adduced any relevant case-law of the Constitutional Court which would have demonstrated that such complaint, in the circumstances of the applicant’s case, offered any prospects of success.

49. As regards the second limb of the Government’s objection, the Court observes that, as the Government have acknowledged, section 114(1)(a) of the 1998 Law was not applicable in the present case. The SSB’s decision to reopen the proceedings concerning the relevant benefit was based on section 114(1) (see paragraphs 33 and 44 above). While it is true that the Ombudsman’s application was successful (see paragraph 40 above), this does not of itself indicate that a hypothetical complaint lodged by the applicant would have had a similar effect. Moreover, it should be noted that the Ombudsman’s challenge was examined nearly ten years after the events complained of in the present case. In reality, the Government’s objection is based on a theoretical and retrospective, and therefore highly speculative, comparison between the applicant’s situation at the material time and recent developments in the Constitutional Court’s case-law.

50. In consequence, the Court considers that in the present case a constitutional complaint cannot be considered with a sufficient degree of certainty to have been a remedy offering reasonable prospects of success. For these reasons, the Government’s plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

(b) Six months

(i) The parties’

51. The Government submitted that should the Court consider that the cassation appeal had not been an effective remedy in the instant case, the calculation of the time-limit should start from the date on which the judgment of the Court of Appeal had been given. If that decision had been given more than six months before the date of introduction of the application to the Court, the application should be considered as having been lodged out of time and rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

52. The applicant contested the argument and claimed that he had complied with the six-month requirement.

(ii) The Court’s assessment

53. The Court reiterates that the object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising

issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, amongst other authorities, *Varnava and Others v. Turkey* [GC], nos. 16064/90; 16065/90; 16066/90; 16068/90; 16069/90; 16070/90; 16071/90; 16072/90 and 16073/90, §§ 156 et seq., ECHR 2009-...; and *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

The final decision for this purpose is the decision taken in the process of exhaustion of effective domestic remedies which exist in respect of the applicant's complaints (see *Kozak v. Poland*, no. 13102/02, § 64, 2 March 2010, with further references).

54. The Court further notes that there were essentially two types of decisions terminating the proceedings in the EWK cases. First, in all cases where the applicants lodged cassation appeals in accordance with the procedural requirements the Supreme Court either examined them on the merits as in *Moskal* (cited above, § 30) or, as in the instant case, decided not to entertain them. Second, in cases where the applicants desisted from lodging cassation appeals the final decisions were those given by the courts of appeal.

55. The cassation appeal was thus a remedy that had been used by the applicant in the lead *Moskal* case as well as by ninety-six other applicants whose cases are pending before the Court regarding the same subject-matter. Although the effectiveness of this remedy has been contested by certain applicants, the Court nevertheless considers that the applicant in the instant case should not be penalised for having tried to file a cassation appeal with the Supreme Court in order to avoid any risk of having his case rejected by the Court for non-exhaustion of domestic remedies.

56. Accordingly the final decision in the case was given by the Supreme Court on 24 January 2005 whereas the applicant lodged his application with the Court on 18 April 2005.

57. That being so, the Court concludes that the applicant complied with the six-month term laid down in Article 35 § 1 and that the Government's objection should be dismissed.

(c) No significant disadvantage

(i) The parties' submissions

58. Lastly, the Government argued that the present application should be declared inadmissible on the ground that the applicant had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention as amended by Protocol No. 14. They stressed that immediately following the revocation of the EWK pension, the applicant being a

co-owner of a farm with his wife, moved from the general social insurance system scheme to the farmers' social insurance system. In their opinion, respect for human rights did not require the examination of the present application. The case was duly examined by the Social Security Board and the domestic courts.

59. The applicant did not comment on the Government's objection.

(ii) The Court's assessment

60. The Court observes that the main element of the criterion set by Article 35 § 3 (b) of the Convention is whether the applicant has suffered any significant disadvantage (see *Adrian Mihai Ionescu v. Romania* (dec.), no. 36659/04, 1 June 2010, and *Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010).

