



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

THIRD SECTION

CASE OF B. v. SWITZERLAND

(Application no. 78630/12)

JUDGMENT

Art 14 + 8 • Discrimination (sex) • Cessation, when the youngest child has reached the age of majority, of payment of pension for a widowed parent providing full-time care for children, where the beneficiary is a man • Welfare benefit in question had an impact on the organisation and management of the applicant's family life • Lack of reasonable justification • Reference to social welfare traditions insufficient • Return to the employment market is equally difficult for both sexes, at the age of the applicant in the instant case and after several years without working

STRASBOURG

20 October 2020

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
11/10/2022**

This judgment may be subject to editorial revision.

In the case of B. v. Switzerland,

The European Court of Human Rights (Grand chamber), sitting as a Grand Chamber composed of:

Paul Lemmens, *President*,

Georgios A. Serghides,

Helen Keller,

Alena Poláčková,

María Elósegui,

Gilberto Felici,

Lorraine Schembri Orland, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 78630/12) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Swiss national, Mr B. (“the applicant”), on 19 November 2012;

the decision to give notice of the application to the Swiss Government (“the Government”) the complaint under Article 14 of the Convention read in conjunction with Article 8, and to declare the remainder of the application inadmissible;

the decision not to have the applicant’s name disclosed;

the parties’ observations;

Having deliberated in private on 20 October 2020,

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

INTRODUCTION

1. The present application concerned alleged discrimination deriving from the Federal Law on pension insurance and survivors (“LAVS”). The applicant submitted that, as a father raising his children alone after the death of his wife, he had been discriminated against as compared to widowed mothers with sole responsibility for raising their children, since he was no longer entitled to a widowed person’s pension since his younger daughter reached the age of majority. He relied on Article 14 read in conjunction with Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1953. He was represented by Mr Luginbuhl, a lawyer.

3. The Government were represented by their Agent, Mr A. Chablais, Permanent Representative of Switzerland to the European Court of Human Rights.

4. After having lost his wife in an accident, the applicant devoted himself full-time to bringing up their two children, who at the time had been one year and nine months and four years old. He was granted a widower's pension and supplementary benefits. On 9 September 2010, having noted that the applicant's younger daughter was about to reach the age of majority, the Compensation Office (*Ausgleichskasse*) of the Canton of Appenzell-Outer-Rhodes issued an order terminating the payment of the applicant's pension on the basis of section 24 (2) of the Federal Law on pension insurance and survivors ("LAVS"), which provided for the extinction of the right to a widower's pension when the youngest child reached the age of eighteen (see paragraph 13 below).

5. The applicant lodged an objection, considering that section 24 (2) LAVS should have been interpreted in conformity with Article 8 of the Swiss Constitution ("the Constitution"), paragraph 3 of which enshrines the principle of equality between men and women (see paragraph 11 below).

6. On 20 October 2010 the Compensation Office rejected the applicant's objection. In its decision it noted that the Swiss legal system did not provide for review of constitutionality, but that the authorities had to interpret Federal laws in accordance with the Constitution in cases where they had a margin of appreciation. However, the Compensation Office considered itself bound by section 24 (2) LAVS, which was, in its view, a clear provision that was not open to interpretation.

7. The applicant appealed to the Cantonal Court against that decision, arguing that there had been no objective reason to treat him differently from a widow. He submitted that he was fifty-seven years old and had raised his two children alone.

8. On 22 June 2011 the court dismissed his appeal. It noted that the conditions for entitlement to a pension applicable to widows and widowers respectively under sections 23 and 24 LAVS were indeed different, which was incompatible *a priori* with the requirements of Article 8 of the Constitution. Nevertheless, it pointed out that during the tenth revision of the LAVS, the legislature had had regard to the unequal treatment of widowers and widows and had decided, on balance, that since there were still relatively few house-husbands they could be required to resume professional activities on termination of their obligation to look after their children. The Cantonal Court considered that only the legislature could change that state of affairs, and that at all events the courts could not refuse to apply the clear letter of the law.

9. The applicant lodged an appeal with the Federal Court, alleging a violation of Article 14 read in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1.

10. By judgment of 4 May 2012 (9C_617/2011), the Federal Court dismissed that appeal. It held that under Article 8 (3) of the Constitution distinctions on grounds of sex could only be justified where the biological

or functional differences between men and women rendered equality of treatment quite simply impossible. It further noted that Switzerland had not ratified Protocol No. 1 and that it was not therefore bound by that provision and the related case-law. As regards the complaint under Article 14 read in conjunction with Article 8 of the Convention, the Federal Court considered that there was nothing in the case-law of the Court to suggest that Article 8 of the Convention required States to provide specific social security benefits.

The Federal Court also ruled that the distinction drawn by sections 23 and 24 LAVS had indeed been contrary to the principle of equality between men and women enshrined in Article 8 (3 of the Constitution. However, it pointed out that although the legislature had been aware of that inconsistency, it had not remedied it because the eleventh revision of the LAVS had been rejected. It consequently held that Article 190 of the Constitution (see paragraph 11 below) required it, and all the other authorities, to apply the impugned provisions.

RELEVANT DOMESTIC LEGAL FRAMEWORK AND PRACTICE

11. The relevant provisions of the Swiss Federal Constitution read as follows:

Article 8 – Equality before the law

- “1. Every person is equal before the law.
2. No person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability.
3. Men and women have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women have the right to equal pay for work of equal value.
4. The law shall provide for the elimination of inequalities that affect persons with disabilities.”

Article 190 – Droit applicable

“The Federal Supreme Court and the other judicial authorities apply the federal acts and international law.”

