



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

FIFTH SECTION

CASE OF P.C. v. IRELAND

(Application no. 26922/19)

JUDGMENT

Art 1 P1 • *Ratione materiae* • Withheld old-age pension payment, due to statutory disqualification while incarcerated, not a “possession”
Art 14 (+ Art 1 P1) • Discrimination • Peaceful enjoyment of possessions • No discrimination against convicted prisoner statutorily disqualified from old-age pension payments while incarcerated • Payments a proprietary interest falling within ambit of Art 1 P1 • No evidence of greater impact on older-age prisoners as a group • Differing impact of the disqualification, based on a person’s level of income and its source, not related to personal status • Convicted prisoners not in relevantly similar position to persons detained for treatment of mental illness or remand prisoners
Art 13 (+ Art 14 and Art 1 P1) • Effective remedy • Supreme Court decision to uphold constitutional complaint, and not proceed with full consideration of Convention complaints, within authorities’ margin of appreciation • No issues arising from level of damages awarded • Manifestly ill-founded

STRASBOURG

1 September 2022

FINAL

01/12/2022

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

In the case of P.C. v. Ireland,

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

Mārtiņš Mits, *President*,

Síofra O’Leary,

Lətif Hüseyinov,

Lado Chanturia,

Ivana Jelić,

Mattias Guyomar,

Kateřina Šimáčková, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 26922/19) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), by Mr P.C. (“the applicant”) on 8 May 2019;

the decision to give notice to the Irish Government (“the Government”) of the complaints concerning Article 1 of Protocol No. 1, alone and in conjunction with Article 14, and also Article 13 of the Convention, and to declare inadmissible the remainder of the application;

the decision to grant the applicant anonymity;

the parties’ observations;

Having deliberated in private on 28 June 2022,

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

INTRODUCTION

1. The case concerns the disqualification of the applicant for his old age pension while serving a sentence of imprisonment. The applicant claimed that this disqualification, provided for by statute, was an interference with his rights under Article 1 of Protocol No. 1, and that it also discriminated against him contrary to Article 14 in conjunction with Article 1 of Protocol No. 1. The applicant also claimed that because the Supreme Court did not determine his Convention complaints and, as a result, did not award him adequate redress, he was denied an effective remedy, contrary to Article 13.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

2. The applicant, P.C., is an Irish national, who was born in 1940 and lives in Dublin. He is represented before the Court by Mr J. MacGuill, a lawyer practising in Dublin.

3. The Government were represented by their Agent, Mr B. Lysaght of the Department of Foreign Affairs.

4. The facts of the case may be summarised as follows. The applicant made Pay Related Social Insurance ('PRSI') contributions, qualifying for the State Pension (Contributory) ('the SPC') in accordance with sections 108-109 of the Social Welfare Consolidation Act 2005 ('the 2005 Act', see further under Part II.C below) when he reached the age of 66 years on 10 February 2006. He began to receive weekly SPC payments from that date to the value of about EUR 230.

5. On 25 March 2011 the applicant was convicted of sixty counts of sexual assault and fourteen counts of rape. The following day, he was sentenced to fifteen years' imprisonment, with the final three years suspended. The applicant indicated to the Court that his anticipated release date was in March 2020. He served his sentence in what the High Court described as "a well-run, modern prison with good facilities and a high standard of care".

6. Section 249(1)(b) of the 2005 Act disqualified persons who were undergoing imprisonment or detention in legal custody from receiving any of the benefits provided for in part 2 of the Act. This included the SPC. On this basis, payment of the applicant's pension ceased as from the date of his imprisonment.

A. Proceedings in the High Court

7. In 2013 the applicant issued proceedings against the State. He sought a declaration that the impugned provision was incompatible with one or more articles of the Constitution, damages for a breach of his constitutional rights, and an injunction ordering the State to pay him his pension. In addition, he argued that the stoppage of his pension was contrary to one or more of the following provisions of the Convention: Articles 3, 5, 6, 8, 13, and 14, as well as Article 1 of Protocol No. 1. He sought a declaration under section 5 of the European Convention on Human Rights Act, 2003 that the impugned provision was incompatible with the Convention and claimed compensation for the loss suffered by him as a result (see further under Part II.B below).

8. The applicant claimed before the High Court that the stoppage of his pension had left him practically destitute, since his only income was a prison gratuity. This had initially been worth EUR 18.90 per week, decreasing to EUR 11.90 per week owing to his inability to perform work within the prison on account of a number of age-related ailments and a wrist injury sustained in prison. The High Court noted that had he been in a position to take on prison work, he could have earned an extra EUR 3.50 per week. As things stood, the applicant explained that he had no money to spend on, for example, extra food, personal clothing or small electronic appliances for use in his cell. He mentioned a payment of EUR 50 from the prison hardship fund in 2013.

He complained that the stoppage of his pension would mean a loss of over EUR 100,000 for him.

9. In addition to the applicant, the High Court also heard evidence from two State officials, a civil servant who explained the structure and purpose of the SPC, and the Assistant Governor of the prison where the applicant was being held. The first witness indicated that about 30-40 prisoners had their SPC payments stopped each year. She also clarified that the SPC is a non-means-tested benefit. All those who meet the eligibility criteria receive it, regardless of any other income or assets. The second witness informed the court about the regime to which the applicant was subject in prison, the facilities and services available to him, and the average cost of maintaining a prisoner per year – approximately EUR 65,000. She indicated that there were between five and ten prisoners in the same age group as the applicant who were performing work in the prison, earning EUR 4.50 per week. It was possible for prisoners to receive additional funds, including from private pensions, that could be lodged by their family into the prisoner's "prison account".

10. The High Court gave judgment on 29 April 2016 ([2016] IEHC 315), dismissing the case. It addressed the question whether payment of the SPC to the applicant represented a property right for the purposes of the Constitution or the Convention. It did not accept the applicant's argument that the contributory nature of the benefit meant that it was a property right. It noted that the benefit system was also funded in part by tax revenue, and the legislature could very well decide to change the funding model from contributions to funding through income tax. Furthermore, it referred to the importance of maintaining flexibility in the social welfare system so that it could meet the social needs prevailing at any moment in time. To classify contributory benefits as property rights would greatly hinder that. In this respect the judgment referred to Convention case-law allowing a wide margin of appreciation to the Contracting States in matters of economic and social strategy.

11. As for the claim of unconstitutional discrimination, the High Court rejected the attempted comparison with prisoners in receipt of private pensions. Such benefits clearly were property rights that the State could not suspend, unless it were to introduce a requirement for prisoners to contribute to the cost of their incarceration. It further noted that such prisoners were actually treated in the same way as their (likely) entitlement to receive the SPC was also suspended for the duration of their detention. Furthermore, the rule applied to all social welfare benefits, not just the SPC. The court rejected the argument that the applicant was being required to meet the cost of his imprisonment whereas those with other sources of income were not. It considered that given the purpose of the SPC – to assist the recipients to meet basic living costs – the State was entitled to withhold the benefit when the person was imprisoned and their essential needs were met. This was an

objectively rational and proportionate measure, and therefore not discriminatory.

12. Turning to the Convention arguments, the High Court summarily rejected those advanced under Articles 3, 5, 6 and 8. As for his complaint under Article 14, it stated:

“124. In this case, the impugned provision applies to the population generally, and more specifically it applies to all persons who are entitled to receive the SPC. It applies to social welfare benefits generally, and not just the SPC. The plaintiff complains that it does not apply to those who have a private pension, other sources of income or a semi-state pension, but as I have already held, this is not comparing like with like. No argument has been advanced, and it does not appear as though any could be made, as to why the plaintiff should be treated differently from the rest of the population as regard the application of s. 249(1). Moreover, if there has been any difference in treatment of the plaintiff with others in analogous situations (and it follows from the above that I do not consider this to be so), this does not give rise to a breach of Article 14 in circumstances where there is a reasonable and objective justification for section 249(1). For these reasons, I do not consider that there has been any violation of the plaintiff's rights under Article 14, taken in conjunction with any other article of the Convention.”

13. Lastly, it dealt with the complaint under Article 1 of Protocol No. 1:

“125. The question as to whether or not the suspension of a State pension, due in a period of incarceration, violates rights under Article 1, Protocol No. 1 of the Convention was considered in [*Szrabjet and Clarke v. the United Kingdom*, nos. 27004/95 and 27011/95, Commission decision of 23 October 1997, unreported]. In that case the Commission concluded that such a measure was in the public interest because prisoners should not be in a position to accumulate a lump sum by reason of being paid a State pension, at a time when they are being maintained by the State. It is submitted on behalf of the plaintiff in these proceedings that *Szrabjet* has been overtaken by subsequent authorities of the ECtHR such as *Stec*, *Andrejeva* and *Stummer*. However, these cases do no more than establish that once a State legislates for payment of a welfare benefit, citizens who meet the eligibility criteria for that benefit have a pecuniary interest in the benefit that is protected by Article 1, Protocol 1 of the Convention. The eligibility requirements themselves must be reasonable and not arbitrary. But significantly, those authorities stop short of holding that a citizen has a property right in such benefits, arising by reason of contributions made and in the context of the claim made in these proceedings by the plaintiff, the conclusions reached in *Szrabjet* remain undisturbed.”

