



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

FOURTH SECTION

CASE OF ANTONI LEWANDOWSKI v. POLAND

(Application no. 38459/03)

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 Antoni Lewandowski 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. 38459/03) 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 Antoni Lewandowski (“the applicant”), on 24 September 2003.

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 alone and in conjunction with Article 14 of 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, Mr Antoni Lewandowski, is a Polish national who was born in 1953 and lives in Mielec.

6. The applicant is married with two adult children. Prior to his early retirement he had been employed for 31 years and had paid his social security contributions to the State.

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

7. On 23 or 28 December 2000 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 22 December 2000. The certificate stated that the child (born in 1989) suffered from chronic allergy sinusitis (*alergiczne zapalenie przewlekłe błony śluzowej nosa*) and recurring pulmonary and throat infections and that she was in need of her parent’s constant care.

9. On 10 January 2001 the Rzeszów Social Security Board issued a decision granting the applicant the right to an early-retirement pension.

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.

11. On 28 February 2001 the applicant resigned from his full-time job as a driver at the Municipal Vehicle Communication (*Miejska Komunikacja Samochodowa*) in Mielec.

12. Consequently, on 2 March 2001 the Rzeszów Social Security Board issued a new decision authorising the payment of the previously awarded retirement pension in the net amount of 1,130 Polish zlotys (PLN) (approximately EUR 260) starting from 1 March 2001.

13. The applicant was issued with a pensioner’s identity card marked “valid indefinitely” and he continued to receive his pension without interruption until the date of the revocation of the right.

14. On 4 June 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 7 June 2002 the doctor stated that, on the basis of the medical documents, the child could not be considered as ever having required such care.

15. On 11 June 2002 the Rzeszów Social Security Board issued simultaneously two decisions in respect of the applicant.

16. By virtue of one decision, the payment of the applicant’s pension was discontinued with immediate effect. By virtue of the other decision, the

Social Security Board revoked the initial decision granting a pension and eventually refused to grant the applicant the right to an early-retirement pension under the scheme provided for by the 1989 Ordinance.

17. The applicant appealed against the respective decisions divesting him of the right to an early-retirement pension. He submitted that he should receive the benefit because his child required constant care, as confirmed by the medical certificate attached to the original application for a pension. Moreover, the applicant alleged that the revocation of his retirement pension was contrary to the principle of vested rights.

18. On 9 September 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.

19. On 28 February 2003 the Social Security Board's doctor, who had examined the applicant's child, stated that the child had suffered from recurring sino-pulmonary infections but did not require permanent care, nursing or assistance.

20. On 22 October 2003 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 his father's permanent care, his nursing or any other form of assistance, 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 had not satisfied the requirement of necessary permanent care.

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

22. On 17 March 2004 the Rzeszów Court of Appeal (*Sąd Apelacyjny*) dismissed the appeal. On 30 March 2004 a copy of the court's judgment was served on the applicant.

23. A professional lawyer, who had been either hired by the applicant or appointed to represent him under a legal-aid scheme, prepared and lodged a cassation appeal against the second-instance judgment on the applicant's behalf.

24. The cassation appeal ran to eight pages and raised a number of points of law. In particular, it was alleged that section 114 of the Law of 17 December 1998 on retirement and disability pensions paid from the Social Insurance Fund had been breached in that the evidence concerning the applicant's child's health, which had been attached to the original pension application, had been re-assessed in the light of a medical certificate issued more recently by the Social Security Board's doctor. It was also argued that the case raised two serious questions of law which had to be resolved (*potrzeba rozstrzygnięcia istotnego zagadnienia prawnego*) namely, whether in the light of the Supreme Court's resolution of 5 June 2003, the child's medical history records as of the time when the applicant first

applied for the EWK pension constituted “newly-discovered evidence” within the meaning of section 114 of the 1998 Law and whether the social security authorities were entitled to reopen the proceedings *ex officio* on the basis of a newly-issued medical certificate of a Social Security Board’s doctor. Lastly, the lawyer argued that it was necessary for the Supreme Court to give a binding interpretation (*potrzeba wykładni przepisów prawnych*) of the relevant provisions which had so far given rise to serious divergences in the jurisprudence.