12. The relevant section of the 17 June 2005 Law on the Federal Court provides:

Section 122: Breach of the European Convention on Human Rights

“An application for review of a judgment of the Federal Court on account of a violation of the Convention of 4 November 1950 for the Protection of Human Rights

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and Fundamental Freedoms (ECHR) may be submitted if the following conditions are satisfied:

- (a) the European Court of Human Rights, in a final judgment, has found a violation of the ECHR or its Protocols;
- (b) compensation cannot remedy the effects of the violation;
- (c) the review is necessary to remedy the effects of the violation.”

13. The relevant provisions of the Federal Law of 20 December 1946 on pension insurance and survivors (“LAVS”) read as follows:

Section 23 – Widow’s and widower’s pension

“1. Widows and widowers are entitled to a pension if they have one or more child(ren) at the time of their spouse’s death.

2. The following are considered as the children of widows or widowers:

(a) children of the deceased spouse who, at the time of the latter’s death, had been living together with the widow or widower and have been fostered by the survivor within the meaning of section 25 (3);

(b) children fostered within the meaning of section. 25 (3) who, at the time of the death in question, had been living together with the widow or the widower and have been adopted by the surviving spouse.

3. Entitlement to a widow’s or widower’s pension begins on the first day of the month following the spouse’s death, and where a foster child has been adopted pursuant to para. 2 (b) above, on the first day of the month following the adoption.

4. Entitlements ends:

- (a) with remarriage;
- (b) with the widow’s or widower’s death.

5. Entitlement resumes in the event of annulment of marriage or divorce. The Federal Council shall settle all the relevant details.”

Section 24 – Special provisions

“1. Widows are entitled to a pension if, on their husband’s death, they have no children or foster-children within the meaning of section 23, but have reached the age of 45 and have been married for at least five years. If a widow has been married several times, regard shall be had, in calculating the amount of the pension, of the overall length of the marriages in question.

2. In addition to the causes of termination mentioned in section 23 (4), entitlement to a widower’s pension ends when the youngest child reaches the age of 18.”

Section 25 – Orphan’s pension

“1. Children whose father or mother has died are entitled to an orphan’s pension. In the event of the death of both parents, they are entitled to two orphan’s pensions.

2. Foundlings are entitled to an orphan’s pension.

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3. The Federal Council shall determine entitlement to an orphan's pension for foster children.

4. Entitlement to an orphan's pension begins on the first day of the month following the death of the father or mother. It ends on the 18th birthday or with the death of the orphan.

5. In the case of children following a training course, entitlement to the pension continues until the end of such education or training, up to the age of 25, the Federal Council may define the concept of 'training course'."

II. PREPARATORY WORK ON THE LAVS CONCERNING WIDOW'S AND WIDOWER'S PENSIONS, AND ATTEMPTED REFORMS

14. Widow's pensions were introduced in Switzerland in 1948, at the same time as the old-age and survivors' pension system ("AVS" system). At the time, married women, especially mothers, had been excluded from the labour market if the couple decided to found a family. The main question in defining the conditions for entitlement to the pension had therefore been whether widows could reasonably be expected to begin or, less frequently, to resume, gainful employment on the death of their husbands (16 March 1945 report by the Federal Commission of experts on the introduction of the AVS system, pp. 64 et seq., and 24 May 1946 message from the Federal Council on proposed legislation on pension insurance and survivors, Federal Gazette, FF 1946 II 353).

15. Widow's pensions were introduced in 1997 at the time of the tenth revision of the AVS system. The Government set out the following considerations during the presentation of the bill in Parliament (5 March 1990 message from the Federal Council concerning the tenth revision of the AVS system, FF 1990 II 1, pp. 37 et seq.):

"Current legislation only provides for widow's pensions, and not widower's pensions. Nowadays, wives are increasingly often in gainful employment, on a full-time or part-time basis.

As regards cases where the husband performs household chores and brings up children, he is not eligible for AVS social welfare protection in the event of his wife's death.

We therefore propose introducing the principle of a widower's pension. However, entitlement to such pension should only arise if the widower has dependent children under the age of eighteen.

We realise that this restriction means that widows and widowers will not enjoy equal treatment; nevertheless, we consider that the planned difference in treatment is still justified for the moment.

Granting widowers' pensions under the same conditions as for widows would exceed the financial framework for the present revision.

A possible alternative might be to set out more restrictive conditions for the award of a widow's pensions, along the lines of the proposal which we presented in April 1988. That alternative was, quite rightly, criticised because of the difficulties inherent

in the idea of older widows returning to work. Indeed, it cannot be denied that the image of family support traditionally conveyed by marriage is still widespread. The AVS system cannot overlook the fact that women who left professional life many years ago would face serious financial problems on their husband's death if the conditions for entitlement to a widow's pension were tightened up.

There are still few marriages which comprise house-husbands. In our view, however, even in such cases, the husband can still be expected to resume gainful employment after having brought up his children. Accordingly, we consider that the said inequality of treatment is currently still defensible."

16. Since 2000 the Government has made several unsuccessful attempts to reform the widow's and widower's pension system, particularly with a view to gradually harmonising widows' entitlement to the pension with that of widowers. Equality of treatment between widows and widowers is thus not currently on the legislature's agenda.

17. In 2000 the Government presented a plan for an eleventh revision of the AVS system. The Federal Council considered the provisions in force on widows and widowers unsatisfactory, and therefore proposed progressively restricting widows' entitlement to the pension in order to bring it into line with that of widowers, after a transitional phase, while relaxing the conditions for entitlement to a widower's pension. Those proposals would have helped improve the situation of widowers. However, they had been mainly aimed at tightening up the conditions applicable to widows, since the Federal Council had not envisaged harmonising the situation of widowers with that of widows with children by extending benefits. In any event that reform was rejected by referendum in 2004.

18. In 2005 the Government presented a new version of its planned eleventh revision of the AVS system, although it did not change the conditions for entitlement to a surviving spouse's pension. The new draft was rejected by Parliament by a final vote in 2010.