14. The judgment concludes with a summary that, as relevant to the complaints now before this Court, states:

“127. The plaintiff claims that he has a constitutionally protected property right to receive payment of the state pension contributory by reason of his having made the requisite number of PRSI contributions during his working years. He also claims that this same right is a property right protected by Article 1, Protocol 1 of the Convention. Analysis of authorities in this jurisdiction, the United States, the United Kingdom and the European Court of Human Rights demonstrates that in those jurisdictions, no such property right accrues. In my view it is no different in this jurisdiction. The right to receive payment of the SPC or indeed any other social welfare benefit is a statutory right only and is subject to such conditions as to eligibility as are laid down by the *Oireachtas* [Parliament] from time to time.

128. In both the Irish constitutional context and in the context of established convention law, the *Oireachtas* has a wide margin of appreciation in establishing criteria for eligibility of any social welfare benefit, but must ensure that such criteria are rational, objective and in pursuit of a legitimate aim, and that they are in no way arbitrary or discriminatory. The SPC forms part of what the defendants have referred to in their submissions as a scheme of single maintenance meaning that the State should not pay more than once for the maintenance of an individual. The purpose of the SPC is to maintain or to assist in the maintenance of an individual in his/her years of retirement. The fact that the benefit is not needs based is not relevant or determinative of the issues raised in these proceedings.

129. Section 249(1) does no more than suspend payment of the benefit in certain circumstances, including a period during which a person who is otherwise eligible to receive the benefit is maintained at the cost of the State while imprisoned. Since the purpose of the benefit in the first place is to assist in the maintenance of the individual, it is perfectly rational that the benefit should not be paid when that person is otherwise being maintained by the State. Moreover if the benefit were paid during a period of incarceration, a person would have the ability to accumulate a lump sum which he would not accumulate but for his incarceration. The section therefore has a rational and objective basis, and equivalent United Kingdom legislation has been acknowledged as such by the ECtHR.

...

132. The plaintiff complains that s. 249(1) operates in a discriminatory manner, contrary to Article 40 of *Bunreacht na hÉireann* [Constitution of Ireland] and Article 14 of the Convention. This complaint is made on the basis that the same measure does not apply to others who are in receipt of private pensions or other kinds of public pensions. This contention must fail for a number of reasons. Firstly, the comparison with others in receipt of private pensions or other types of public pension is a comparison of two different factual situations. The ECtHR has held repeatedly that Article 14 applies when States treat differently persons in analogous situations. There is a fundamental difference between a private pension or a public service pension payable in accordance with the terms of a public service superannuation scheme (such as in Lovett) and the SPC and so the comparison advanced by the plaintiff is one of two different factual situations that does not give rise to discrimination for the purposes of Article 14 of the Convention. In the context of Article 40.1 of *Bunreacht na hÉireann*, it has been held that when comparing the different treatment of persons, it is important not simply that the persons can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made (*M.R. & D.R. (suing by their father and next friend O.R.) and others v. An T-Ard-Chláraitheoir*). In comparing himself to others in receipt of private pensions or other public service pensions, the plaintiff is not comparing like with like. Section 249(1) applies to all prisoners who otherwise meet the criteria for eligibility to the SPC, including those who may also be in receipt of private pensions or other public service pensions. More than that, it applies to all social welfare benefits. For these reasons the section does not result in discrimination of the plaintiff's right to equal treatment under either the Constitution or the Convention.

133. The State has an express duty to protect as best it may the property rights of every citizen and it is well established that any interference with those rights must be in accordance with the exigencies of the common good and must be warranted by and proportionate to the objectives sought to be secured. All of that depends upon the existence of a property right in the first place, and since I have held that the plaintiff does not have a property right in the SPC, the need to analyse the section to see that it

meets these criteria is limited. However, it is necessary to the extent that statutory provisions which disqualify persons from receiving benefits to which they would otherwise be entitled must be rational, objective and in pursuit of a legitimate objective. The objectives of avoiding double maintenance and the accumulation of a lump sum that would not be accumulated, but for a person's imprisonment (and the consequent maintenance of that person at the expense of the State) in my view meet those requirements."

B. Proceedings in the Supreme Court

15. The applicant sought leave to bring an appeal to the Supreme Court directly, rather than to the Court of Appeal (known as a "leapfrog appeal"). In granting leave, the Supreme Court considered, in its determination of 15 September 2016, that the case raised an issue of general public importance, and that there were exceptional circumstances that justified bringing the case directly to the final court. It identified as the essential question in the case the issue whether the exclusion of prisoners from benefiting from a contributory old age pension was consistent with rights guaranteed in either or both the Constitution and the Convention. It granted leave in respect of all of the grounds raised by the applicant, including the eleventh ground which referred to Article 1 of Protocol No. 1 alone and in conjunction with Article 14 of the Convention.

1. The first Supreme Court judgment

16. The Supreme Court delivered two judgments in the case. In the first judgment, dated 27 July 2017 ([2017] IESC 63), the Supreme Court first considered the nature of the legal entitlement to the SPC under the relevant provisions of Part 2 of the 2005 Act:

"[45]. ... What ss.108 and 109 of the Act undoubtedly do contain is a legal entitlement, on foot of which, subject to compliance with the statutory conditions, an eligible person might sue if denied the pension. Of course, eligibility hinges on compliance with conditions. But, the statutory provisions, at least, give rise to a justiciable, if conditional, legal entitlement. It is unnecessary to go so far as to hold, therefore, that this constitutes a form of property right recognised and protected by law. The Minister submits there has been a breach of the statutory conditions. But, what is undoubted is that the provision is mandatory, not subject to any provisions of law, and affects some prisoners in a more severe way than others in receipt of private pensions, or other pensions, emanating from the State, such as Army pensions."

17. The Supreme Court then examined whether the disqualification was a penalty imposed in a manner breaching the separation of powers under the Constitution by infringing upon the sentencing power of the courts. Having examined the range of exemptions from the disqualification, the Supreme Court stated:

"[48]. The only conclusion ... is that the mandatory sanction is to be confined to the specific class of person who are deemed to be "fully criminally culpable"; it is a sanction imposed by statute and regulation on those found by a court of law to have

committed serious crimes, warranting imprisonment... The effect of the statute, as applied, is to focus the impact of the mandatory disqualification directly on persons who are subject to terms of imprisonment, such as the appellant.”

18. The Supreme Court then examined the State’s arguments as to the purpose of the disqualification:

“[54]. Counsel for the Minister submits there is a rationale for the provision, based on unjust enrichment. But is this the true rationale, bearing in mind the provision’s legislative history? I am not persuaded. Even on a consideration of the exceptions and exclusions which are, in a manner of speaking, “ring fenced”, one is inevitably left with the conclusion that the provision is intended to impact, only on “culpably” guilty persons. The categories of person who are excluded from disqualification, such as those found not guilty, those detained pending trial where there is no charge, those where there is a qualification on the finding of guilt, or where there is absence from the State, leaves only that category of persons who are found guilty in due course of law, and who do not come within the exceptions.”

19. It stated that the question was whether the impugned provision constituted a punishment and therefore an impermissible administration of justice by legislation. The judgment continues:

“[57]. Having regard to its legislative history, and its impact, the impugned provision was, undoubtedly, originally intended to be punitive in purpose. It cannot be convincingly now said its effect has, as it were, “morphed” into something different, namely, a “social solidarity” provision. The sums of money involved are significant, and could amount in total to six figures by the conclusion of the sentence. While it may be said the provision’s purpose is to avoid unjust enrichment, its true effect can only be described as punitive, retributive, indiscriminate, and disproportionate. No such financial penalty is mandatorily imposed on prisoners with independent means... But more significantly, the section is still a punishment which is not imposed by a court.

[...]

[59]. To my mind, the prohibition on the payment of the SPC to sentenced persons can only constitute an additional punishment. Article 34 of the Constitution provides that justice shall be administered in courts established by law, by judges appointed under the Constitution. Article 38 provides that no person shall be tried on any criminal charge, save in due course of law. But this punishment is not imposed by a court at all. As such, it contravenes Articles 34 and 38 of the Constitution. The imposition of penalties, in the context of sentencing a person convicted of crimes, is a function exclusively reserved by Article 34 of the Constitution to the courts. Sentencing is an integral part of trial in due course of law, guaranteed by Article 38 of the Constitution. The provision, as applied, offends against those principles.

60. What is in question here is a statutorily based sanction, which is imposed entirely outside the domain of court proceedings, in an indiscriminate way, which is essentially punitive in effect. It is, in that sense, arbitrary, as well as constituting an invasion into the judicial domain. In light of the nature and extent of these incursions, no argument based on proportionality, or social solidarity, can meet the appellant’s case, as the measure constitutes an incursion into the domain prescribed as judicial under the Constitution.

