



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

COURT (CHAMBER)

CASE OF PAUGER v. AUSTRIA

(Application no. 16717/90)

JUDGMENT

STRASBOURG

28 May 1997

In the case of Pauger v. Austria¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr F. MATSCHER,

Mr R. MACDONALD,

Mr J. DE MEYER,

Mrs E. PALM,

Mr J.M. MORENILLA,

Mr M.A. LOPES ROCHA,

Mr L. WILDHABER,

Mr J. MAKARCZYK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 23 January and 25 April 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 17 April 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 16717/90) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian national, Mr Dietmar Pauger, on 14 February 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

¹ The case is numbered 53/1996/672/858. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant designated the lawyer who would represent him (Rule 31). The lawyer was given leave by the President of the Court to use the German language (Rule 28 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 27 April 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr J. De Meyer, Mr S.K. Martens, Mrs E. Palm, Mr J.M. Morenilla, Mr M.A. Lopes Rocha and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr J. Makarczyk, substitute judge, replaced Mr Martens, who had resigned (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 25 September 1996 and the applicant's memorial on 27 September 1996.

On 18 September 1996 the Commission produced various documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 January 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr F. CEDE, Ambassador, Head of the International Law
Department, Federal Ministry of Foreign Affairs, *Agent*,
Ms I. SIEß, Constitutional Department, Federal Chancellery,
Ms E. BERTAGNOLI, International Law Department, Federal
Ministry of Foreign Affairs, *Advisers*;

(b) for the Commission

Mr B. MARXER, *Delegate*;

(c) for the applicant

Mr W. MANTL, Professor of Public Law and Political
Sciences, University of Graz, *Counsel*.

The Court heard addresses by Mr Marxer, Mr Mantl and Mr Cede.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Dietmar Pauer, an Austrian national who was born in 1941, is Professor of Public Law and Political Sciences at the University of Graz (Styria) and lives in Graz. His wife, who was a schoolteacher with the status of a civil servant in the region (Land) of Styria, died on 23 June 1984.

A. Proceedings prior to the amendment of the Pensions Act 1965

1. Before the administrative authorities

7. On 24 August 1984 Mr Pauer applied to the Regional Education Council (Landesschulrat) for a survivor's pension.

8. On 30 August 1984 it dismissed his application on the ground that whereas under section 14 (1) of the Pensions Act 1965 (Pensionsgesetz 1965 - see paragraph 30 below) a widow of a civil servant could in certain circumstances claim a pension, a widower could not.

9. Mr Pauer appealed to the Styria Regional Government (Steiermärkische Landesregierung), which upheld the decision on 21 September 1984.

2. In the Constitutional Court and the Administrative Court

10. On 15 October 1984 Mr Pauer applied to the Constitutional Court (Verfassungsgerichtshof) and on 22 October to the Administrative Court (Verwaltungsgerichtshof).

11. In a separate development on 4 October 1984, after holding a public hearing, the Constitutional Court had repealed section 14 (1) of the Pensions Act 1965 with effect from 28 February 1985 on the ground that the difference in treatment between widowers and widows in respect of pension payments was in violation of the principle of equal treatment (Gleichheitsgebot).

12. On 13 February 1985 the Administrative Court dismissed the applicant's appeal. It considered that, irrespective of the repeal of the statutory provision in question, his claim for a widower's pension had no legal basis.

13. On 23 February 1985, after deliberating in private, the Constitutional Court declined to accept the appeal for adjudication (Article 144 para. 2 of the Federal Constitution (Bundes-Verfassungsgesetz) - see paragraph 32 below) on the ground that it did not have sufficient

prospects of success. It considered that it had already repealed section 14 (1) of the Pensions Act and that it could not rule on the same question again.

14. On 26 September 1985 Parliament enacted the eighth amendment to the Pensions Act 1965 (Achte Pensionsgesetznovelle - see paragraph 31 below) with retrospective effect from 1 March 1985.

B. Proceedings after the reform of the Pensions Act

1. Before the administrative authorities

15. On 13 May 1985 Mr Pauger reapplied to the Regional Education Council for a survivor's pension.

16. On 18 November 1985 the Council awarded him a pension of 2,441.70 Austrian schillings (ATS) with effect from 1 March 1985, which represented one-third of his pension rights, in accordance with the transitional provisions under Part II, paragraph 2, of the Pensions Act as amended (see paragraph 31 below).