19. In response to a motion submitted to the Council of States on 26 March 2007 by the Social Security and Public Health Commission (motion 07.3276), asking the Federal Council to draft a bill geared to bringing the status of widowers with children into line with that of widows, the latter came down against approving the said motion for a number of reasons, including the extra cost of such an adjustment, an estimated 200 million Swiss francs, while accepting that the rules in force at the time led to inequalities between widows and widowers with children. In view of the foreseeable trends in AVS finances, the Federal Council refused such an increase in costs.

20. In 2014 the Government presented a draft reform titled "Prévoyance vieillesse 2020" (old-age pensions 2020 – "the 2020 reform"), which proposed, *inter alia*, adapting survivors' benefits to the situation as experienced by widows at that time, albeit without placing widows and widowers on an equal footing. The Government considered that the system operating at the time was no longer suited to the current context, but that

social realities were such as to prevent complete standardisation of the AVS conditions for entitlement to a widow's pension and a widower's pension. In drawing up its proposals the Government had relied on objective data from a survey of the economic situation of widows and widowers, which had shown that Switzerland had an effective mechanism for covering the loss of income consequent upon bereavement and that widowhood could entail a change of behaviour on the employment market. The survey demonstrated that widowers were usually in a sounder economic situation than widows, for reasons mainly linked to the employment market and continuing inequalities between women and men in that sphere. In view of the increasing number of women in gainful employment and the changes in role-sharing in the family and at work, the Government considered that the bereavement risk ought to be covered in a more targeted manner. The 2020 reform consequently provided for abolishing widow's pensions for childless women after a long transitional period, but only very slightly modified the conditions for entitlement to a widower's pension, payment of which was to end – as was already the case at the time – on the youngest child's eighteenth birthday.

21. The 2020 reform was approved by Parliament on 17 March 2017. Having deliberated, both houses decided not to modify the widow's and widower's pension system in force. A referendum held on 24 September 2017 rejected the planned "old-age pensions 2020" reform.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

22. The applicant submitted that unlike a widow in a similar situation, he had no longer been entitled to a widower's pension since his younger daughter had reached the age of majority, and therefore considered that he had suffered discrimination. He relied on Article 14 of the Convention read in conjunction with Article 8.

Article 14 provides:

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

Article 8 reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society

in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

1. *The parties’ submissions*

(a) The Government

23. The Government invited the Court to declare inadmissible the complaint under Article 14 read in conjunction with Article 8 as being incompatible *ratione materiae* with the Convention pursuant to Article 35 § 3 (a) of the Convention, as their main submission, and in the alternative, as being manifestly ill-founded.

24. The Government submitted that the AVS pension for surviving spouses was intended as income replacement to mitigate the financial consequences of the death of the main breadwinner. That pension was therefore not comparable to benefits aimed specifically and directly at the promotion of family life and the maintenance of children, the cost of which was covered by the AVS orphan’s pension (section 25 LAVS). The AVS survivor’s pension was therefore not geared to sustaining the family, nor did it have any impact on the organisation of family life.

25. The Government stated that in the case of *Di Trizio v. Switzerland* (no. 7186/09, 2 February 2016), the Court had held that the application of the combined method in the applicant’s case might influence her and her husband in deciding how to divide up tasks within the family and, accordingly, have an impact on the organisation of their family and professional life. They agreed with the minority judges that such a flexible criterion for the application of Article 8 raised issues.

26. Emphasising that the applicant could have foreseen that payment of his widower’s pension would be discontinued when his younger daughter reached the age of majority, the Government submitted that he had not demonstrated to what extent the organisation of his family life had been affected by such discontinuance or explained how he would be unable to resume gainful employment when his younger daughter came of age.

27. Finally, the Government argued that if paying a pecuniary benefit to one member of a family were sufficient to make Article 8 applicable, it would follow that all State financial benefits were subject to that provision. They considered that such an extensive interpretation of the scope of Article 8 was undesirable and would have the unfortunate effect of requiring the Court to act as a “Supreme Social Insurance Court”.

28. For those reasons, the Government considered that Article 8 did not apply to the present case, and that consequently Article 14 was also inapplicable.

(b) The applicant

29. The applicant considered his complaint admissible.

30. He submitted that Article 14 of the Convention was applicable to the instant case. He took the view that the Court should hear and determine his case in isolation, and that it was not required to give a leading decision on it.

31. The applicant explained that on the date of termination of payment of his widower's pension, 1 December 2010, he had had to apply for social welfare assistance in order to provide for his own upkeep. Furthermore, he pointed out that his chances of finding employment with his qualifications as a textile engineer were low, because he had already been fifty-seven years old at the time. He added that he suffered from longstanding health problems, enclosing medical certificates drawn up in 2011 and 2017 with his observations before the Court. For those reasons he considered that the termination of payment of the pension had had, and was still having, major repercussions on his family life.

32. The applicant argued that the Court now interpreted the accessory nature of Article 14 less restrictively than previously. In his view it was sufficient that the factual elements to be adjudicated fell within the scope of the relevant Convention right. The Court had extended its relevant case-law to embrace a right to participation in society, and, to the extent that the State voluntarily granted social benefits, individuals had the right not to be excluded from them.

33. Finally, the applicant stated that in the case of *Willis v. the United Kingdom* (no. 36042/97, ECHR 2002 IV), the Court had found the national legislation in breach of Article 14 read in conjunction with Article 1 of Protocol No. 1 and had ordered the United Kingdom to pay the applicant a widower's pension. The applicant considered that in that case the fact that the Court had relied on the latter provision and left open the question whether the applicant could also plead the protection of Article 8 of the Convention did not imply that the applicability of that provision should be immediately ruled out in the present case.