61. The fact that the provision is broad in its terms does not entitle the State to, by regulation, adopt a means of application which constitutes an incursion into the judicial domain. Disproportionate or discriminatory means negate any lawful end. The Minister

must be found to have acted *ultra vires*, if the necessarily implied constitutional limitation of jurisdiction invades the judicial domain. The effect of the section in question, when combined with the regime established by the regulations made under it, offends against the separation of powers principle.

62. The effect of s. 249 (1) is to result in an impermissible legislative incursion into the judicial function by making provision for the imposition of an extra penalty upon an individual in receipt of SPC, without permitting the fact of this to be taken into account by a sentencing court in exercising its discretion as to the appropriate penalty to be imposed upon a person convicted of an offence that attracts a sentence of imprisonment. The manner in which the extra penalty operates fails to safeguard the appellant's right to have justice administered in courts established by law, by judges appointed in the manner provided by the Constitution. In my view, the section as applied contravenes the principles of separation of powers, and administration of justice, fundamental to the Constitution ..."

20. Given this finding, the Supreme Court found it unnecessary to proceed to any full consideration of the rights under the Convention. It did not consider that the Convention case-law that had been cited before it could bring the case any further.

21. Although it upheld the challenge to the impugned provision, the Supreme Court decided to adjourn for a short period the issue of the remedy to be granted and invited the parties to make submissions on this.

22. On 15 January 2018 the State made an interim payment of EUR 7,500 to the applicant.

2. The second Supreme Court judgment

23. The Supreme Court gave its remedies judgment on 28 November 2018 ([2018] IESC 57). The court was not unanimous. The majority judgment was given by O'Donnell J (Clarke C.J., McKechnie J. and O'Malley J. concurring). He commented on the first judgment as follows (emphasis in the original):

"7. The appellant challenged the provisions on a number of grounds, but significantly for present purposes, the court did not hold for the appellant on the wider grounds asserted, but rather determined that the effect of the narrowing of the disqualification by the 2007 Regulations was to render the disqualification a further punishment for a criminal offence. This, the court concluded, was an interference with the administration of justice, since the process of trial, adjudication and sentence are integral aspects of the administration of justice in criminal matters, consigned by the Constitution to the courts, and which cannot be conferred upon any other body. It followed from this reasoning that if the disqualification had not been limited to persons convicted, but if, for example, it included other persons lawfully detained by the State, and whose accommodation and upkeep was therefore paid for by the State, or if the disqualification was imposed by the court at the sentencing stage rather than by statute, then such provisions *might* pass constitutional muster. On this reasoning, there was nothing *per se* offensive to the Constitution in the State excluding payment of (at least some) benefit to a person whose detention was provided for by statute, and equally nothing offensive in the idea that in the case of persons convicted and sentenced to imprisonment, such an order could in an appropriate case be made by a sentencing court. Furthermore, since the unconstitutionality identified was located in the interaction of the regulations and

the statute, questions necessarily arose as to how any determination of the inconsistency of the resulting situation with the Constitution could or should be remedied. For these reasons and others, it was understandable that the court adopted the course of adjourning consideration of the appropriate order to be made.”

24. O’Donnell J then discussed the rationale for and acceptability of a court adjourning a final order in an appropriate case so as to allow the legislature time to consider how to respond to the finding that a provision of law was contrary to the Constitution. He moved on to the question of damages pursuant to the declaration of invalidity of section 249(1)(b) of the 2005 Act. He noted that in Irish constitutional law a declaration of invalidity did not normally lead, without more, to an award of damages. He considered the applicant’s argument that damages should be awarded automatically to be erroneous.

25. The next issue considered was whether, as a consequence of the declaring the statutory provision invalid, the applicant should then recoup in full the unpaid benefits. While it was clear as a matter of law that a declaration of invalidity established the nullity of the provision in question from the moment of its enactment (or from the date of entry into force of the Constitution for older legislation), that did not mean that all actions taken on foot of that provision must likewise be considered to be without any legal effect. As shown by a series of relevant rulings by the Supreme Court, it was established beyond question that there was no automatic rule of consequential invalidity, at least in the field of criminal law. As the applicant’s claim was a civil one, this raised slightly different issues. This led O’Donnell J to review a second series of decided cases, the foremost of these being the 1982 judgment of the Supreme Court in the case of *Murphy v. The Attorney General* holding that the Irish tax system was contrary to the Constitution in view of the manner in which it provided for the tax assessment of married couples compared to two single persons. While the Supreme Court had clarified that the offending provisions of tax legislation had been void *ab initio*, it had also significantly limited the consequences of this by holding that only the two plaintiffs could recover the excess tax paid, and only in relation to the two years that had passed since they had begun their legal challenge.

26. He reached the following conclusion on the applicant’s case:

“47. Turning to this case in conclusion, it appears to bear some comparison with the facts of *Murphy v. Attorney General* [1982] I.R. 241: indeed, the payment of social welfare payments pursuant to the 2005 Act is the other side of the State’s accounting process from the collection of taxes considered in *Murphy*. In one respect at least this case may present a stronger case for a limitation of the effect of a declaration of invalidity. The outcome of *Murphy* was that it was never permissible to insist upon a single assessment of married couples. Here, however, the decision of this court is not so clear cut. It seems conceivable that it would be entirely permissible to make at least some adjustment to the entitlement to social welfare of persons detained by the State and whose expenses are reduced by that fact, although not necessarily extending to the blanket removal effected by s. 249(1)(b). There was no time in which a person in the

position of the appellant could contend that they were entitled to receive payments while imprisoned, nor was there any legislative judgment that the appellant was so entitled. Indeed, to treat the appellant and anyone in the same position as fully entitled to payments under the 2005 Act, would be to create a new form of legislative entitlement to benefit, and moreover one which not only was not approved by the *Oireachtas* but, moreover, plainly runs counter to the legislative intention. Just as the court will not sever a provision if the result will be to create legislation inconsistent with the legislative intention as apparent from the Act, the court should be slow to permit a declaration of invalidity to create by default a form of legislation of general application, which it is plain the *Oireachtas* would not have enacted, and which, moreover, would extend the financial burden on the State and its citizens without sanction of the *Dáil* [the lower house of the Irish Parliament]. Furthermore, the theory of any claim in litigation is that a person is forced to bring proceedings because the defendant wrongfully withholds something which the plaintiff claims. The failure of the defendant to provide the benefit or pay the damages justifies the commencement of proceedings and the awarding of costs against the defendant. But here, the Minister for Social Welfare could never lawfully have paid the benefit to the appellant. The Minister was bound by the law to apply s. 249(1)(b) and had no entitlement to treat it as invalid or a nullity: that was solely within the jurisdiction of the Superior Courts pursuant to Article 34 of the Constitution. All of these factors point, in my view, to an obligation to fashion an appropriate remedy in this case, rather than adopt the general approach of consequential invalidity.

48. The invalidation of s. 249(1)(b) will require that the *Oireachtas* now address the question in a comprehensive, and, I hope, humane way, and produce an outcome consistent with the Constitution. That may yet yield benefits for prisoners and others detained by the State. In terms, however, of the recovery of benefits unpaid for the period while the 2005 Act, and more specifically s. 249(1) was in force, I would follow the broad approach in *Murphy v. Attorney General* [1982] I.R. 241, and would be prepared to hold that this appellant would be entitled to be paid benefits, but limited to a period approximating to the time taken in these proceedings. That must be subject of some rough estimation, since it cannot be that dilatory proceedings would increase the amount recovered. In fact he has already been paid a sum of €7,500 on account of damages by the State authorities. There has been no precise quantification of the amount of the claim made by the appellant under this heading by reference to the progress of the case. Taking a broad and admittedly unscientific approach, I would accordingly order that the appellant is entitled to receive €10,000, in this regard, €7,500 of which has already been paid. The fact that a claim was not intimated earlier means, as in *Murphy*, that the State was entitled to maintain its accounts on the assumption that the disqualification contained in s. 249 was valid and effective. No person who had not issued proceedings would be entitled to claim any entitlement. Where proceedings have been issued and not advanced, it will be necessary to consider carefully if any entitlement to any benefit is appropriate. However, that issue is not one which arises in this case.”

27. Clarke CJ gave a brief concurring judgment. Commenting on the applicant’s claim to receive full retrospective payment of his pension, he said:

“1.5 ... [I]t is sufficient for present purposes to acknowledge that there are a wide range of potential measures which might have been or might now be introduced which would fall short of conferring on Mr. C the entitlement to obtain a full pension. To hold that he is retrospectively entitled to a full pension as a consequence of the declaration of inconsistency with the Constitution being made today would, therefore, be to confer a windfall gain on him.”

28. McKechnie J also issued a concurring judgment in which he addressed the applicant's claim for redress. He stated:

"16. ... I can finally say that the declaration of invalidity alone is not an effective remedy in this case. Indeed, there is an argument for suggesting that at least from the date of the institution of the proceedings the plaintiff should be entitled to recover by way of damages the amount which, but for the invalidated section, he would have received. The only prohibition preventing that from happening was s. 249(1)(b) of the 2005 Act. However, to do so in a manner as simplistic as that would risk infringing on the legislative role. It would in effect be tantamount to saying that in respect of a convicted person who is incarcerated the State may not have a view on the S.P.C. as applying to him. To go further along that route would be to second guess the legislature and in any event is not a matter for this Court. Therefore, although attractive, the simplicity of that approach is not appropriate."