17. On 28 November 1985 the applicant appealed against that decision to the Styria Regional Government. He argued that the Regional Council had not ruled on whether or not his pension should be suspended, a matter that affected him inasmuch as he was employed as a university professor (section 40 (a) (1) of the Pensions Act as amended - see paragraph 31 below). He also said that both the transitional provisions under Part II, paragraph 2, of the Pensions Act as amended and section 40 (a) (1) of this Act were in violation of the principle of equality before the law and were unconstitutional.

18. On 7 January 1986 the Regional Government confirmed the amount of the pension due to the applicant. It decided, however, to suspend payment on the ground that he was gainfully employed.

2. In the Constitutional Court

19. On 22 February 1986 Mr Pauger applied to the Constitutional Court complaining that the transitional provisions of the Pensions Act, as amended, under which he was entitled only to a reduced pension until 1 January 1995, and section 40 (a) (1) of the Act, pursuant to which his pension rights had been suspended, were unconstitutional.

20. On 1 July 1987 the Constitutional Court decided to review the constitutionality of section 40 (a) of the Pensions Act (Article 140 para. 1 of the Federal Constitution - see paragraph 32 below). It did not rule on whether the transitional provisions of the Act were constitutional.

21. On 9 December 1987 the Constitutional Court held a hearing at which it heard argument by the representative of the Government and the applicant.

22. On 16 March 1988 the Constitutional Court repealed section 40 (a) of the Pensions Act with effect from 30 June 1988 on the ground that it was in violation of the principle of equal treatment. It said that no convincing reason had been given for the difference in treatment between, on the one hand, a retired civil servant or his surviving spouse with additional income and, on the other hand, a civil servant still in employment who likewise had additional income.

23. On 17 March 1988 the Constitutional Court quashed the Regional Government's decision of 7 January 1986 (see paragraph 18 above).

24. On 21 June 1988 the Regional Government made a further ruling and upheld the Regional Council's decision of 18 November 1985 (see paragraph 16 above) awarding the applicant a pension of ATS 2,441.70 with effect from 1 March 1985 and payable immediately.

25. On 11 August 1988 the applicant again applied to the Constitutional Court claiming that the transitional provisions of the Pensions Act under which he was only entitled to a reduced pension until 1 January 1995 were unconstitutional (section 40 (a) (1) of the Pensions Act - see paragraph 31 below). He did not ask for a hearing to be held.

26. On 3 October 1989, after deliberating in private, the Constitutional Court dismissed Mr Pauger's appeal (section 19 (4) of the Constitutional Court Act (Verfassungsgerichtshofsgesetz) - see paragraph 33 below). It said that the transitional provisions in question reflected the continuing change in attitudes towards the equality of the sexes and was not therefore in violation of the principle of equal treatment.

3. Before the Human Rights Committee of the United Nations

27. On 5 June 1990 Mr Pauger applied to the Human Rights Committee of the United Nations relying on the same facts as he had in his application to the Commission. He alleged that there had been a violation of Article 26 of the International Covenant on Civil and Political Rights, which provides:

"All persons shall be equal before the law and shall be entitled without any discrimination to the equal protection of the law."

28. On 30 March 1993 the Human Rights Committee found that there had been a violation of the Article.

II. RELEVANT DOMESTIC LAW

A. Substantive law

29. The relevant provisions of the Pensions Act 1965 read as follows:

Section 2 (1)

"A civil servant shall acquire the right to a pension for himself and the members of his family from the day he assumes his duties ..."

Section 3 (1)

"A retired civil servant shall be entitled to a monthly pension if he has completed at least ten reckonable years of service."

Section 4 (1)

"Pensions shall be calculated with reference to the basic monthly salary and the total number of reckonable years of service."

30. In its 1965 version section 14 (1) of the Pensions Act provided as follows:

"The widow of a civil servant shall be entitled to a monthly pension if the civil servant himself was entitled to a retirement pension at the time of his death or if he would have been entitled to one when he retired."

31. Since 1 March 1985, when the eighth amendment to the Pensions Act 1965 came into force, the relevant provisions of this Act have been as follows:

Section 14 (1)

"The surviving spouse of a civil servant shall be entitled to a monthly survivor's pension if the civil servant himself or herself was entitled to a retirement pension at the time of his or her death or if he or she would have been entitled to one when he or she retired."