25. On 9 July 2004 the Supreme Court refused to entertain the cassation appeal (*odmowa przyjęcia kasacji do rozpoznania*) on the ground that the lawyer had not properly described the circumstances which would justify the examination of the cassation appeal (*okoliczności uzasadniające rozpoznanie kasacji*).

B. The applicant’s financial situation following the revocation of his EWK pension

26. Following the social security proceedings the applicant was not ordered to return his early-retirement benefits paid by the Social Security Board, despite the revocation of his right to an early-retirement pension.

27. On 2 September 2005 the applicant resumed his paid employment.

28. The Government submitted that the applicant’s gross annual income was PLN 4,962 (approximately EUR 1,185) in 2005, PLN 19,274 (approximately EUR 4,604) in 2006, PLN 15,363 (approximately EUR 3,670) in 2007, PLN 20,576 (approximately EUR 4,915) in 2008, PLN 14,013 (approximately EUR 3,347) in 2009 and PLN 9,106 (approximately EUR 2,175) in the first half of 2010.

29. The applicant did not provide any details about his employment after the revocation of his EWK pension. He only submitted that he was currently earning EUR 250 per month, that is, approximately PLN 3,000 per year (approximately PLN 1,046 per month and PLN 12,552 per year).

30. The Government also submitted that the applicant’s wife had a gainful employment. Her gross income was PLN 32,952 (approximately EUR 7,869) in 2002, PLN 29,601 (approximately EUR 7,067) in 2003, PLN 35,303 (approximately EUR 8,428) in 2004, PLN 36,244 (approximately EUR 8,653) in 2005, PLN 38,198 (approximately EUR 9,125) in 2006, PLN 39,797 (approximately EUR 9,502) in 2007, 43,236 (approximately EUR 10,323) in 2008, PLN 46,808 (approximately EUR 11,176) in 2009 and PLN 20,922 (approximately EUR 4,995) in the first half of 2010.

31. The applicant has two daughters. The Government noted that the older daughter (born in 1983) had been employed since 2007 and her annual gross income was PLN 8,545 (approximately EUR 2,040) in 2007, PLN 16,625 (approximately EUR 3,968) in 2008, PLN 19,522

(approximately EUR 4,660) in 2009 and PLN 9,738 (approximately EUR 2,323) in the first half of 2010. The applicant's younger daughter (born in 1989) does not have a job. In 2009 she was in receipt of a postgraduate scholarship (*stypendium*) paid by the District Employment Office (*Powiatowy Urząd Pracy*) in the gross annual amount of PLN 2,488 (approximately EUR 539).

32. 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

33. 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.

34. 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.

35. 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, including in the one at hand, cassation appeals were rejected for failure to comply with various procedural requirements.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Social security system

36. 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.

B. Cassation appeal

37. 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.

38. 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.”

39. 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 judgment no. K 18/99

1. Judgment no. K 18/99

40. 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.

41. 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*

42. 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.

43. 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

44. 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) Abuse of the right of an individual application

(i) *The Government*

45. The Government submitted that the present application constituted an abuse of the right of individual application under Article 35 § 3 of the

Convention in that the applicant had misrepresented to the Court his current social security status and the financial situation of his family.

46. In particular, the Government noted that the applicant had informed the Court that after the revocation of his EWK pension his family and he had been left without any means to live, his social security contributions had dried up and he was not eligible for any insurance cover. In fact, the main source of income of the applicant's family, both when the applicant had been in receipt of his EWK pension and after its revocation, had been the salary of the applicant's wife, which represented 128% of the average income in Poland. They also noted that the revocation of an EWK pension did not result in the loss of social security contributions paid prior to a person's early retirement. Lastly, the revocation of the EWK pension did not deprive the applicant of insurance. The applicant could sign up for health insurance individually, as an unemployed person, or together with his wife, as the spouse of an employed person. To that effect, the Government noted that on 25 February 2003 the applicant had registered as an unemployed person and had obtained health insurance. Subsequently, on 20 July 2003 the applicant joined his wife's health insurance scheme.