29. MacMenamin J, who had given the principal judgment in the case, took a different position on the question whether the effects of a declaration of invalidity are *ex tunc* or *ex nunc*. He introduced his reasoning by recalling key elements of the first judgment:

"5. A number of features in the principal judgment require reiteration. First, the declaration to be made will not affect the validity of the custodial part of the appellant's sentence. That is not in question. Next, the principal judgment holds that ss. 108 and 109 of the Act of 2005 contain a simple legal entitlement, on foot of which, subject to compliance with certain statutory conditions, an eligible person may be entitled to the State Pension Contributory. Eligibility is contingent, therefore, upon the fulfilment of these statutory conditions. As the Court pointed out, the appellant does not hold any constitutionally cognisable property right in the pension. The appellant's interest in the pension is, therefore, limited in this way. The issues of redress ... can only be considered in that context. Additionally, I would emphasise that the Court did not find that s. 249 offended against the guarantee of equality before the law contained in Article 40.1 of the Constitution. The question of over-inclusivity, or under-inclusivity, did not arise in the case of this appellant – a sentenced prisoner."

30. For the reasons he set out at length, his conclusion was that the primary redress to be granted in the case was an *ex tunc* declaration of the invalidity of s. 249(1)(b) of the 2005 Act. Moving on to the issue of damages, he recalled the grounds of the principal judgment:

"69. The principal judgment contained observations to the effect that the s. 249(1) disqualification was arbitrary, indiscriminate, and disproportionate, insofar as concerned the appellant. But the *ratio* of the principal judgment is that the disqualification operated by s. 249(1)(b) is a penalty on prisoners, in that it constitutes an impermissible incursion into the judicial domain. The judgment did not hold there was any other constitutional invalidity... The judgment does not speak to any constitutional right of the appellant to equality of treatment before the law under Article 40.1 of the Constitution, or a narrowing of the disqualification by the Regulations.

70. To reach such a determination would have necessitated going considerably beyond the scope of the principal judgment, and would have required a court to consider the proportionality of s. 249(1) in its true legal sense, having regard to the legitimacy of the end which the provision seeks to achieve. Whether that objective is legitimate and proportionate are arguable propositions. The provision might be justified on the

grounds of the legislation being part of a social solidarity code, or indeed on the alternative grounds that the appellant's basic needs, which he would normally discharge from his SPC, are, in fact, undertaken by the State during the period of his imprisonment. But the case did not extend that far."

31. He concluded with a summary of his reasoning, which reads as relevant:

"97. ...

4. In my view, the appellant has not shown that any personal constitutional right of his was breached. What has been shown is, rather, that s. 249(1)(b) of the Act of 2001 is constitutionally invalid, because it imposed an extra-judicial punishment on prisoners.

5. The constitutional invalidity was caused by the absence of judicial process relating to the disqualification at the time of his sentencing. What the outcome of such a hearing might be, in the words of Budd J., is "imponderable", and "unascertainable". Any "loss" resulting, even if it were quantifiable, is necessarily indirect. In general, it seems to me that the simple application of the law, as it stood for many years, could not in itself give rise to a claim in damages, or a finding of wrongdoing. These would be necessary to establish any claim."

II. RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Bunrecht na hÉireann ("the Constitution")

32. Article 34.1 of the Constitution states:

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

33. Article 38.1 of the Constitution states:

"No person shall be tried on any criminal charge save in due course of law."

34. Article 40.1 of the Constitution states:

"All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

B. The European Convention on Human Rights Act 2003 ('the 2003 Act')

35. Section 3 of the 2003 Act states:

"(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

(2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to

subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.”

36. Section 5(1) of the 2003 Act states:

“(1) In any proceedings, the High Court, the Court of Appeal or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as “a declaration of incompatibility”) that a statutory provision or rule of law is incompatible with the State’s obligations under the Convention provisions.”

37. Sections 5(2) to 5(5) set down the effects of a declaration of invalidity. A declaration does not affect the validity, ongoing operation or enforcement of the provision or rule or prevent a further application to the Court. The declaration must be laid before the *Oireachtas*. The party may then apply to the Attorney General for compensation in respect of any injury, loss or damage suffered as a result of the incompatibility, and the Government, in their discretion, may make an *ex gratia* payment of an amount in compensation they consider appropriate, having regard to the principles and practice applied by the Court in affording just satisfaction to an injured party under Article 41 of the Convention.

C. Irish social welfare system

1. Background to the State Pension (Contributory)

38. A non-contributory, means-tested old age pension, now the State pension (non-contributory), was first introduced in 1908. The Social Welfare (Insurance) Act 1952 established a single co-ordinated insurance scheme for unemployment, widows, orphans, pensions, and national health based on a single Social Insurance Fund into which all contributions are paid and out of which all social insurance payments are made. The fund is financed by contributions from employers, employees and self-employed persons supplemented by contributions from general taxation. Persons pay a percentage of their earnings as social insurance contributions, but benefits are capped regardless of the amount contributed. In 2013, approximately 22 per cent of the funding came from employees/self-employed persons, 60 per cent came from employers and 15 per cent came from the State, with lesser contributions from other sources.

39. The contributory old age pension was first established in 1961 and was renamed the State pension (contributory) in 2006. The SPC is not means tested. There is currently a difference of 4.6 per cent between the State pension (contributory), paid at EUR 248 per week, and the State pension (non-contributory) paid at EUR 237 per week. The contribution rates, payment rates and age of qualification are all subject to regular legislative changes. Where an individual is eligible for other benefits in addition to the

SPC, they will be paid the benefit with the higher rate. Increases are payable for persons with a dependent spouse or partner.

2. *The Social Welfare Consolidation Act 2005 (the “2005 Act”)*

40. Part 2 of the 2005 Act (Sections 6-138) provides for a series of social welfare payments. Section 108 of the 2005 Act states that, subject to the other provisions of the Act, a person is entitled to receive the State pension (contributory) where he or she has attained pensionable age and satisfies the contribution conditions in section 109 of the Act. Section 109 states that a claimant must have entered into insurable employment prior to attaining the age of 56 years and have made the required number of contributions. Persons may be disqualified from receiving the SPC where they are in receipt of certain other welfare payments under the 2005 Act.

41. Section 249(1) of the 2005 Act (as amended) states:

“(1) Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Part 2 (including any increase of benefit) for any period during which that person—

(a) is absent from the State, or

(b) is undergoing imprisonment or detention in legal custody.”

42. Articles 217 and 218 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (‘the 2007 Regulations’) reversed the effects of the disqualification contained in s. 249(1) of the 2005 Act for the majority of Part 2 benefits, including the SPC, for persons absent from the State, persons detained in respect of a criminal charge which was subsequently withdrawn or in respect of which they were subsequently acquitted, persons detained in an institution for the treatment of mental illness (other than those found not guilty by reason of insanity) and persons imprisoned for failure to pay a fine.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

43. The applicant complained of a violation of his rights under Article 1 of Protocol No. 1 to the Convention, which states 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. The parties' submissions

44. The Government submitted that on account of his disqualification from entitlement to receive the SPC while serving his sentence of imprisonment, this benefit could not be regarded as a “possession” of the applicant’s within the meaning of this provision. Under domestic law, the applicant’s assertable right to receive the benefit was subject to the proviso that he continue to satisfy the conditions governing its award. This he had ceased to do as from the beginning of his prison sentence, and so the stoppage of payment could not be considered an “interference” with any proprietary interest he might have had in the SPC. The stoppage of payment in the event of imprisonment was based on a pre-existing statutory provision of long standing rather than any unilateral act by the respondent State. It should have been clear to the applicant all along what the consequence of imprisonment would be for his social security entitlements. The disqualification would have ended with his release, at which time his entitlement to the benefit would have been restored and payment would have resumed. The argument that the Supreme Court’s declaration of constitutional invalidity retrospectively removed the statutory provision entirely from domestic law, making it possible to ignore the effect of its existence prior to that moment, was misconceived and an incorrect reading of the Supreme Court’s judgments in the case.

45. The applicant maintained that the SPC represented a “possession” of his, being a statutory social security benefit that he had already qualified for, and had been in receipt of, prior to his imprisonment. As a matter of Irish law, he had had an assertable right to the benefit all along, given that the statutory provision disqualifying him from receiving it while in prison had been struck down by the Supreme Court as repugnant to the Constitution. He rejected as incorrect the Government’s argument that by virtue of s. 249(1)(b) he had lost his entitlement to the SPC from the outset of his imprisonment until the conclusion of the domestic proceedings. That provision could not be regarded as a valid limitation of his property rights. The fact that the Supreme Court had made an award must be taken to signify recognition that he had had a “possession”. That the award had been considerably lower than his actual losses could not cast doubt on that but should be regarded as a distinct matter.