Section 15 (1)

[provision already amended in 1984] "A survivor's pension shall amount to 60% of the retirement pension calculated on the basis of the total number of reckonable years of service and of the spouse's grade at the time he or she retired ..."

Section 40 (a) (1)

"If a civil servant or a surviving spouse has income deriving from current employment, the retirement pension or survivor's pension shall be suspended ..."

Part II, section 2 (transitional provisions)

"The monthly payments to which the widower or former spouse shall be entitled are: - from 1 March 1985, one-third of the pension; - from 1 January 1989, two-thirds of the pension; - from 1 January 1995, the full pension. This restriction shall not apply if the widower or former spouse is incapable of gainful employment or indigent."

B. Procedure

1. The Federal Constitution

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

Article 90 para. 1

"Hearings by trial courts in civil and criminal cases shall be oral and public. Exceptions may be prescribed by law."

Article 140

"1. ... The Constitutional Court shall also rule on the constitutionality of Acts when an individual has applied to it claiming that his or her rights have been breached by such Acts on account of their unconstitutional character ...

...

7. If an Act has been abrogated on the basis that it is unconstitutional or if the Constitutional Court has held under paragraph 4 that an Act was unconstitutional, its decision shall be binding on all courts and administrative authorities.

Except in relation to the case before the Court, abrogation of an Act shall not have retrospective effect, unless specifically so provided in the judgment. If in its abrogation decision the Court has set a time-limit under paragraph 5 [for a maximum of one year], the Act shall remain applicable to facts occurring until the expiry of the time-limit, except for facts relating to the case before the Court."

Article 144

"1. The Constitutional Court shall hear appeals against the decisions of administrative authorities, including those of independent administrative tribunals, where the applicant claims that the decision has infringed a right secured by the Constitution or that his rights have been violated by the enforcement of a regulation contrary to the law, an Act contrary to the Constitution or an international treaty incompatible with Austrian law. An appeal shall only lie once all other remedies have been exhausted.

2. Up to the time of the hearing the Constitutional Court may by means of a decision decline to accept a case for adjudication if it does not have sufficient prospects of success or if it cannot be expected that the judgment will clarify an issue of constitutional law. The Court may not decline to accept for adjudication a case excluded from the jurisdiction of the Administrative Court by Article 133."

2. Constitutional Court Act

33. The relevant provisions of the Constitutional Court Act read as follows:

Section 19

"1. The judgments of the Constitutional Court, except for those referred to in sections 10 and 36 (c), shall be delivered following a public hearing to which the plaintiff, the opposing party and all other parties to the proceedings shall be summoned.

2. ...

3. The Constitutional Court may decide at a private sitting, without further proceedings or a hearing, upon a proposal by the reporting judge:

1. to decline to accept a case for adjudication under Article 144 para. 2 of the Federal Constitution;

2. to dismiss an application for:

(a) manifest lack of jurisdiction of the Constitutional Court,

(b) failure to comply with a statutory time-limit,

(c) failure to rectify a procedural defect,

(d) raising a point which is a matter of settled precedent,

(e) lack of standing;

3. to strike the case out of its list where the application has been withdrawn or the case has been settled. (paragraph 86)

4. [paragraph amended by the Act of 26 June 1984] The Constitutional Court may decide not to hold a hearing when it is apparent from the written pleadings submitted to it by the parties and from the files relating to the earlier proceedings that a hearing is not likely to assist the Court in its understanding of the case. Upon a proposal by the reporting judge it may also decide, without a hearing, at a private sitting:

1. to dismiss an appeal if there has clearly been no violation of a right secured by the Constitution;

2. cases where the question of law has been sufficiently clarified by the previous case-law of the Constitutional Court;

3. to allow an appeal that has led to the setting aside of a regulation contrary to the law, an Act contrary to the Constitution or an international treaty incompatible with Austrian law.

5. ..."

Section 82 (1)

"Appeals shall only lie under Article 144 para. 1 of the Constitution once administrative remedies have been exhausted and within six weeks of the decision taken at last instance being served on the plaintiff."

Section 83 (1)

"The appeal and the documents appended thereto shall be communicated to the authority that took the decision in issue, giving it a period of not less than three weeks within which to submit its observations."

Section 84

"1. When the observations in reply have been received or the time-limit has expired ... the President of the Constitutional Court shall set the date of the hearing.