2. The Court's assessment

(a) Principles concerning the applicability of Articles 14 and 8 of the Convention

34. As regards protection against discrimination, it should be remembered that Article 14 only complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among other authorities, *Sahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII; *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 53, 24 January 2017; and *Fábián v. Hungary* [GC], no. 78117/13, § 112, 5 September 2017). The application of Article 14 does not presuppose a

breach of one of the substantive rights guaranteed by the Convention. It is necessary and sufficient that the facts of the case fall within the ambit of one or more of the provisions of the Convention or of its Protocols (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 72, ECHR 2013).

35. The Court also reiterates that the Convention does not guarantee, as such, the right to an old-age pension or any social benefit of a particular amount (see *Yuriy Romanov v. Russia*, no. 69341/01, § 45, 25 October 2005). Moreover, the Convention does not confer on an individual a right to enjoy any given standard of living (see *Vassilenkov v. Ukraine*, no. 19872/02, § 18, 3 May 2005).

36. As regards the “family life” aspect of Article 8, the Court points out, first of all, that that concept does not include only social, moral or cultural relations; it also comprises interests of a material kind (see *Merger and Cros v. France*, no. 68864/01, § 46, 22 December 2004).

37. The Court further observes that measures enabling one of the parents to stay at home to look after the children are measures which promote family life and necessarily affect the way in which it is organised; such measures fall within the ambit of Article 8 (see, *inter alia*, *Petrovic v. Austria*, 27 March 1998, § 27, *Reports of Judgments and Decisions* 1998-II, and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 130, ECHR 2012; see, to similar effect, *Weller v. Hungary*, no. 44399/05, § 29, 31 March 2009, and *Dhahbi v. Italy*, no. 17120/09, § 41, 8 April 2014).

38. As regards the “private life” aspect of Article 8, the Court reiterates that it is a broad concept which is not susceptible to exhaustive definition. It can sometimes embrace aspects of an individual’s physical and social identity (see *Glor v. Switzerland*, no. 13444/04, § 52, ECHR 2009; *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I; and *Otgon v. the Republic of Moldova*, no. 22743/07, 25 October 2016).

39. In a case against Switzerland which was heard and determined in 2016 (see *Di Trizio*, cited above), the Court considered that the applicant’s complaint fell under the “family” limb of Article 8 because the case concerned issues relating to the organisation of family life. In making this finding the Court noted that the current legal system – the combined method of calculating degrees of disability – was applied in the majority of cases to women wishing to work part-time following the birth of a child. It also noted that the Federal Court itself had acknowledged that the combined method could sometimes result in the loss of the disability benefit, particularly affecting women working part-time after the birth of a child. The Court concluded that the application of the combined method to the applicant might influence her and her husband in deciding how to divide up tasks within the family and, accordingly, have an impact on the organisation of their family and professional life.

40. In another case against Switzerland (*Belli and Arquier-Martinez v. Switzerland*, no. 65550/13, 11 December 2018), the applicants relied on respect for their private life, their family unity and their autonomy in challenging the competent authorities' decision to withdraw their right to two types of benefit (a disability allowance and an extraordinary invalidity insurance pension) on the grounds that they had moved to Brazil. They submitted that the first applicant, an adult with a severe disability, needed the support of her mother, the second applicant, who lived in Brazil with her husband for professional reasons. The Court considered that the refusal to pay the benefits abroad was liable to affect the organisation of the applicants' family life, and that their complaint therefore fell within the ambit of Article 8 of the Convention.

(b) Application of the above-mentioned principals

41. Before considering whether the applicant can avail himself of the protection of Article 8 in the instant case, the Court reiterates that the aim of the Convention is to protect rights that are practical and effective rather than illusory and theoretical (see, among other authorities, *Kimlya and Others v. Russia*, nos. 76836/01 and 32782/03, § 86, ECHR 2009, and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). In other words, regard must be had to the particular features of the case under consideration and, in particular, of the social and family situations in which the applicant finds himself.

42. As regards the present case, the applicant argued that, unlike a widow in a similar situation, he had no longer been entitled to a widower's pension since his younger daughter had come of age. Accordingly, he considered that he had suffered discrimination within the meaning of Article 14 of the Convention.

43. In the light of the case-law cited, the Court holds that the applicant's complaint falls within the ambit of Article 8, because the widow's and widower's pension is aimed at exonerating the surviving spouse from the need to engage in paid work in order to have time to look after his children. The Court considers that the pension is therefore clearly "family-related" since it has a real impact on the organisation of the applicant's family life (see, *mutatis mutandis*, *Di Trizio*, cited above, § 62).

44. The Court also takes the view that the widower's pension had had very palpable consequences for the applicant. It observes, in that connection, that the applicant's wife died in an accident, leaving a 21-month-old baby and a four-year-old child behind. Since then the applicant, who had been working before his wife's death, had devoted himself exclusively to his children's upbringing and had been unable to engage in his occupation. He had been fifty-seven years old when payment of the pension ceased, and had not been in gainful employment for over sixteen years. The applicant had already reached the age of fifty-nine when the

Federal Court delivered judgment. The Court acknowledges that at that age it is very difficult to return to the labour market. Under those circumstances, the Court takes the view that the widower's pension, which had been paid to the applicant since his wife's death and had been terminated when the applicant's younger child had reached the age of majority, had had an impact on his organisation and management of his family life.

45. Having regard to the foregoing considerations, the Court considers that the complaint put forward by the applicant falls within the ambit of Article 8. It follows that Article 14 of the Convention read in conjunction with Article 8 is applicable in the present case. Consequently, the Court rejects the Government's objection concerning the inapplicability of those provisions in the instant case.