B. The Court’s assessment

46. On the question whether the SPC represented a possession of the applicant’s within the meaning of Article 1 of Protocol No. 1, the Court refers to the relevant principles set out in its case-law on the applicability of this provision to social benefits. These were recalled and considered in detail in *Bélané Nagy v. Hungary* [GC], no. 53080/13, §§ 80-89, 13 December 2016. As stated there, at § 86:

“Where the person concerned did not satisfy (see *Bellet, Huertas and Vialatte*, cited above), or ceases to satisfy, the legal conditions laid down in domestic law for the grant of any particular form of benefits or pension, there is no interference with the rights under Article 1 of Protocol No. 1 (see *Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009) where the conditions had changed before the applicant became eligible for a specific benefit (see *Richardson*, cited above, § 17). Where the suspension or diminution of a pension was not due to any changes in the applicant’s own circumstances, but to changes in the law or its implementation, this may result in an interference with the rights under Article 1 of Protocol No. 1 (see *Grudić*, cited above, § 77).”

47. The Court considers that the facts of the present case correspond to the first of the situations described above. In accordance with a clear statutory provision, part of domestic law for many decades, maintained in each successive piece of legislation governing the domestic social welfare system, the fact of imprisonment meant automatic disqualification from receiving the SPC until the prisoner’s release. It was the change in the applicant’s personal situation that saw him lose his entitlement to the benefit, as provided for in the legislation then in force, rather than any change in the law or the manner of its implementation. The situation differs from that described in § 89 of the *Béláné Nagy* judgment:

“89. ...[W]here the domestic legal conditions for the grant of any particular form of benefits or pension have changed and where the person concerned no longer fully satisfies them due to the change in these conditions, a careful consideration of the individual circumstances of the case – in particular, the nature of the change in the requirement – may be warranted in order to verify the existence of a sufficiently established, substantive proprietary interest under the national law. Such are the demands of legal certainty and the rule of law, which belong to the core values imbuing the Convention.”

48. The applicant has stressed that the legislative provision disqualifying him from the SPC was declared invalid as from the point in time that its scope was narrowed by the 2007 Regulations to serving prisoners, and so should not now be taken as having been a valid limitation on his “possession”. The Court observes that while the notion of “possessions” is an autonomous one (see, among many others, *Béláné Nagy*, cited above, § 73), when the interest in question is a social security benefit, the individual’s claim to it is necessarily governed by the domestic legal framework. For this reason, the domestic courts’ analysis of the nature of such an interest cannot be overlooked. The Supreme Court only went as far as holding that the applicant’s interest in the SPC was “at least, a justiciable, if conditional, legal entitlement”. It did not go so far as to hold that it was a form of property right recognised and protected by law (see paragraph 16 above). In his second judgment on the case, McMenamin J stated that under the 2005 Act the applicant had “a simple legal entitlement, on foot of which, subject to compliance with certain statutory conditions, an eligible person may be entitled to the [SPC]” (see paragraph 29 above). This characterisation of the applicant’s interest corresponds to that of the Court. Furthermore,

notwithstanding the striking down of s. 249(1)(b) of the 2005 Act, the Supreme Court declined to award the applicant damages equal to the amount of the withheld pension payments, observing that to do so would be tantamount to recognising a benefit that had no basis in legislation, had not been approved by the legislature and would plainly run counter to the legislative intention (see paragraph 26 above).

49. In his submissions under Article 1 of Protocol No. 1 the applicant maintained that, based on this Court's case-law, he had a "proprietary interest" in the SPC, such that this provision should be regarded as applicable. However, the Court would point out that the cases referred to by the applicant (*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, ECHR 2010, and *Stummer v. Austria* [GC], no. 37452/02, ECHR 2011) all involved complaints of discrimination in the area of social security. Accordingly, what those applicants needed to establish was not a cognisable property right or a "possession" as such, but a proprietary interest falling within the ambit of Article 1 of Protocol No. 1, thereby engaging Article 14. These cases are not to be understood as modifying the approach to be taken with respect to Article 1 of Protocol No. 1, as indeed is clear from the Court's reasoning in each of them (see *Stec and Others*, §54, *Carson and Others*, §§ 64-65, and *Stummer*, §§ 82-83). As the applicant has also raised a complaint of discrimination, the Court will revert to this question in Part II below.

50. As far as Article 1 of Protocol No. 1, taken alone, is concerned however, the Court finds that the pension payments that were withheld from the applicant between 25 March 2011 and 28 November 2017, during which time he was statutorily disqualified from receipt of the SPC on account of his imprisonment, cannot be regarded as "possessions" within the meaning of this provision. It follows that this complaint is incompatible *ratione materiae* with this provision within the meaning of Article 35 § 3(a) and so must be rejected in accordance with Article 35 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

51. The applicant complained under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 that the disqualification contained in s. 249(1)(b) of the 2005 Act discriminated against him on several grounds. Article 14 of the Convention reads as follows:

"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."

A. Admissibility

52. The applicant argued that the SPC came within the ambit of Article 1 of Protocol No. 1, so that Article 14 was applicable. The Government did not raise any objection to the admissibility of this complaint and accepted that Article 14 applied. As the Court has recently recalled, the issue of the applicability of a Convention provision is one that goes to its jurisdiction *ratione materiae* and should be addressed at the admissibility stage unless there is a particular reason to join it to the merits (*Savickis and Others v. Latvia* [GC], no. 49270/11, § 119, 9 June 2022). The Court seeing no reason in this case to join the issue of applicability to the merits of the complaint, it will address it at this stage.

53. The Court has already referred in Part I above to the manner in which Article 14 can be engaged in conjunction with Article 1 of Protocol No. 1 where social security benefits are concerned. This has been set out in many decided cases, such as the *Stummer* case (cited above), which states, as relevant:

“82. According to the Court’s established case-law, the principles which apply generally in cases under Article 1 of Protocol No. 1 are equally relevant when it comes to welfare benefits. In particular, this Article does not create a right to acquire property. It places no restriction on the Contracting State’s freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, 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* (dec.), cited above, § 54; *Andrejeva*, cited above, § 77; and *Carson and Others*, cited above, § 64).

83. Moreover, in cases such as the present one, concerning a complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question (see *Gaygusuz v. Austria*, 16 September 1996, § 40, *Reports of Judgments and Decisions* 1996-IV, and *Willis v. United Kingdom*, no. 36042/97, § 34, ECHR 2002-IV). Although Article 1 of Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14 (see *Stec and Others* (dec.), cited above, § 55, and *Andrejeva*, cited above, § 79).”

54. In light of these principles, it is clear in the present case, and not disputed by the Government, that the SPC represented for the applicant a proprietary interest within the meaning of the Court’s case-law on Article 14. This provision is therefore applicable.

55. As the complaint does not appear to be inadmissible on any of the grounds listed in Article 35 of the Convention, it must be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

56. The applicant submitted that he had suffered discrimination on the grounds of (a) his age, (b) his status as a prisoner whose only source of income was the SPC, and (c) his status as a convicted prisoner serving a sentence of imprisonment.

57. Regarding age, the applicant noted that the “trigger” for disqualification was related to the fact of imprisonment and to his eligibility for the SPC on account of his age. He argued that he was subject to indirect discrimination on this basis. He referred to his evidence to the High Court, to the effect that his age-related medical conditions left him unable to work and to earn additional money during his imprisonment. He claimed that he was in a relevantly similar situation to younger prisoners similarly disqualified from social welfare benefits during imprisonment, but who were more likely to be able to work and obtain additional funds to purchase basic commodities. Thus, the disqualification, even if framed in neutral terms, impacted disproportionately on older prisoners in his situation, giving rise to indirect discrimination.

58. Regarding the second ground, the applicant claimed that his reliance on the SPC as his sole source of income qualified as “other status” for the purposes of Article 14. He argued that the private pensions, public service pensions and private income of other prisoners were not subject to any interference similar to the disqualification, and they could use this income to improve their living conditions whereas he was effectively destitute. Even if the disqualification was framed in neutral terms as applying to all social welfare recipients, it impacted disproportionately on the poorest, who relied on the SPC and other benefits as their sole source of income and who were subjected to a harsher prison environment as a result.

59. Finally, the applicant maintained that he was discriminated against on the basis of his status as a convicted prisoner compared to other persons in legal detention, including those detained while awaiting trial or detained in psychiatric care, who were not subject to the disqualification (see paragraph 42 above). He argued that while the material needs of other detainees were also met by the State, it was only convicted prisoners who were required to contribute to the cost of their maintenance through the disqualification.

60. The applicant argued that once a *prima facie* case of discrimination had been established, the Government was required to show that the discrimination had a legitimate aim and that there was a reasonable relationship of proportionality between that aim and the means employed. He argued that the Supreme Court had rejected the justification put forward by

the State and found that the measure was punitive. He argued that the State's submissions implicitly accepted that the reason for singling out convicted prisoners was that they were guilty of wrongdoing; however, as such persons had already been punished through a sentence determined by a judge in all the circumstances of their case, further punishment was neither necessary nor proportionate. He argued that the Court should have regard to the Supreme Court's comments in its first judgment as to the effects of the measure. Even if the measure was intended to avoid double maintenance only for the criminally culpable, there were more proportionate means to meet this aim such as requiring all prisoners to contribute to their maintenance according to their means. He argued that the disqualification could not be objectively justified as a matter of penal and social policy in the same way that the Court had upheld a similar disqualification in *S.S. and Others v. the United Kingdom*, (dec.), no. 40356/10, 21 April 2015, due to the finding of the Supreme Court that the disqualification was invalid as being repugnant to the Constitution.