2. The hearing shall be held in the presence of the applicant, the authority in question (section 83 (1)) and any other party to the proceedings."

III. AUSTRIA'S RESERVATION IN RESPECT OF ARTICLE 6 OF THE CONVENTION (ART. 6)

34. The instrument of ratification of the Convention deposited by the Austrian Government on 3 September 1958 contains a reservation which provides as follows:

"The provisions of Article 6 of the Convention (art. 6) shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitutional Law."

PROCEEDINGS BEFORE THE COMMISSION

35. Mr Pauger lodged an application with the Commission on 14 February 1990. Relying on Article 6 para. 1 of the Convention (art. 6-1), he complained that he had not had access to a court or had a fair hearing in the Constitutional Court, which, among other things, had not held a hearing. He also complained of the total length of the proceedings.

36. On 9 January 1995 the Commission declared the application (no. 16717/90) admissible as regards the complaint concerning the lack of a hearing and declared it inadmissible as for the rest. In its report of 27 February 1996 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 6 para. 1 (art. 6-1) (by seventeen votes to

eleven). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment³.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

37. The Government requested the Court to "hold that there has been no violation of Article 6 para. 1 of the Convention (art. 6-1) in the instant case".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

38. The applicant submitted that the lack of a public hearing in the Constitutional Court was in breach of Article 6 para. 1 of the Convention (art. 6-1), which provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] tribunal ..."

39. The Government and the Commission took the opposite view.

40. The Court must first determine whether Article 6 para. 1 (art. 6-1) is applicable.

A. Applicability of Article 6 para. 1 (art. 6-1)

41. Mr Pauger maintained that his right to a survivor's pension was a civil right within the meaning of Article 6 para. 1 of the Convention (art. 6-1). Moreover, as section 14 (1) of the Pensions Act 1985 had removed any distinction on the basis of sex, he had had a "right" to such a pension on the same basis as a widow. Lastly, the Constitutional Court's judgment had been directly decisive for his civil right.

42. The Commission found that Article 6 para. 1 (art. 6-1) applied to the proceedings in issue.

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-III), but a copy of the Commission's report is obtainable from the registry.

43. The Government, on the contrary, disputed that point on the ground that Mr Pauger did not have a "right" in domestic law; they relied on the case of *Gaygusuz v. Austria* (judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV). Under ordinary Austrian law the applicant was unequivocally denied a full survivor's pension. His application to the Constitutional Court did not therefore relate to an existing right but to the creation of a new right which was more favourable to him. As there was no such right, the applicant could only claim in the Constitutional Court that he should have such a right. That claim was not sufficient to establish that there was a "civil right" in domestic law.

44. The Court considers, firstly, that in the instant case there was a "contestation" (dispute) over a right.

Section 2 (1) of the Pensions Act provides that "A civil servant shall acquire the right to a pension for himself and the members of his family from the day he assumes his duties ..." (see paragraph 29 above). Moreover, since the eighth amendment to the Pensions Act 1965 came into force on 1 March 1985, section 14 (1) of the Act has not distinguished between a widower and a widow as regards pension entitlement (see paragraph 31 above). Under that section the applicant was therefore, as a widower, entitled in principle to such a pension.

Under the transitional provisions of the Act widowers were entitled only to a reduced, phased pension from 1 March 1985 to 1 January 1995 (see paragraph 31 above). On 11 August 1988 the applicant applied to the Constitutional Court claiming that the transitional provisions, under which he was granted only a reduced pension, were unconstitutional in so far as they did not permit him to receive a full survivor's pension (see paragraph 25 above).

There was therefore a "contestation" (dispute) over the scope of the applicant's rights to a pension and even as to their existence.

45. The right to a pension is a civil right, as the Court has held several times (see the *Francesco Lombardo v. Italy* and *Giancarlo Lombardo v. Italy* judgments of 26 November 1992, Series A nos. 249-B and 249-C, pp. 26-27, paras. 14-17, and p. 42, paras. 13-16, respectively, and the *Massa v. Italy* judgment of 24 August 1993, Series A no. 265-B, p. 20, para. 26).

46. Moreover, proceedings come within the scope of Article 6 para. 1 (art. 6-1), even where they are conducted before a constitutional court, if their outcome is decisive for civil rights and obligations (see, *inter alia*, the *Süßmann v. Germany* judgment of 16 September 1996, Reports 1996-IV, p. 1171, para. 41).