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

B. Merits

1. The parties' submissions

(a) The applicant

47. The applicant submitted that he had not been in receipt of the widower's pension since 1 December 2010, because his youngest child had come of age, adding that that would not have happened had he been a woman. He regarded this as blatant discrimination on grounds of sex. In his view, the current regulations on the widow's and widower's pension in Switzerland clearly comprised a gender-based imbalance to the detriment of men.

48. The applicant alleged that the Federal Court itself had rightly considered that Article 8 of the Constitution (Equality) prohibited any legal discrimination on grounds of sex. He added that according to Federal Court case-law, distinctions based on sex could only be justified where the biological or functional differences between men and women purely and simply ruled out equal treatment. The applicant considered that it would obviously be easy to bring the regulations on widowers' pensions into line with the rules governing widow's pensions. Nevertheless, the Swiss legislature had never succeeded in securing the adoption of the relevant amendment to the LAVS, even though the "male breadwinner" model had long been a thing of the past.

49. The applicant stated that the Federal Court ought to have reacted to the issue of discrimination, given that the Convention was directly applicable in Switzerland and, according to a 5 March 2010 report by the Federal Council concerning the relationship between international law and domestic law (Federal Gazette, FF 2010, pp. 2109 et seq.), Article 190 of

the Constitution was not an absolute obstacle to the exercise of constitutional jurisdiction.

50. The applicant submitted that only “strong reasons” could justify inequality of treatment on grounds of sex, which precept could already be deduced from the judgment in the case of *Burghartz v. Switzerland* (22 February 1994, Series A no. 280-B), which concerned the regulations on surnames. He observed that he had already been fifty-seven years old when the authorities had stopped paying his pension. Even childless widows received pensions from their forty-fifth birthday onwards, provided that they had been married for at least five years. The applicant pointed out that he had been married for five-and-a-half years before losing his wife, who had been only twenty-six at the time of her death, and that he had been a single father ever since. Those were further reasons why he considered that he had been discriminated against as compared with widows.

51. The applicant considered that the judgment in the case of *Andrle v. the Czech Republic* (no. 6268/08, 17 February 2011), cited by the Government, was irrelevant to the present case inasmuch as it had concerned an old-age pension rather than a widow’s pension. Moreover, he observed that in the Czech Republic old-age pensions were obviously subject to an age criterion, as in Switzerland.

52. The applicant submitted that widows’ and widowers’ pensions were based on the long obsolete “male breadwinner” model, which the introduction of section 23 (1) combined with section 24 (2) and section 24 (1) LAVS had not altered. He explained, moreover, that the legislature had never succeeded in rectifying that inequality of treatment. In that regard, he pointed out that the eleventh revision of the AVS system had never taken place and that it at all events it would have changed nothing for widowers as regards section 24 (1) and (2) LAVS, as the Government also rightly observed. Finally, the applicant considered that the purported additional costs of 200 million Swiss francs mentioned by the Government were purely financial arguments which could not legitimate, in particular, the difference of treatment which he had sustained in connection with the widower’s pension.

53. Having regard to the foregoing considerations, the applicant concluded that in the present case there were no “strong reasons” – within the meaning of the Court’s case-law – capable of justifying the inequality of treatment on grounds of sex which he claimed to have suffered. From his point of view, reasons that were purely financial or bound up with tradition were insufficient to justify such discrimination; nor could the latter be justified by the biological and functional differences used as discriminatory criteria by the Federal Court. Consequently, the impugned inequality of treatment was not objectively and reasonably justified. The inevitable conclusion was therefore that there had been a violation of Article 14 read in conjunction with Article 8 of the Convention.

b) The Government

54. The Government were aware that widows and widowers were not treated equally, but considered that the difference of treatment laid down was objectively and reasonably justified.

55. As regards the legitimate aim, the Government explained that the widow's pension was based on the presumption that the husband provided for his wife's financial maintenance, particularly where she had children (section 23 (1) and (2) LAVS; see paragraph 13 above). Deemed financially dependent on her husband, the wife generally received a widow's pension on the latter's death, while a widower was not entitled to any corresponding benefit. The Government considered that widows should still benefit from greater protection. Consequently, they held that the impugned difference of treatment had a legitimate aim. They considered that their position had been confirmed, *mutatis mutandis*, by the Court's *Andrle* judgment (cited above, § 53).

56. As regards the proportionality requirement, the Government referred to the *Andrle* judgment, cited above, stating that Article 14 did not prohibit member States from treating groups differently in order to correct "factual inequalities", and that it left them a wide margin of appreciation regarding social issues.

57. The Government also cited the *Petrovic v. Austria* judgment (27 March 1998, § 40, *Case Reports* 1998-II), relating the authorities' refusal to award the applicant a parental leave allowance. In its judgment, the Court had concluded that the Austrian authorities had not overstepped their margin of appreciation and that the impugned difference of treatment had not been discriminatory within the meaning of Article 14. The Court had considered that at the material time, in the late 1980s, there had been no common denominator in the States' legal systems in that sphere, with most Contracting States not providing for parental leave allowance for fathers.

58. The Government submitted that the same considerations applied to the instant case. Indeed, the difference between the conditions for granting a widow's pension and those for granting a widower's pension had originated in the circumstances prevailing when that benefit had been introduced. The widow's pension had emerged in 1948 in order to meet the welfare needs of married women in the event of their husband's death, at a time when the women performed the household chores and brought up the children, while their husbands provided for their financial maintenance. The widower's pension had been introduced in 1997 in order to take into account the increasing numbers of married women engaged in paid work, and also in order to protect married men performing housework and raising their children in the event of their wife's death. However, the legislature had considered that only widowers with dependent children under the age of eighteen should be entitled to that benefit.