(b) The Government

61. Responding to the first ground advanced by the applicant, the Government argued that as s. 249(1)(b) applied not only to the SPC but also to a range of benefits available to persons of working age, it could not be said that age was a relevant factor in its application. There was no evidence to support a complaint of indirect discrimination. The applicant had in fact performed some work during his imprisonment but stopped due to a wrist injury. Other prisoners of his age continued to work and there was no evidence that prisoners over a certain age were prevented from working, or that the type of work available was unsuitable for them.

62. The Government, referring to the Commission's decision in *Szrabjet and Clarke v. United Kingdom* (cited above) argued that persons in receipt of a state pension were not in a relevantly similar situation to those in receipt of a private pension. They noted the Grand Chamber's statement in the *Carson* judgment that private pension schemes were not analogous to a state contributory pension, and its endorsement of the House of Lords' statement that "national insurance contributions are little different from general taxation which disappears into the communal pot of the consolidated fund".

63. The Government argued that the disqualification was intended to ensure that individuals were not "doubly maintained" by the State. If the applicant had not been subject to the disqualification, he would have received about EUR 233 per week while being maintained by the State, potentially accumulating a substantial lump sum over the course of his sentence at the cost of the State. This would have been inconsistent with the purpose of the social welfare system of providing persons with a basic level of cover as a matter of social solidarity and would have conferred an unfair advantage on the applicant compared to other social welfare recipients. The Government

maintained that the Supreme Court, while finding that the disqualification had a punitive element, had accepted that its purpose was also to avoid unjust enrichment. Referring to the *Szrabjet and Clarke* decision (cited above), the Government submitted that the prevention of double maintenance and of consequent unjust enrichment was in the public interest.

64. The Government rejected the applicant's claims that he was in an analogous situation to a person detained on mental health grounds, as such persons were not detained in prisons. Nor was he in an analogous situation to those detained while awaiting trial; if such persons were not convicted, they should never have been in prison in the first place, and it was necessary to restore them to their original position. Even if the Court were to consider that the two groups of detainees were in a relevantly similar situation, the difference in treatment between them was a proportionate and legitimate differentiation having regard to the status of convicted prisoners. In this connection, the Government argued that the respondent State should be allowed a wide margin of appreciation in regulating social security legislation and the national legislature's policy choice was only to be interfered with where it was "manifestly without reasonable foundation".

2. *The Court's assessment*

65. The applicant complains that he has suffered discrimination on three grounds that come within the scope of Article 14. The Court will first set out the relevant general principles of its case-law and then examine each ground relied on.

(a) **General principles**

66. In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see, amongst many authorities, *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 64, 24 January 2017). In other words, the requirement to demonstrate an analogous position does not require that the comparator groups be identical. An applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relevantly similar situation to others treated differently. The Court has clarified that the elements which characterise different situations, and determine their comparability, must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question (see *Fábián v. Hungary* [GC], no. 78117/13, § 121, 5 September 2017).

67. However, not every difference in treatment will amount to a violation of Article 14. Only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián v. Hungary*, cited above, § 113 and

further references therein). In this context, the words “other status” have generally been given a wide meaning in its case-law (see *Carson and Others*, cited above, § 70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift v. the United Kingdom*, no. 7205/07, §§ 56-59, 13 July 2010).

68. A difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (see *Biao v. Denmark*, [GC], no. 38590/10, § 103, 24 May 2016). Such a situation may amount to indirect discrimination, which does not necessarily require a discriminatory intent (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 184, ECHR 2007-IV).

69. A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013 (extracts), *Topčić-Rosenberg v. Croatia*, no. 19391/11, § 36, 14 November 2013 and further references therein).

70. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that the latter was justified (see *Khamtokhu and Aksenchik*, cited above, § 65, *Biao v. Denmark*, cited above, § 92, and *D.H. and Others v. the Czech Republic*, cited above, § 177).

71. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The scope of this margin will vary according to the circumstances, the subject matter and its background (see *Stummer v. Austria*, cited above, § 88).

72. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation” (see *Carson and Others*, cited above, § 61). Any measures taken on such grounds, including the reduction of the amount of pension normally payable to the qualifying population, must nevertheless be implemented in a non-discriminatory manner and comply with the requirements of proportionality (see *Lakićević and Others v. Montenegro and Serbia*, nos. 27458/06 and 3 others, § 61, 13 December 2011, and *Stec and Others*, cited above, § 55). Moreover, the Court has recognised a wide margin of appreciation for States in relation to prisoner and penal policy (see *S.S. and*

Others, cited above, § 43, with further references). In any case, irrespective of the scope of the State's margin of appreciation, the final decision as to the observance of the Convention's requirements rests with the Court (see, *inter alia*, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 126, ECHR 2012 (extracts)).

(b) Application of these principles to the present case

(i) The complaint of age discrimination

73. While the applicant's complaint focussed on the stoppage of his old age pension, the Court observes first of all that s. 249(1)(b) applied to many types of benefit available to persons of working age and so did not specifically target the SPC. There is therefore no question of a difference in treatment based directly on age.

74. As for the claim of indirect discrimination based on age, the Court recalls that it has recognised that age might constitute "other status" for the purposes of Article 14 of the Convention, although it has not, to date, suggested that discrimination on grounds of age should be equated with other "suspect" grounds of discrimination (see *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, § 45, 25 July 2017 and the authorities cited therein). It next observes that a claim of indirect discrimination under Article 14 involves showing that the measure in question has a disproportionate impact on the members of a particular group even though not specifically aimed at them or manifesting any discriminatory intent against them. Such a claim requires evidence from the person making it. The applicant has referred to the evidence he gave to the High Court about how various age-related ailments rendered him unable to work in prison (see paragraph 8 above). However, the evidence required to substantiate a complaint of indirect discrimination against a particular group – here older prisoners – must relate to the group as such rather than just one member of it. The applicant has not offered such evidence. The evidence before the High Court was that some prisoners in this age group (between five and ten) were performing paid work in the same prison (see paragraph 9 above). This can only speak against the applicant's complaint of indirect discrimination on the ground of age.

75. Accordingly, the Court concludes that this aspect of the applicant's complaint under Article 14 has not been substantiated.

(ii) The complaint of discrimination linked to source or level of income

76. The Court observes, first, that under s. 249(1)(b) of the 2005 Act, all recipients of the SPC, including those in receipt of other retirement pensions and/or other sources of income, were disqualified from that benefit while imprisoned. In formal terms, therefore, all of them were treated alike.

77. The applicant's complaint however was about the more severe impact of the disqualification on prisoners who, like him, had no other source of income, compared to those who had additional sources of revenue that were not stopped or reduced on account of their incarceration. He claimed that prisoners in the former group were near-destitute, while those in the latter group had the means to improve the quality of their lives in prison. He submitted that this disclosed indirect discrimination against those in his situation. He therefore criticised as mistaken the approach of the High Court to this issue, guided by the Commission's *Szrabjet and Clarke* decision (cited above) that had rejected a similar complaint of discrimination from those applicants for the reason that prisoners with different pension arrangements – public versus private – could not be regarded as being in a comparable position.

78. The Court observes that the Article 14 complaint raised in the *Szrabjet and Clarke* case was not framed in terms of indirect discrimination and so was not examined from that standpoint. Where a claim of indirect discrimination is raised, the focus of the inquiry is not on the relevant similarities between two comparator groups, but on whether there is a disproportionately prejudicial effect on one group of persons more than any other. However, a complaint of indirect discrimination must still relate to a ground covered by Article 14. The applicant has argued that a person's level of income and its source qualifies as "other status". As recalled above, this term has been given a wide meaning. However, the Court considers that this complaint concerns more specifically differing financial entitlements, i.e. under the general social welfare system and other benefit schemes linked to professional activity or private investments. As stated in a previous case:

"The Court does not consider that the fact of having, or not having, acquired a right to a welfare benefit can be considered to be an aspect of personal status within the meaning of Article 14. Unlike the principal grounds set out in Article 14, such as "sex", "race" or "colour", it is not an innate characteristic which applies from birth. Furthermore, unlike "religion", "political or other opinion" or even place of residence, the fact of having acquired a right to a benefit does not relate to a core or personal belief or choice."

79. While the case in question, *Springett and Others v. United Kingdom*, (dec.), no. 34726/04, 27 April 2010, concerned a very different factual situation, the Court considers that the reasoning there applies equally in the present case. The different impact that the disqualification had on prisoners with and without other social security entitlements or other forms of income is not related to an aspect of their personal status within the meaning of Article 14. Accordingly, this aspect of the applicant's complaint of discrimination is not cognisable under this provision.