47. In the instant case the only means by which Mr Pauger could challenge the administrative authorities' decisions was an application to the Constitutional Court as it alone could rule on the constitutionality of the statutory provisions in issue. If it found that those provisions were

unconstitutional, they would be declared void and the applicant's pension rights would be reassessed.

48. The Constitutional Court's judgment was therefore directly decisive for Mr Pauger's civil right.

49. Article 6 para. 1 (art. 6-1) accordingly applies to the proceedings in issue.

B. Compliance with Article 6 para. 1 (art. 6-1)

1. Austria's reservation in respect of Article 6 (art. 6)

50. In the Government's submission, the Court could not consider the complaint that the Constitutional Court had not held a public hearing, since proceedings in that court were covered by Austria's reservation in respect of Article 6 of the Convention (art. 6) (see paragraph 34 above). The reservation was valid and applicable in the instant case in so far as section 19 (4) of the Constitutional Court Act was not wider in scope than the corresponding provision in force in 1958.

51. The applicant maintained that Austria's reservation in respect of Article 6 (art. 6) could not be invoked in the instant case. Firstly, it was void as it did not comply with the requirements of Article 64 of the Convention (art. 64), which provides:

"1. Any State may, when signing [the] Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article (art. 64).

2. Any reservation made under this Article (art. 64) shall contain a brief statement of the law concerned."

Secondly, it was not applicable in the present case as section 19 (4) of the Constitutional Court Act did not come into force until 1984.

52. In the Commission's view, it was unnecessary to ascertain whether the reservation prevented it from considering the Constitutional Court's failure to hold a public hearing, since in the present case that failure had not amounted to a breach of Article 6 para. 1 of the Convention (art. 6-1).

53. The Court notes firstly that section 19 (4) of the Constitutional Court Act, on which the decision not to hold a hearing was based (see paragraph 26 above), came into force in 1984 (see paragraph 33 above), whereas Austria ratified the Convention and made the reservation in question in 1958. Under Article 64 para. 1 (art. 64-1) a reservation may only be made in respect of laws "then in force" in the State's territory. In 1958 there was no provision like the new paragraph 4, enacted in 1984, of section 19 cited above.

54. The Court therefore finds, as in the case of *Fischer v. Austria*, which concerned the Administrative Court (judgment of 26 April 1995, Series A no. 312, pp. 19-20, paras. 41-42), that the above reservation does not preclude its reviewing the applicant's complaint as to the lack of a hearing in the Constitutional Court.

55. In the light of this conclusion, the Court does not consider it necessary to examine the validity of the reservation in relation to the other conditions laid down in paragraphs 1 and 2 of Article 64 of the Convention (art. 64-1, art. 64-2).

2. Merits of the complaint

56. The applicant submitted that a public hearing in the Constitutional Court would have made it possible to clarify all the aspects of the case and would have led to a different outcome. His failure to request such a hearing could under no circumstances be seen as a waiver of his right to a hearing. Contrary to the procedure in the Administrative Court, no provision was made for such a request in the Constitutional Court, nor would it serve any useful purpose since the decision whether to hold a hearing was a matter for that court's discretion. Lastly, issues of sex discrimination as regards pension entitlement were matters of public interest and justified holding a hearing.

57. The Government and the Commission considered, on the contrary, that by failing to make such a request Mr Pauger had unequivocally waived his right to a public hearing. Moreover, the dispute had not raised issues of public interest such as to make a hearing necessary.

58. The Court recalls that the public character of court hearings constitutes a fundamental principle enshrined in Article 6 para. 1 (art. 6-1), but that neither the letter nor the spirit of that provision (art. 6-1) prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public. Any such waiver must be made in an unequivocal manner and must not run counter to any important public interest (see, *inter alia*, the *Schuler-Zgraggen v. Switzerland* judgment of 24 June 1993, Series A no. 263, p. 19, para. 58).

59. In the present case the Regional Education Council and the Regional Government which ruled on the applicant's pension claim (see paragraphs 15-18 above) were wholly administrative bodies. Given the nature of the complaints raised by the applicant, only the Constitutional Court could rule on the constitutionality of the provisions in issue (Article 144 of the Federal Constitution - see paragraph 32 above). Mr Pauger was thus in principle entitled to a public hearing, as none of the exceptions laid down in the second sentence of Article 6 para. 1 (art. 6-1) applied (see the *Håkansson and Sturesson v. Sweden* judgment of 21 February 1990, Series A no. 171-A, p. 20, para. 64).