61. The severity of a violation should be assessed taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case (see *Korolev*, cited above). In other words, the absence of any significant disadvantage can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant (see *Adrian Mihai Ionescu*, cited above).

62. However, in the present case the alleged lack of significant disadvantage is inseparably linked with the Court's assessment of the proportionality of the measure complained of, in particular with the question whether, in consequence of the revocation of his pension, the applicant suffered an "excessive burden" for the purposes of Article 1 of Protocol No. 1 to the Convention (see also paragraph 65 below). That being so the Government's argument would, in the Court's view, more appropriately be dealt with at the merits stage.

63. The Court accordingly joins the Government's plea of inadmissibility on the ground of the absence of any significant disadvantage to the merits of the case.

2. Conclusion on admissibility

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

B. Merits

1. The parties' submissions

(a) The applicant

65. The applicant submitted that divesting him, in the circumstances of the case, of his acquired right to an early-retirement pension had amounted to an unjustified deprivation of property.

66. In the applicant's view, there was no reasonable relationship of proportionality between the interference and the interests pursued. He had quit his employment in order to take care of his sick child. The special measures taken by the Government in the Sub-Carpathian region had no relevance for his professional situation, in view of his age and education. For these reasons it had been impossible for him to find a job. He stressed that his farm did not bring in an income.

67. The applicant also claimed that he had borne an excessive burden in that the decision of 22 September 2002 had deprived him of his main source of income with immediate effect.

(b) The Government

68. The Government claimed that the interference with the applicant's property rights had been lawful and justified. In particular, divesting the applicant of his right to the early-retirement pension had been provided for by law and was in the public interest. There was also a reasonable relationship of proportionality between the interference and the interests pursued. In the Polish social security system only retirement pensions granted under the general scheme were, in principle, permanent and irrevocable. All other benefits, based on conditions subject to change were subject to verification and possible revocation.

69. They further noted that even though the decision to revoke the EWK pension had a retroactive effect, the applicant had not been required to reimburse the sum of PLN 13,495.98. In addition, immediately after revocation of his EWK pension, the applicant had transferred from the general social insurance system to the farmers' social insurance system and to the corresponding health insurance system.

2. The Court's assessment

(a) General principles

70. The relevant general principles are set out in the *Moskal* judgment, cited above, paragraphs 49-52. The Court would nevertheless reiterate that any interference by a public authority with the peaceful enjoyment of

possessions should be lawful and must pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see *Moskal*, cited above, §§ 49 and 50).

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

(i) Whether there has been an interference with the applicant's possessions

71. The parties agreed that the decisions of the Rzeszów Social Security Board of 4 September 2002, subsequently validated by two court instances (the regional court and the court of appeal) which deprived the applicant of the right to receive the EWK pension, amounted to an interference with his possessions within the meaning of Article 1 of Protocol No. 1 to the Convention.

(ii) Lawfulness of the interference and legitimate aim

72. As in the *Moskal* case the Court considers that this interference was provided for by law and pursued a legitimate aim, as required by Article 1 of Protocol No. 1 to the Convention (see *Moskal*, cited above, §§ 56, 57 and 61-63 and also *Iwaszkiewicz v. Poland*, no. 30614/06, §§ 47, 48, 26 July 2011).

(iii) Proportionality

73. In the instant case, a property right was generated by the favourable evaluation of the applicant's dossier attached to his application for a pension, which was lodged in good faith, and by the Social Security Board's recognition of the right (see also paragraph 9 above). Before being invalidated the decision of 16 July 2001 had undoubtedly produced effects for the applicant and his family.

74. It must also be stressed that the delay with which the authorities reviewed the applicant's dossier was relatively long. The 2001 decision was left in force for fourteen months before the authorities became aware of their error. On the other hand, as soon as the error was discovered the decision to discontinue the payment of the benefit was issued relatively quickly and with immediate effect (see paragraphs 13 and 14 above).

Even though the applicant had an opportunity to challenge the Social Security Board's decision of 22 September 2002 in judicial review proceedings, his right to the pension was determined by the courts more than two years later (see paragraphs 20 and 21 above).