59. The Government added that with a view to equality of treatment, there had been several successive plans to bring the conditions for entitlement to widowers' pension into line with those for widows' pension. Such a "levelling down" of the conditions for entitlement to the widower's pension in fact coincided with the current regulations in many European States. Hitherto, even though the issue had been extensively debated, the idea of establishing equal treatment between widows' and widowers' pensions had been removed from the agenda on the grounds that a higher level of protection for widows was still justified. For example, in the framework of the 2020 reform, the Federal Council had proposed adapting survivors' benefits to the current situation of widows, without providing for proper equality between widowers and widows, relying on data from a survey of the economic situation of widows and widowers. Nevertheless, even though it had considered the current system no longer suited to the current situation, the Federal Council had noted that social realities were such as to prevent complete standardisation of the conditions set out under the AVS system for entitlement to a widow's pension and a widower's pension.

60. Having regard to the foregoing considerations, the Government concluded that the distinction drawn by the Swiss legislature was based on an objective and reasonable justification. They considered that they could not be blamed for gradually modifying the benefits system with due regard to the particular social situation in Switzerland. The Government consequently submitted that Switzerland had not overstepped its margin of appreciation in that sphere and that there had been no violation of Article 14 read in conjunction with Article 8 of the Convention.

2. The Court's assessment

(a) The applicable principles

61. The Court reiterates that Article 14 of the Convention affords protection against any kind of discrimination in the enjoyment of the rights and freedoms set forth in the other substantive provisions of the Convention and the Protocols thereto. However, not every difference in treatment will amount to a violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory (see, for example, *Belli and Arquier-Martinez*, cited above, § 89; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 88, *Case Reports* 1997-VII; and *Zarb Adami v. Malta*, no. 17209/02, § 71, ECHR 2006-VIII).

62. According to the Court's case-law, a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification. The existence of such justification must be assessed

in relation to the aim of the impugned measure, having regard to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim: Article 14 will also be violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, for example, *Belli and Arquier-Martinez*, cited above, § 90; *Zarb Adami*, cited above, § 72; *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2006-VI; *Petrovic*, cited above, § 30; and *Lithgow and Others v. the United Kingdom*, 8 July 1986, Series A no. 102, § 177).

63. In other words, the concept of discrimination generally includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94, and *Belli and Arquier-Martinez*, cited above, § 91). Indeed, Article 14 does not prohibit differences of treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention (see, among other authorities, *G.M.B. and K.M. v. Switzerland* (dec.), no. 36797/97, 27 September 2001, and *Zarb Adami*, cited above, § 73).

64. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Konstantin Markin*, cited above, § 126, and *Gaygusuz v. Austria*, 16 September 1996, § 42, *Case Reports* 1996-IV). The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background (see *Rasmussen v. Denmark*, 28 November 1984, § 40, Series A no. 87, and *Inze v. Austria*, 28 October 1987, § 41, Series A no. 126), but the final decision as to observance of the Convention's requirements rests with the Court. Since the Convention is first and foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Weller*, cited above, § 28; *Stec and Others*, cited above, §§ 63-64; *Ünal Tekeli v. Turkey*, no. 29865/96, § 54, ECHR 2004-X; and, *mutatis mutandis*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV).

65. The Court further reiterates that the advancement of gender equality is today a major goal in the member States of the Council of Europe, and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (see

Konstantin Markin, cited above, § 127; *Burghartz*, § 27, cited above; and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A no. 263). In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. For example, States cannot impose traditions deriving from the idea that the man plays a primordial role and the woman a secondary role in the family (see *Ünal Tekeli*, cited above, § 63).

(b) Application of the above-mentioned principles to the instant case

i. Existence of grounds of discrimination prohibited under Article 14

66. The applicant submitted that he had suffered discrimination as compared with widows on account of the termination of payment of his widower's pensions when his younger daughter had come of age, because a widow in the same situation would not have lost entitlement to her pension. Having regard to the foregoing considerations, the applicant can legitimately claim to have been the victim of discrimination on grounds of "sex" within the meaning of Article 14 of the Convention.

67. Furthermore, the Court notes that in his observations, the applicant apparently alluded to a different type of discrimination on grounds of sex inherent in sections 23 and 24 LAVS (cited above – see paragraph 13 above): widows without children, on the death of their husband, are entitled to a widow's pension provided that they are at least forty-five years old and have been married for at least five years, whereas widowers meeting those same criteria do not qualify for a widower's pension. Since the applicant has two children whom he brought up after his wife's death, there is no need to answer the question whether or not the difference of treatment to which the applicant was referring is compatible with Article 14 of the Convention.

ii. Existence of a difference in treatment between persons in relevantly similar situations

68. The Court considers that the applicant suffered differential treatment on account of the termination of payment of his widower's pension. It observes that even after their youngest child comes of age, widows remain entitled to their pensions, and that the applicant, even though he was in the same situation, was not treated in the same way.

69. The Court observes that the authorities' refusal to grant the applicant a widower's pension was based exclusively on the fact that he was a man. They did not argue that the applicant failed to satisfy any of the other statutory conditions for the award of the benefit and he was accordingly in a like situation to women as regards his entitlement to that benefit (see, *mutatis mutandis*, *Willis*, cited above, 41).

70. It remains to be seen whether that difference of treatment is objectively and reasonably justified.

iii. Whether the difference of treatment is objectively and reasonably justified

71. The Government submitted that the widower's pension was based on the assumption that the husband provided for the financial maintenance of his wife, particularly where she had children. They added that providing a higher level of protection to widows than to widowers was still justified nowadays. The Court is prepared to accept that the argument put forward by the Government objectively justifies the impugned difference of treatment. On the other hand, it considers that the question whether that difference is in fact reasonable must be examined in detail.

72. As regards the reasonableness of the difference of treatment, the Court reiterates that very weighty reasons would have to be put forward before a difference of treatment on grounds of sex could be regarded as compatible with the Convention, regardless of whether the alleged discrimination affects a woman or, as in the present case, a man.