47. Lastly, the Government argued that the applicant had misled the Court in representing himself as a person who had wished to stay at home to take care of his daughter. In reality, the applicant had had a full-time job up until the time he was granted an EWK pension and he resumed his paid employment some time after his pension was revoked. In the Government's view, the applicant had sought early retirement not because he wished to take care of his child at home but because he wished to maintain a source of income.

(ii) The applicant

48. The applicant submitted that his salary prior to his early-retirement was PLN 1,700 per month. In these circumstances, taking early retirement under the EWK scheme did not result in any material gain since his EWK pension was lower than his salary, amounting to approximately PLN 1,100 per month.

49. The applicant also noted that after his EWK pension had been revoked he had taken up paid employment to earn his living. His financial situation at that time was so bad that the applicant's family risked eviction.

50. The applicant also argued that his wife and older daughter's income were irrelevant for the case. His wife's social security situation was not the subject of the application to the Court and the applicant's adult daughter stopped living in the applicant's common household in 2004.

(iii) The Court

51. The Court considers that, except in extraordinary cases, an application may only be rejected as abusive if it was knowingly based on

untrue facts (see the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1206, §§ 53-54; *I.S. v. Bulgaria* (dec.), no. 32438/96, 6 April 2000; *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X; or *Rehak v. the Czech Republic*, (dec.), no. 67208/01, 18 May 2004).

52. The Court notes that in the present case the gist of the Government's arguments does not actually concern "untrue facts" allegedly adduced by the applicant before the Court. Rather, their objection is based on their own perception of the applicant's possible intentions behind his decision to take advantage of the EWK early-retirement pension scheme and/or on their assessment of his and his family's overall financial situation after the revocation of the pension. It has not been disputed that the applicant quit his job when he was officially judged eligible to obtain an EWK pension and only resumed full-time employment after his pension had been withdrawn.

53. The Government's preliminary objection should therefore be dismissed.

(b) Non-exhaustion of domestic remedies

(i) The Government

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

55. They submitted that the applicant did not lodge a cassation appeal against the Rzeszów Court of Appeal's judgment of 17 March 2004 in compliance with procedural requirements. As a result, his cassation appeal was rejected on the ground that the circumstances which would justify the examination of the cassation appeal had been insufficiently described.

56. The Government argued that the cassation appeal should be considered an effective and available remedy for the EWK cases. They referred to several examples of domestic case-law. In particular, they pointed to a case in which a cassation appeal had been allowed by the Supreme Court which had remitted it to the Court of Appeal. Afterwards the applicant's appeals against the Social Security Board's decision had again been rejected at two instances and, finally, the Supreme Court had refused to entertain the second cassation appeal lodged in this case. The Government did not indicate the grounds for quashing the judgment by the Supreme Court when examining the cassation appeal for the first time.

57. In their additional observations on the case, the Government also 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 40 and 41 above).

58. In their further submissions, the Government referred to the Constitutional Court's judgment of 28 February 2012 (see paragraphs 42 and 43 above). 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.

59. In view of the foregoing, the Government invited the Court to reject the application for non-exhaustion of domestic remedies, pursuant to Article 35 § 1 of the Convention.

(ii) The applicant

60. With respect to the first part of the Government's objection, the applicant submitted that the cassation appeal in his case had been prepared and lodged on his behalf by a professional lawyer, as was required by the law. The lawyer turned out to be badly qualified. His error, however, should not be attributed to the applicant and should not deprive the Court from examining his case on the merits.

The applicant did not comment on the second part of the Government's objection.

(iii) The Court

61. The Court reiterates that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 65).

(α) Cassation appeal

62. In so far as the Government argued that the applicant's cassation appeal had not been lodged in compliance with procedural requirements, the Court notes at the outset that in the operative part of the decision of 9 July 2004 the Supreme Court refused to entertain the applicant's cassation appeal and did not reject it, as was claimed by the Government (see paragraph 25 above).

It is true, however, that the ground which was relied on by the Supreme Court to justify the decision in question was of a formal character, namely the failure of the applicant's lawyer to describe properly the circumstances which would justify the examination of his client's cassation appeal.

63. The Court observes, in the context of EWK cases, 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, § 24) or 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.