75. In examining the conformity of these events with the Convention, the Court reiterates the particular importance of the principle of good governance. It requires that where an issue pertaining to the general interest is at stake, especially when it affects fundamental human rights, including property rights, the public authorities must act promptly and in an appropriate and above all consistent manner (see *Beyeler v. Italy* [GC], no. 33202/96, § 120, ECHR 2000-I; *Öneryıldız v. Turkey* [GC], no. 48939/99, § 128, ECHR 2004-XII; *Megadat.com S.r.l. v. Moldova*, no. 21151/04, § 72, 8 April 2008; and *Rysovsky v. Ukraine*, no. 29979/04, § 71, 20 October 2011). It is desirable that public authorities act with the utmost care, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other such rights. In the present case, the Court considers that having discovered their mistake, the authorities failed in their duty to act speedily and in an appropriate and consistent manner (see *Moskal*, cited above, § 72).

76. In the Court's opinion, the fact that the State did not ask the applicant to return the pension which had been unduly paid (see paragraph 69 above) did not mitigate sufficiently the consequences for the applicant flowing from the interference in his case.

77. In this connection it should be observed that as a result of the impugned measure, the applicant was faced, without any transitional period enabling him to adjust to the new situation, with the total loss of his early-retirement pension, which constituted his main source of income. Moreover, the Court is aware of the potential risk that, in view of his age and the economic reality in the country, particularly in the undeveloped Podkarpacki region, the applicant might have considerable difficulty in securing new employment.

78. The Government stressed that the applicant was a farmer and after the revocation of the EWK pension he derived an income from the farm. The applicant disagreed; he submitted that the farm provided very little income which covered his and his family's basic living needs. The Court considers that while it is true that the applicant co-owns a farm, it clearly did not constitute his main source of income, since for 28 years he had been employed outside the farm in a non-agricultural enterprise.

79. In so far as the Government listed various benefits available in Poland, the Court considers that they have failed to specify which of those benefits, if any, were available in the applicant's situation.

80. In view of the above considerations, the Court finds that a fair balance has not been struck between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights and that the burden placed on the applicant was excessive.

81. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention and the Government's objection based on no significant disadvantage (see paragraph 57 above) must accordingly be rejected.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. 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

83. The applicant claimed 100,000 Polish zlotys (PLN) in respect of pecuniary and non-pecuniary damage. This amount corresponded to the EWK pension which he would have received for several years had it not been revoked (monthly PLN 887).

84. The Government submitted that the applicant's claim was exorbitant.

85. The Court finds that the applicant was deprived of his income in connection with the violation found and must take into account the fact that he undoubtedly suffered some pecuniary and non-pecuniary damage (see *Moskal*, cited above, § 105 with a further reference). Making an assessment on an equitable basis, as is required by Article 41 of the Convention, the Court awards the applicant 12,000 euros (EUR) to cover all heads of damage.

B. Costs and expenses

86. The applicant did not make a claim for costs and expenses.

C. Default interest

87. The Court considers it appropriate that the default interest rate 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

1. *Joins* unanimously to the Government's preliminary objection concerning no significant disadvantage to the merits of the applicant's complaint under Article 1 of Protocol No. 1 to the Convention and declares the application admissible;
2. *Holds* by five votes to two that there has been a violation of Article 1 of Protocol No. 1 to the Convention and *dismisses* in consequence the Government's above-mentioned objection;
3. *Holds* by five votes to two
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, in respect of pecuniary and non pecuniary damage, EUR 12,000 (twelve thousand euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

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

Fatoş Aracı
Deputy Registrar

David Thór Björgvinsson
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Hirvelä and Bianku is annexed to this judgment.

D.T.B.
F.A.

JOINT PARTLY DISSENTING OPINION OF
JUDGES HIRVELÄ AND BIANKU

The instant case raises issues similar to those dealt with by the Court in *Moskal v. Poland* (no. 10373/05) and *Lewandowski v. Poland* (38459/03). The majority in those cases found that there had been a breach of Article 1 of Protocol No. 1 to the Convention. We dissented. We dissent in this case also, for the reasons we gave in our Joint Partly Dissenting Opinion in the *Moskal* case and in the *Lewandowski* case.