73. The Court does not rule out the possibility that the introduction of a widow's pension without any equivalent benefit for widowers was justified by the role and status of women in society at the time of the enactment of the relevant law, that is in 1948 (see paragraphed 14 above). Nor was there any need to answer the question whether the impugned difference of treatment, which had emerged with the introduction of the widower's pension in 1997, had still been justified at that time.

74. However, the Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions and the notions currently prevailing in democratic States (see, among many other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26, and *Kress v. France* [GC], no. 39594/98, § 70, ECHR 2001-VI). It also reaffirms that references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. It follows that the Government cannot rely on the assumption that a husband supports his wife financially (the "male breadwinner" concept), in particular where she has children, in order to justify differential treatment to the detriment of widowers *vis-à-vis* widows.

75. With more specific regard to the present case, the Court points out that the applicant's wife lost her life in an accident when their children were one year and nine months and four years old respectively. Since then the applicant, who had been working before his wife's death, has been exclusively caring for his children and has been unable to engage in his former occupation. He was fifty-seven years old when payment of the pension ceased, and had not been in gainful employment for over sixteen years. The Court cannot discern how the applicant, at that age, could have

had less difficulty in re-entering the labour market than a woman in a relevantly similar situation, or how the termination of payment of the pension could have had less impact on him than on a widow in similar circumstances.

76. Lastly, the Court notes the failure of all the Government's various attempts the since 2000 to reform the widows' and widowers' pensions system, aimed in particulier at gradually harmonising entitlement to those pensions (see paragraphs 16-20 above). It observes that the Federal Court has accepted that the relevant provisions clearly do not comply with the principle of equality between men and women enshrined in Article 8 (3) of the Constitution, that it has stressed that although the legislature was aware of that non-compliance, they failed subsequently to remedy it, and that it has concluded that the current law should be applied by itself and the other authorities in accordance with Article 190 of the Constitution (see paragraph 11 above). The Court cannot accept the use of that conclusion to justify the difference of treatment suffered by the applicant. It reaffirms that Article 1 of the Convention requires States Parties to respect the human rights set out in that instrument. Although it leaves to the State a free choice of the means to be used in guaranteeing those rights and does not impose any model on them in that regard, it reserves the right to conduct strict supervision of the effective respect for the rights in question as implemented in practice.

77. Having regard to the foregoing considerations, the Court cannot conclude that in the instant case there were any "strong reasons" justifying the difference of treatment on grounds of sex complained of by the applicant. Consequently, it considers that the Government have failed to provide any reasonable justification for the difference of treatment sustained by the applicant. The Court would emphasise that that conclusion should not be interpreted in such a way as to encourage the Swiss Government to abolish or reduce the pension awarded to women with a view to rectifying the inequality of treatment noted.

78. Accordingly, the Court finds that there has been a violation of Article 14 read in conjunction with Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant claimed the sum of 189,355 Swiss francs (CHF) in respect of the pecuniary damage which he had sustained as a result of the termination of payment of the widower's pension and other supplementary benefits.

81. The Government argued that if the Court found a violation of Article 14, it would have to admit that the domestic courts were better placed than itself to accurately estimate the pecuniary damage sustained by the applicant. They also submitted that a retrial or a reopening of proceedings, at the applicant's request, would, in principle, be an appropriate means of remedying the alleged violation. The Government stated that the applicant, duly represented by counsel before the Court, could bring a compensation claim in the framework of an application for a review of the Federal Court's judgment of 4 May 2012.

82. The Court discerns a direct causal link between the violation found and the alleged pecuniary damage, to wit the cessation of payment of the widower's pension as of 1 December 2010. However, like the Government, it considers that the domestic courts are indeed in a better position than itself to accurately estimate the damage in question – having regard, *inter alia*, to the fact that the amount of pension paid can vary from one year to the next (see, *mutatis mutandis*, in respect of a disability pension, *Di Trizio*, cited above, § 120). Furthermore, regard should be had to the subsidiary nature of the mechanism set out in Article 41, which states that the Court should afford just satisfaction to the injured party if the internal law of the respondent State concerned allows only partial reparation to be made for the consequences of a violation of the Convention.

83. In those circumstances, although the respondent State is generally free to choose, under the supervision of the Committee of Ministers, the means of honouring its obligations under Article 46 § 1 of the Convention, provided that those means are compatible with the conclusions set out in the Court's judgment (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 88, ECHR 2009), the Court has nevertheless stated on many occasions that a re-trial or a reopening of proceedings at the applicant's request is, in principle, an appropriate means of remedying the finding found (see, among other authorities, *Di Trizio*, cited above, § 120; *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; and *Claes and Others v. Belgium*, nos. 46825/99, § 53, 2 June 2005).

84. In the present case, the Court agrees with the Government that there is nothing to prevent the applicant from submitting a claim for damages in the framework of an application for a review of the Federal Court judgment which he is challenging before the Court. Since such a possibility is explicitly provided for in section 122 of the Law on the Federal Court of 17 June 2005 (see paragraph 11 above) and there is nothing to suggest that

that channel is illusory – nor has the applicant so alleged – the Court considers that there is no need to make any award in respect of pecuniary damage.

85. Furthermore, the applicant claims a sum of CHF 18,935.50 in respect of the non-pecuniary damage resulting from his lack of contact with his daughters owing to the termination of the widower's pension and the need to fall back on social welfare.

86. The Government considered that there was no causal link between possible discrimination on grounds of sex, contrary to Article 14 read in conjunction with Article 8 of the Convention, and the alleged pecuniary damage. Consequently, they invited the Court to reject the applicant's claims under that head.

87. The Court agrees with the Government. It considers that the applicant has failed to demonstrate the existence of a causal link between the discrimination as prohibited by Article 14 which he sustained as a result of the termination of payment of his pension when his younger daughter reached the age of majority and the alleged pecuniary damage.