(iii) *The complaint of discrimination based on status as a convicted prisoner*

80. The Court recalls that it has accepted that the fact of being a prisoner can constitute “other status” within the meaning of Article 14 of the Convention. It has accepted this in relation to complaints raised by convicted prisoners (see the *Clift* case, cited above), remand prisoners (see *Laduna v. Slovakia*, no. 31827/02, ECHR 2011 and *Varnas v. Lithuania*, no. 42615/06, 9 July 2013), and convicted prisoners transferred to secure psychiatric facilities for treatment (*S.S. and Others*, cited above).

81. It must next be established whether the comparisons put forward by the applicant are valid, i.e., whether he was in a relevantly similar situation to: (i) persons detained for the treatment of mental illness; (ii) remand prisoners.

82. In the *Fábián* case (cited above), the Grand Chamber stated in this regard (at § 121):

“...[A] difference in treatment may raise an issue from the point of view of the prohibition of discrimination as provided for in Article 14 of the Convention only if the persons subjected to different treatment are in a relevantly similar situation, taking into account the elements that characterise their circumstances in the particular context. The Court notes that the elements which characterise different situations, and determine their comparability, must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question.”

83. It is clear that the common element between the applicant and his chosen comparators is the fact that their liberty is restricted by law for a certain time, and that during the period of their detention their essential needs are met by the State. Yet a closer examination of the matter is required.

84. In relation to the first comparator group, the Court recalls that in *S.S. and Others* (cited above) it accepted the comparison between the applicants in that case (who had been convicted of very serious offences, given lengthy sentences and then transferred to secure psychiatric hospitals for treatment) and other psychiatric patients (who had also been convicted but instead of being sentenced were sent directly to hospital). In so doing, the Court noted both the similarities between the two groups (the need for psychiatric treatment) and the difference in terms of their criminal-law status, which could “not be regarded as insignificant or irrelevant”. The groups were not in an identical situation, but the relevant similarity (detained in hospital for the treatment of mental illness) was enough to permit the comparison, the Court adding that the prisoner status of the applicants would be very relevant to its assessment of compliance with Article 14.

85. In contrast, in the present case the additional element that permitted the comparison between different categories in *S.S. and Others* – severe mental illness – is lacking. Indeed, it can be said that the difference between this applicant and the first comparator group is greater than it was in *S.S. and Others*, since in the latter case both groups had been subject to the criminal process. There was no attempt to establish a comparison with mental patients

detained under civil law powers, as the applicant seeks to do here. Concentrating on the fact that persons placed in psychiatric facilities are “detainees” obscures the defining characteristic of this group. They are patients, not prisoners. Their physical liberty is restricted under civil law for the purpose of treatment; convicted prisoners are detained under criminal law mainly for a punitive purpose.

86. In light of these considerations, the Court finds that the applicant is not in a relevantly similar situation to persons in group (i), given the significant legal and factual differences between them. He therefore cannot claim to be discriminated against *vis-à-vis* such persons.

87. Turning to the second comparator group, the Court agrees that it is closer to the applicant’s situation than the first group in that remand prisoners are also subject to the criminal process and detained in prison pending trial. In its case-law the Court has accepted comparisons, for the purposes of Article 14, between the two categories of prisoner, at least in certain respects. As stated in the *Clift* case, what the applicant must demonstrate is that “having regard to the particular nature of his complaint, he was in a relevantly similar situation to others treated differently”. This is further seen in the *Laduna* and *Varnas* cases (cited above), where the Court accepted that the complaints of the applicants – remand prisoners – about restrictions on contacts with family were “of relevance to all persons detained in prisons”.

88. However, the methodology laid down in the *Fábián* case involves taking into account the elements that characterise each group, to be assessed in light of the subject-matter and purpose of the impugned measure. In the Court’s view, the defining characteristic of the second comparator group is their status for the purposes of the criminal law – although detained, they are presumed innocent. The Government put it that where such prisoners are acquitted or the charges are withdrawn, then they should never have been detained in the first place. The Court recalls that in both the *Laduna* and *Varnas* cases it placed some emphasis on the fact that those applicants had to be presumed innocent (see, respectively, § 64 and § 119). In this respect it made reference to relevant European and international standards, which envisage differentiated treatment for remand prisoners, in keeping with their status as “unconvicted persons”. The difference in legal status is significant. There is neither certainty nor finality about detention on remand. It may end before trial (consistently with Article 5 § 3 of the Convention). The accused may be acquitted, their innocence before the law unaffected. The status and situation of the convicted prisoner are plainly different, characterised by certainty and finality. The difference is also shown by what the end of detention means for each category. For the unconvicted, they simply regain their liberty. For the serving prisoner, especially a long-serving prisoner like the applicant, regaining freedom may be more of a process involving rehabilitation efforts, conditional release and social support following return to the community.

89. In light of these considerations, the Court doubts strongly that the subject-matter of the applicant's complaint – continuity of payment of a social benefit which the Government described as one intended to cover the basic living costs of retired persons – can bring the two groups into an analogous position so as to permit the comparison contended for by the applicant.

90. As for the purpose of the measure that made the distinction complained of, the position of the Supreme Court in the first judgment was that the disqualification of convicted prisoners was punitive in its original purpose (when initially introduced in 1908). In that judgment the Supreme Court did not find in favour of the applicant on the wider grounds asserted. It found simply that the impugned disqualification constituted further punishment for a criminal offence imposed automatically by statute and not by a court with jurisdiction to try and sentence him. While the Supreme Court engaged briefly with the Government's explanation of the purpose of or reasons for the impugned disqualification – namely the avoidance of unjust enrichment in the social welfare system – it did not have to decide this issue given the narrower basis on which it found s. 249(1)(b) of the 2005 Act to be contrary to the Constitution. However, at this stage of the analysis of the applicant's complaint under Article 14, the issue is not yet whether the aim or purpose of the impugned measure was or was not justified in Convention terms. Rather, the purpose of the impugned measure goes to the assessment of the elements that characterise the situations of the groups between which the comparison is sought to be made. Only when that comparison has been recognised does the Court come to the questions of justification, legitimate aim, proportionality and, if applicable, the margin of appreciation.

91. Admittedly, because the Supreme Court did not engage with the applicant's Convention arguments in either its first or second judgments, finding instead in his favour on narrower constitutional grounds, the Court is left with the public interest relied on by the respondent Government in support of the impugned disqualification, namely the prevention of double maintenance of individuals, an objective which the Commission has previously accepted (see *Szrabjet and Clarke*, cited above). That public interest finds implicit support in the approach in the Supreme Court's second judgment (see in particular the extract at paragraph 26 above).

92. In any event, the Court has identified above significant differences between remand prisoners and convicted prisoners. It observes that remand prisoners would also have been subject to disqualification from the SPC, and other benefits affected by s. 249(1)(b), had it not been for the exception in their favour contained in Article 218 of the 2007 Regulations. In the Court's view, this is the measure that makes the distinction between the two groups. As for the purpose of the exception, the Government have submitted that it reflects the fact that persons detained pending trial are presumed innocent; if no conviction follows, they should be restored to the position they were in

prior to being charged. The Court considers that rather than affirm the comparability of the two groups, this tends instead to underline the significant difference between them. Notwithstanding the common element of detention, the Court concludes that remand prisoners and convicted prisoners cannot be regarded as being in a relevantly similar situation with respect to the continuance of the social security benefit at issue in the present case.

(c) Overall conclusion on the complaint of discrimination

93. In light of the foregoing analysis of each of the aspects of the applicant's complaint, the Court concludes that there has been no discrimination and, therefore, no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

94. The applicant further complained that he did not have an effective remedy for the alleged breach of his rights under Article 1 of Protocol 1, alone and in conjunction with Article 14. He relied on Article 13 which reads:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. The parties' submissions

1. The applicant

95. The applicant argued that as the Supreme Court had not examined the merits of his Convention complaints, but ruled only on distinct constitutional grounds, he had been denied an effective remedy in relation to the former. He criticised the practice of the domestic courts of giving priority to constitutional arguments, and of going no further than that if they consider that a declaration of unconstitutionality will resolve the issue between the parties. The problem was that this presupposed that the Convention claim was encompassed by the challenge on constitutional grounds. As seen in his case, though, his claim that the SPC represented “possessions” of which he had been deprived both wrongly and in a discriminatory way and that he should be compensated in full for this, had not been determined by the Supreme Court. It was no answer to say that constitutional remedies, including the striking down of legislation and the granting of appropriate relief, were generally more effective than the remedies available under the 2003 Act. The problem was the weakness of the latter mechanism. The Supreme Court had missed the opportunity to make a declaration of incompatibility of s. 249(1)(b) with the obligations of the respondent State under the Convention, meaning that the mechanism for bringing legislation into line with the Convention had not been activated. This failure was not consistent

with the obligations on the domestic courts as an organ of a Contracting Party to the Convention.