60. However, the Constitutional Court does not as a rule hear parties unless one of them expressly asks it to do so. The applicant could consequently have been expected to ask for a hearing if he found it important that one be held (see the Håkansson and Stureson judgment previously cited, pp. 20-21, para. 67). Mr Pauger is moreover a professor of public law and is therefore familiar with Constitutional Court procedure (see, *mutatis mutandis*, the Melin v. France judgment of 22 June 1993, Series A no. 261-A, pp. 11-12, para. 24).

61. As the applicant made no such request he must be considered to have unequivocally waived his right to a public hearing (see the Håkansson and Stureson judgment previously cited, p. 21, para. 67).

62. Lastly, it is necessary to determine whether, in spite of this waiver, the dispute in the Constitutional Court ran counter to an important public interest which made it necessary for a hearing to be held.

63. The question of the principle of equality between widows and widowers as regards pension entitlement had already been resolved by the Constitutional Court, after holding a public hearing, in its judgment of 4 October 1984 (see paragraph 11 above). Mr Pauger's application only related to the constitutionality of the transitional provisions of the 1985 Act, which were unfavourable to widowers (see paragraph 31 above).

His case did not therefore raise a matter of public interest such as warranted a public hearing.

There has accordingly been no violation of Article 6 para. 1 of the Convention (art. 6-1).

II. COMPLIANCE WITH ARTICLE 27 PARA. 1 (b) OF THE CONVENTION (art. 27-1-b)

64. Before the Commission the Government had argued that the application was inadmissible inasmuch as the applicant had brought the same case before the Human Rights Committee of the United Nations. In the Government's submission, the Commission could not therefore examine the petition, in accordance with Article 27 para. 1 (b) of the Convention (art. 27-1-b) which reads as follows:

"The Commission shall not deal with any petition submitted under Article 25 (art. 25) which:

...

(b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

..."

65. In its decision as to admissibility of 9 January 1995 the Commission considered that "the applicant did not submit substantially the same matter as raised in his application to the Human Rights Committee of the United Nations. While before [the Human Rights Committee] he complained of discrimination against him, before the Commission he complained about issues related to the proceedings before the Austrian authorities and courts".

66. The Government did not raise the issue of compliance with Article 27 para. 1 (b) of the Convention (art. 27-1-b) before the Court and it is not necessary for the Court to consider it of its own motion (see, *mutatis mutandis*, the *Campbell v. the United Kingdom* judgment of 25 March 1992, Series A no. 233, p. 23, para. 66, and the *Papamichalopoulos and Others v. Greece* judgment of 24 June 1993, Series A no. 260-B, p. 69, para. 40 in fine).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 6 para. 1 of the Convention (art. 6-1) applies in the instant case and has not been breached;
2. Holds that it is not necessary to examine of its own motion whether Article 27 para. 1 (b) of the Convention (art. 27-1-b) was complied with.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 May 1997.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 55 para. 2 of Rules of Court B, the concurring opinion of Mr Matscher is annexed to this judgment.

R.B.
H.P.

CONCURRING OPINION OF JUDGE MATSCHER

(Translation)

I voted with the Chamber, which decided unanimously that there had been no breach of Article 6 para. 1 (art. 6-1) even though, in my view, the applicant had no "right" and there could not therefore have been a "contestation" (dispute) within the meaning of that Article (art. 6-1). What the applicant asked the Constitutional Court to do - and this was the only possibility open to him - was to declare a statutory provision void, and only if that court had found that the provision in issue was unconstitutional could he have claimed that he had a right within the meaning of Article 6 (art. 6).

In this connection I would also cite the statement in paragraph 46 of the judgment, which in my view is too general, namely that proceedings come within the scope of Article 6 para. 1 (art. 6-1), even where they are conducted before a constitutional court, if their outcome is decisive for civil rights and obligations (see my separate opinion in the case of Ruiz-Mateos v. Spain, judgment of 23 June 1993, Series A no. 262, p. 32).

As to the rest, I entirely agree with the reasoning in the judgment as regards compliance with Article 6 para. 1 (art. 6-1) in the instant case.