64. Analysing the applications filed with the Court concerning the same subject-matter, it is noticeable that only fifteen cassation appeals were examined on the merits by the Supreme Court. Moreover, they were all dismissed. The Supreme Court refused to entertain eighty-one correctly lodged cassation appeals, seeing no ground justifying their examination on the merits (see paragraph 35 above). Twenty-four applicants did not attempt to lodge a cassation appeal claiming that the practice of the Supreme Court meant that this remedy had no prospects of success (see paragraph 34 above).

65. The Court considers that there was a consistent line of jurisprudence of the regional and appellate courts in cases where an EWK pension was revoked after the Social Security Board's doctor had re-examined the file and had considered that the child's illness had not been such as to require the parent's constant care within the meaning of the domestic law. The Supreme Court in principle endorsed this approach by refusing to examine on the merits cassation appeals in the great majority of cases. Moreover, the Government did not refer to any examples of cases in which the Supreme Court had allowed a cassation appeal and reversed the previous judgments by granting an EWK pension.

66. In the light of the above, the Court finds that in the particular circumstances of the case the applicant's procedural mistake did not have any material bearing on the effectiveness of his cassation appeal. As noted above (see paragraphs 64 and 65 above), most cassation appeals which had been lodged by applicants with similar cases were considered by the Supreme Court as not deserving of substantive examination. Accordingly, the prospects of success of the applicant's cassation appeal, even if it had been lodged properly, were very slim and, therefore, not sufficient for the purposes of Article 35 § 1 of the Convention.

(β) Constitutional complaint

67. 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).

68. 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).

69. 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.

70. 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 42, 43 and 58). While it is true that the Ombudsman's application was successful (see paragraphs 42 and 43 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.

71. 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.

2. Conclusion on admissibility

72. The Court also 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

(a) The applicant

73. 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. He also argued that even if the benefit had indeed been granted erroneously, an individual who had applied for it in good faith should not be expected to pay the price for the mistake of public authorities acting without due diligence.

(b) The Government

74. 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 general interest. There was also a reasonable relationship of proportionality between the interference and the interests pursued.

2. The Court's assessment

(a) General principles

75. 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

76. The parties agreed that the decisions of the Rzeszów Social Security Board of 11 June 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. The Court sees no reason to hold otherwise.

(ii) *Lawfulness of the interference and legitimate aim*

77. 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*

78. In the instant case, a property right was generated by the favourable evaluation of the applicant's dossier attached to the application for a pension, which was lodged in good faith, and by the Social Security Board's recognition of the right (see paragraphs 7-9, 12 and 13 above). Before being invalidated the decision of 10 January 2001 had undoubtedly produced effects for the applicant.

79. It must be stressed that the delay with which the authorities reviewed the applicant's dossier was relatively long. The decision of 10 January 2001 was left in force for seventeen 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 14 and 15 above). Even though the applicant had an opportunity to challenge the Social Security Board's decision of 11 June 2002 in judicial review proceedings, his right to the pension was eventually determined by the courts only two years later and during that time he was not in receipt of any welfare benefit or salary (see paragraphs 17-27 above).

80. 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 *Rysovskyy 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).

81. Moreover, 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 26 above) did not mitigate sufficiently the consequences for the applicant flowing from the interference in his case. The Court notes in this

connection that the applicant, after his right to the EWK pension had been confirmed by the authorities, decided to resign from his gainful employment (see paragraph 11 above).

82. It should also 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 only source of income at that time. 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 had considerable difficulty in securing new employment. Indeed, it took the applicant more than three years to find a paid job and to earn the equivalent of the amount of his former EWK pension, that is, approximately EUR 250 net per month (see paragraphs 27-29 above).

83. The Government submitted that the applicant's wife had been continuously employed. However, the Court considers that this fact is not decisive for the matter at hand, namely whether the revocation of the EWK pension placed an excessive burden on the applicant as an individual in his own right irrespective of third party financial support.

84. In view of the above considerations, the Court does not see any reason to depart from its ruling in the leading case concerning EWK pensions, *Moskal v. Poland*, and finds that in the instant case 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.

85. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATIONS OF ARTICLES 6 § 1 AND 8 OF THE CONVENTION

86. The applicant also alleged that the *ex officio* reopening of the social security proceedings, which had resulted in the quashing of the final decision granting him a right to a pension, was in breach of the principle of legal certainty under Article 6 § 1 of the Convention.