88. On the other hand, the Court holds that the applicant sustained non-pecuniary damage from the authorities' refusal to grant him a widower's pension as of 1 December 2010. Ruling on an equitable basis pursuant to Article 41, the Court considers that it would be appropriate to award 5,000 euros (EUR) to the applicant under that head.

B. Costs and expenses

89. Lastly, the applicant claimed a total of CHF 10,866.45 in respect of costs and expenses: CHF 3,300 in respect of judicial fees incurred before the domestic courts, CHF 350 for the lodging of the application with the Court, and CHF 7,216.45 in respect of the additional observations submitted to the Court by his lawyer.

90. The Government did not contest the merits of the claim for reimbursement of judicial fees incurred before the domestic courts (CHF 3,300) or of the fees for the lodging of the application with the Court (CHF 350). On the other hand, they disputed the claim of CHF 7,216.45, which they considered excessive as related exclusively to the additional observations of 23 June 2017 (11 pages). They considered that a total award of CHF 2,000 would be appropriate.

91. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sums of CHF 3,300 (approximately EUR 3,056) and CHF 350 (approximately EUR 324), undisputed by the Government. As regards

expenses incurred in the drafting of the additional observations, the Court considers, like the Government, that the amount claimed is excessive. It considers that a sum of EUR 3,000 is sufficient to cover the costs and expenses corresponding to that head of claim. Accordingly, the Court awards the applicant a total amount of EUR 6,380.

C. Default interest

92. 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, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 14 read in conjunction with Article 8 of the Convention;
3. *Holds*
 - (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 following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 6,380 (six thousand three hundred and eighty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

B. v. SWITZERLAND JUDGMENT

Done in French, and notified in writing on 20 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Milan Blaško
Registrar

Paul Lemmens
President

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

P.L.
M.B.

CONCURRING OPINION OF JUDGE KELLER

1. I voted with the majority for a finding of a violation of Articles 8 and 14 of the Convention. A difference in treatment of widows and widowers as exemplified in the present case is no longer justifiable today. Furthermore, the application of Article 8 in the instant case is necessitated by a number of recent judgments (see paragraphs 38-40 of the Chamber judgment). However, I find the reasoning set out by the Court difficult to follow for several reasons. Indeed, in my view such case-law is based on a truncated interpretation of Article 8 and is incompatible with the teachings of treaty law and the Grand Chamber. The path chosen by the Court amounts to imposing on the respondent State commitments into which it deliberately declined to enter in deciding not to ratify Protocol No. 1 to the Convention.

2. First of all, for the same reasons as I set out together with Judges Spano and Kjølbrot in the case of *Di Trizio v. Switzerland* (no. 7186/09, 2 February 2016), and with Judge Dedov in *Belli and Arquier-Martinez v. Switzerland* (no. 65550/13, 11 December 2018), I consider that the complaint put forward in the present case is primarily of a pecuniary nature and that it falls within the ambit of Article 1 of Protocol No. 1 rather than Article 8 of the Convention.

3. Indeed, there can be no doubt in the present case that the applicant's complaint concerned the payment of a social welfare benefit. The relevant case-law is clear as regards the fact that such benefits usually fall under Article 1 of Protocol No. 1 (see, for an outline of the principles governing this subject matter, *Bélané Nagy v. Hungary* [GC], no. 53080/13, §§ 80-89, 13 December 2016). Indeed, "(i)f... a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements" (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 54, ECHR 2005-X). More specifically, the Court has confirmed that disputes concerning payment of a survivor's pension fall within the ambit of that provision (see *Şerife Yiğit v. Turkey* [GC], no. 3976/05, §§ 57-59, 2 November 2010).

4. Nor is there any doubt that the Convention and its Protocols must be read as a whole (see, for example, *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, § 90, 10 January 2017). Nevertheless, that requirement does not mean that Article 8 of the Convention must be understood as encompassing all the obligations flowing from Article 1 of Protocol No. 1. There are at least two reasons for that.

5. Firstly, one of the fundamental principles of treaty law is that treaties must be interpreted on the basis of the common intention of the parties (see *Dispute regarding navigational and related rights (Costa Rica v.*

Nicaragua), judgment, *I.C.J. Reports* 2009, § 63). In that connection, the adoption by the parties to a treaty of a protocol concerning specific subjects obviously manifests their joint intention that the latter should not be governed by the original treaty (cf. *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §§ 51 and 136, 8 November 2016).

6. Moreover, as the Grand Chamber stated in connection with Article 2 of Protocol No. 4, “Article 5 should not, in principle, be interpreted in such a way as to incorporate the requirements of Protocol No. 4 in respect of States which have not ratified it, including the United Kingdom” (see *Austin and Others v. the United Kingdom* [GC], no. 39692/09 and 2 others, § 55, ECHR 2012).¹ Therefore, the Protocols are not systematically taken into account in interpreting provisions of the Convention; far from it.

7. This divergence of approaches adopted by the Court is regrettable in terms of the legitimacy of the Convention system. In the present case, by extending the criterion for the applicability of Article 8, the Court is once more taking on a role comparable to that of a “Supreme Social Insurance Court” with regard to a State which has deliberately not accepted such a situation.

8. The foregoing considerations show the ramifications of an issue which extend far beyond Switzerland and Protocol No. 1 to raise the more general question of the place of the Protocols in the interpretation of the Convention. In my view the Grand Chamber must be called upon to settle this vital issue.

¹ Conversely, it is logical to interpret the Protocols in the light of the Convention, which is by definition ratified by all the High Contracting Parties (see, for example, *Burghartz v. Switzerland*, 22 February 1994, §§ 23-24, Series A no. 280-B, and *Enver Şahin v. Turkey*, no. 23065/12, § 59, 30 January 2018).