96. If the Supreme Court would have examined, in constitutional terms, the substance of the applicant's Convention complaints, and afforded him adequate redress in the case that it upheld his challenge, it might be said that he had been granted an effective remedy. But this had not happened. The ultimate absence in the domestic proceedings of any substantive assessment of his Convention claims laid bare the ineffectiveness of the Irish system in this regard.

97. Furthermore, the damages awarded by the Supreme Court could not be considered an effective remedy for his Convention complaints. That court had not recognised that he had any property interest in the SPC or that he had been deprived of it in a discriminatory manner. It had taken the view that if the legislature had realised the unconstitutional nature of the impugned provision, it would not have revoked it but adapted it so that its purpose was maintained. The sum awarded to him was only a fraction of his actual loss. This too revealed a flaw in the 2003 Act, according to the applicant, since no damages would have been available to him from a court under its section 3. The domestic system should make provision for a remedy for claims such as the ones in this case, irrespective of whether a statutory provision is repugnant to the Constitution on other grounds. The striking down of the legislative provision in this case, with no declaration of incompatibility, meant that the compensatory remedy under section 5 of the 2003 Act was not available.

98. Lastly, the applicant considered that by reserving its ruling on remedies to a later date, the Supreme Court had delayed the granting of relief by 16 months. The effect of this had been to cause him further financial loss, since his entitlement to the SPC was not restored until the date of the second judgment.

2. *The Government*

99. The Government first explained the structure and logic of the 2003 Act. They then explained the approach of the Irish courts in proceedings where constitutional and Convention issues are raised. That approach had been set by the Supreme Court in the 2009 case of *Carmody v. Minister for Justice, Equality and Law Reform*. It held that where a court finds that statutory provisions are inconsistent with the Constitution, and that such a finding will resolve the issues between the parties as regards all the statutory provisions impugned, then that is the remedy which the party should be granted. This was a more effective remedy than a declaration of incompatibility under the 2003 Act, which cannot invalidate a provision of other legislation. The Government considered this approach to be entirely consistent with Article 13, adding that States were not required to incorporate the Convention into their domestic law or to give effect to it in any particular way.

100. Nothing would be gained by inverting the order set down by the Supreme Court in the *Carmody* judgment. At most, a court could make a declaration of incompatibility, but it would not be able to award damages under section 3(2), on account of the proviso that appears in section 3(1), i.e., that the duty on every organ of State to perform its functions compatibly with the State's obligations under the Convention does not apply where a particular course of action is required by any other statutory provision. A declaration of incompatibility under section 5 of the 2003 Act did not affect the validity, continuing operation or enforcement of the statutory provision in question but would provide a basis for the Government to offer, at its discretion, *ex gratia* compensation to the party concerned. If the court then proceeded to find the impugned provision contrary to the Constitution it would be able to afford relief not available under the 2003 Act, in the form of a declaration of invalidity and possibly an award of damages. Thus, the rule laid down in *Carmody* meant that the courts went directly to the most effective remedy available where Convention complaints correspond in substance to complaints made under the Constitution.

101. As for the relief granted to the applicant, the Government submitted that he had in fact benefitted from a set of remedial measures: the impugned provision had been struck down with the result that his entitlement to receive the SPC had been restored with immediate effect; he had been granted compensation; his legal costs had been met by the State. Taken together, these elements represented an effective remedy in the present case. It rejected the applicant's complaint that the damages should have reflected the total sum of withheld payments, as to focus on this element meant ignoring the other ones. Moreover, the Supreme Court had explained why there was no basis in constitutional practice for making such an award in the circumstances. It had also been explained why such an award would have been inappropriate for the courts to make, in view of legislature's stance, and why it would have been an unjustified windfall for the applicant. In addition, by demanding full compensation, the applicant was disregarding the fact that for the period of his disqualification, his living needs had been covered by public funds. It was tantamount to trying to derive financial benefit from imprisonment at the expense of the State.

B. The Court's assessment

102. The Court would first clarify that, as established in its settled case-law, Article 13 requires a remedy in domestic law only where an individual has an "arguable claim" that one of his or her rights or freedoms set forth in the Convention or the Protocols thereto has been violated (see among many others *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131). The Court has concluded above that the applicant's complaint under Article 1 of Protocol No. 1, taken alone, is inadmissible. It

follows that as far as that provision is concerned the applicant does not have an arguable claim and therefore his complaint must likewise be rejected as incompatible *ratione materiae* with this provision of the Convention. Consequently, the Court will examine his complaint under Article 13 only in relation to his claim to have been discriminated against.

103. The applicant has criticised the domestic legal system, and specifically the model chosen by the respondent State for implementing the Convention directly within its legal order, as well as the remedial scheme of the 2003 Act. The Court recalls its case-law to the effect that there is no requirement on the Contracting States to incorporate the Convention so as to make it a part of their domestic law (see among others *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 113, ECHR 2002-VI).

104. In examining an individual application, the Court does not embark on a general, abstract review of domestic legislation. Where Article 13 is concerned, the Court's assessment proceeds in line with the principles set down in its case-law, recently summarised in the case *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020 (further citations omitted):

“130. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief.

131. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint. However, the remedy required by Article 13 must be “effective” in practice as well as in law. The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.”

105. To begin with, the Court observes that in the domestic proceedings the applicant was able to raise his complaints under many Convention provisions. All of these were examined by the High Court, which did not find in his favour in relation to any of them, or in relation to any of the constitutional grounds advanced in tandem with them (see paragraphs 12-13 above).

106. Subsequently, the applicant was granted leave by the Supreme Court to bring his case directly before that court. In granting leave, the Supreme Court expressly identified the essence of applicant's challenge, on constitutional and Convention grounds, to the statutory disqualification (see paragraph 15 above). The applicant was thus enabled to raise, at final instance, his complaint that his loss of pension entitlement was discriminatory and thus contrary to Article 14.

107. The applicant was critical of the fact that his Article 14 complaint was not determined by the Supreme Court, and that the damages that were awarded to him on a different basis were but a fraction of the pecuniary loss he claimed. The Court recalls that it has found a violation of Article 13 where the domestic courts were unable to properly engage with the substance of a Convention complaint, meaning that no effective remedy was available for such complaints (see among many others *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, §§ 135-139, ECHR 1999-VI). The situation in the present case is quite different. The Supreme Court upheld the applicant's challenge to the statutory disqualification on another ground relied on by him. It then stated that it was unnecessary to proceed to a full consideration of the Convention arguments that had been raised before it as this would not bring the case any further (see paragraph 20 above). This cannot be regarded as an omission on the part of the Supreme Court. In its case-law this Court has acknowledged that the domestic authorities have a margin of appreciation in conforming with their obligations under Article 13 (see *Smith and Grady*, cited above, § 135). It considers that this margin must be taken as encompassing the discretion of a domestic court that is competent to determine constitutional issues alongside Convention issues to uphold a challenge to legislation on some but not all of the grounds raised by litigants before it. Taking such an approach in a case is not inconsistent with the duty of the respondent State to ensure the availability of a remedy for alleged violations of Convention rights.

108. As for the level of the award to the applicant, the Court notes that the Supreme Court did not accept his claim to recoup in full the unpaid benefits, following extensive consideration of the relevant case-law and practice of the Irish courts. It further found that the specific features of his case militated in favour of limiting the relief to be granted on foot of the declaration of the constitutional invalidity of the impugned legislative provision. The Supreme Court considered that "to treat the appellant and anyone in the same position as fully entitled to [SPC] payments under the 2005 Act, would be to create a new form of legislative entitlement to benefit, and moreover one which not only was not approved by the [legislature] but, moreover, plainly runs counter to the legislative intention". It concluded that rather than treat the applicant's pecuniary claim as an automatic consequence of its holding, the features of the case pointed instead to an obligation to fashion an appropriate remedy (see paragraph 20 above). This led it to make an award approximating to the value of the pension payments corresponding to the duration of the appellate proceedings.

109. The Court recalls here that the immediate effect of the Supreme Court's second judgment was that the applicant was rendered eligible once more for receipt of the SPC. Although the applicant has complained that the interval between the two Supreme Court rulings delayed this remedy and thus diminished its effectiveness, the Court does not consider that, from the

perspective of Article 13 of the Convention, the Supreme Court can be criticised for the manner in which it decided to manage and structure the proceedings. As is clear from both of its judgments, the remedial aspect of the case threw up complex issues of constitutional principle that called for further submissions from the parties and deliberation by the court.

110. As noted above, the Court has established in its case-law that the effectiveness of a remedy in this context does not depend on the certainty of a favourable outcome for the applicant. It has also stated that the mere fact that an applicant's claim fails is not in itself sufficient to render the remedy ineffective (see *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, no. 44460/16, § 160, 7 June 2018). It is to be underlined that in this case the applicant's challenge was successful, and that his claim for pecuniary relief was upheld in part. Accordingly, even if the redress granted was not in line with what the applicant sought, there can be no question for this reason alone of the State having failed in its obligation to make effective remedies available.

111. It follows that this part of the application must be deemed manifestly ill-founded and be rejected, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares*, the application admissible as regards the complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Done in English, and notified in writing on 1 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytschik
Registrar

Mārtiņš Mits
President