He also complained under Article 8 of the Convention of an interference with his right to respect for his private and family life in that by divesting him of the EWK pension the authorities deprived him of his sole source of income and the financial resources indispensable for his livelihood.

87. The Court notes that these complaints are linked to the one examined above and must therefore likewise be declared admissible.

88. However, having regard to the reasons which led the Court to find a violation of Article 1 of Protocol No. 1 to the Convention, the Court finds

that the applicant's complaints under Articles 6 and 8 of the Convention do not require a separate examination (see *Moskal*, cited above, §§ 83 and 94).

III. REMAINING COMPLAINTS

89. Lastly, the applicant alleged a breach of Article 13 of the Convention and Article 2 of Protocol No. 1 to the Convention. 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.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. 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

91. The applicant claimed pecuniary damage comprising: (1) the restitution of the EWK pension in the amount of PLN 1,190 (approximately 280 euros (EUR)) per month and (2) the equivalent of the EWK pension, which had not been paid to him in the period from June 2002 until the present day, with statutory interest. The applicant also claimed non-pecuniary damage. He submitted, however, that he was not capable of putting a value on his suffering and humiliation and essentially asked the Court to determine the amount on an equitable basis.

92. The Government submitted that the applicant's claims were groundless and undeserved.

93. 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 required by Article 41 of the Convention, the Court awards the applicant EUR 8,000 to cover all heads of damage.

B. Costs and expenses

94. The applicant also claimed an approximate amount of EUR 250 - 500 for the costs and expenses incurred in relation to the present application. He did not submit any invoices to justify his claim.

95. The Government noted that the applicant had not substantiated the costs which he claimed to have incurred with the necessary bills.

96. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria and the fact that the applicant failed not only to provide the Court with the necessary documents but also to indicate a precise amount of the costs incurred, the Court rejects the claim for costs and expenses under all heads.

C. Default interest

97. 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. *Declares* unanimously the complaints under Articles 6 and 8 of the Convention and under Article 1 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible;
2. *Holds* by five votes to two that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds* unanimously that it is not necessary to examine separately the applicant's complaints under Articles 6 and 8 of the Convention;
4. *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, the amount of EUR 8,000 (eight thousand euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of pecuniary and non-pecuniary damage, 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;

5. *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

To our regret, we are unable to agree with the majority in this case. The reasons for our dissent are identical to those expressed in the joint partly dissenting opinion of Judges Bratza, Hirvelä and Bianku in the leading case of *Moskal v. Poland* (no. 10373/05, 15 September 2009).

However, in view of the significant number of Polish cases based on the same or at least very similar circumstances which have been examined simultaneously by the Court together with the *Lewandowski v. Poland* case, we feel it necessary to add the following comments.

The majority puts the emphasis for finding a violation of Article 1 of Protocol No. 1 to the Convention on the proportionality of the measures taken by the authorities when revoking the early retirement pension (the “EWK” pension), following a review of the applicant’s dossier. Just as in *Moskal* (§ 72) the majority concludes that the authorities, having discovered their mistake, failed in their duty to act in good time and in an appropriate and consistent manner, referring also to the principle of good governance (see § 80 of the judgement).

Comparing all 10 cases examined by the Court on the same day as *Lewandowski*, it seems that the erroneous evaluation made by the authorities of the applicants’ entitlement to a EWK pension took place in the same region, Podkarpacki, and within a one-year period. This, in our opinion, shows that the mistake was rather limited in time and space. While a common definition of the concept of good governance is not easy to find at European level, it seems to us that this principle, as well as appropriateness and consistency, would require the EWK policy to be applied in the same way throughout the territory of Poland, and that persons and families fulfilling the legal conditions for obtaining a pension should be granted one. This is all the more true when regard is had to the normally limited resources governments have at their disposal as far as social care is concerned and to the interests of other individuals, especially children in need of care and their parents who have to take care of them. In this regard we reiterate the concerns expressed in paragraphs 4 and 6 of the joint partly dissenting opinion in the *Moskal* case.