



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

THIRD SECTION

CASE OF AZINAS v. CYPRUS

(Application No. 56679/00)

JUDGMENT

STRASBOURG

20 June 2002

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
28/04/2004**

This judgment may be subject to editorial revision.

In the case of Azinas v. Cyprus,

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEŖ,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE, *judges*,
Mr D. HADJIHAMBIS, *ad hoc judge*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 19 June 2001 and on 30 May 2002,

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

PROCEDURE

1. The case originated in an application (No. 56679/00) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Cypriot national, Mr Andreas Azinas (“the applicant”), on 18 January 2000.

2. The applicant was represented before the Court by Mr A. Demetriades, a lawyer practising in Nicosia. The Cypriot Government (“the Government”) were represented by their Agent, Mr A. Markides, Attorney-General of the Republic of Cyprus.

3. The applicant alleged a violation of Article 6 § 1 (reasonable time) of the Convention and Article 1 of Protocol No. 1, with relation to his dismissal from the Public Service and the consequent forfeiture of his pension rights.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Mr L. Loucaides, the judge elected in respect of Cyprus, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr D. Hadjihambis to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. On 19 June 2001 the Chamber declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other’s observations.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. From the establishment of the Republic of Cyprus in 1960 and up to his dismissal from the Public Service, the applicant worked as Governor of the Department of Co-operative Development of the Public Service in Nicosia. On 28 July 1982 the Public Service Commission instituted disciplinary proceedings against him and decided to dismiss him retrospectively due to the fact that on 8 April 1981 he was found guilty by the District Court of Nicosia of stealing, breach of trust and abuse of authority. He was sentenced to 18 months' imprisonment. The applicant's appeal against both conviction and sentence was dismissed by the Supreme Court on 16 October 1981.

9. The Public Service Commission held that the applicant had managed the resources of the above-mentioned Department as if it were his private property and spent them for purposes other than those of the Department. The disciplinary sentence of dismissal also resulted in the forfeiture of the applicant's retirement benefits including his pension, according to section 79(7) of the Public Service Law No. 33/67, as from the date of his conviction by the District Court.

10. On 8 October 1982 the applicant filed an application with the Supreme Court requesting that the decision to dismiss him from the public service be declared null and void. The applicant's main argument was that the decision had been taken in excess or abuse of power in that the sanction of dismissal, with the consequent forfeiture of retirement benefits, was disproportionate to the gravity of the offence. He also contended that the forfeiture was contrary to Article 12(2) of the Constitution, which guarantees the right not to be tried or punished twice. He alleged that the forfeiture of his pension rights and the sentence of imprisonment amounted to a double punishment for the same act.

11. On 21 December 1982 (according to the Government) or 5 January 1983 (according to the applicant), the Government filed their objections. On 19 April 1984 (according to the Government) or 15 September 1984 (according to the applicant), the applicant filed his observations, to which the Government replied on 10 December 1984 (according to them) or 19 December 1984 (according to the applicant). From then on, the hearing of the case was repeatedly adjourned and was only completed on 9 March

1988. Judgment was delivered on 12 June 1991, by which the Supreme Court rejected the applicant's application and confirmed the Public Service Commission's decision.

12. The Supreme Court stated that it could neither control the severity of the sentence imposed by a disciplinary organ, except if the latter exceeded the limits of its margin of appreciation, nor the manner in which the organ assessed the facts of the case. It held that the discretion of the Public Service Commission only concerned the nature of the sanction, the loss of the retirement benefits being the normal consequence of the particular sanction imposed by the Commission. As for the right not to be punished twice for the same act, the Supreme Court held that "criminal and disciplinary proceedings may be pursued simultaneously or in succession in respect of the same conduct, in recognition of the fact that the two proceedings are designed to serve separate and distinct purposes" and that "the same act may constitute both a criminal and a disciplinary offence; that this is so, is no obstacle to the institution of disciplinary proceedings, nor a conviction upon a disciplinary charge similar in nature to an offence created by the Criminal Code ...".

13. On 18 July 1991 the applicant appealed on points of law to the Supreme Court sitting as an appeal court. Five grounds were included in the notice of appeal. The fifth ground challenged the finding of the Supreme Court, sitting as a first instance court, that the loss of retirement benefits was not contrary to Articles 23(1) and 23(2) of the Constitution.

14. The hearing was adjourned several times. It was fixed for 12 January 1996, but as the applicant appointed a new lawyer, a total of four adjournments were granted from that date until 18 November 1996, at the request of counsel for both sides.

15. On 18 November 1996 the applicant's lawyer informed the Supreme Court that negotiations for a settlement of the applicant's claims concerning his retirement benefits were in progress and invited the court to adjourn the case pending their outcome. The hearing was thus fixed for 3 February 1997.

16. However, on 6 December 1996, the applicant filed an application for amendment of his grounds of appeal. The Supreme Court granted the application on 17 January 1997 and directed for the amended notice of appeal to be filed within ten days.

17. From 3 February 1997 to 14 September 1998 the applicant requested and obtained six further adjournments pending the above-mentioned negotiations: on 9 May 1997, 6 October 1997, 4 November 1997, 9 January 1998, 10 March 1998 and 30 April 1998.

18. On 14 September 1998 in his opening address, the applicant's lawyer stated that he would only deal with grounds 3 and 4 of the appeal, which also covered ground 5. In those grounds the applicant had challenged the findings that his dismissal and consequent forfeiture of his pension rights were not disproportionate to the gravity of the offence, and that the

Public Service Commission had acted lawfully, within the limits of its discretion, in imposing these sanctions. He conceded the withdrawal of the other grounds of appeal. Subsequently, the lawyer declared that “he did not raise any other issue on this point (forfeiture of pension rights) as a separate and autonomous right because it was a very big issue”. However, it transpires from the pleadings that the applicant’s lawyer expressly stated that he would deal with grounds 3 and 4, which also implied ground 5. Ground 5 read as follows: “The finding of the First Instance Court that the loss of the applicant’s retirement benefits is not contrary to Articles 23(1) and (2) of the Constitution is erroneous.” Judgment was reserved.

19. In the meantime, one of the members of the bench hearing the case was appointed Minister of Defence, and the Supreme Court decided to reopen the proceedings. On 8 March 1999 the hearing was adjourned until 31 March 1999 due to a change in the composition of the court and then until 29 April 1999 because one of the judges was absent on sick-leave. On 21 April 1999 the applicant’s lawyer applied for a further adjournment due to another engagement. The hearing was fixed for 14 May 1999 but was adjourned again until 17 June 1999, owing to the absence of one member of the bench, and then until 9 July 1999 at the request of the applicant. Thus the appeal was heard for a second time on 9 July 1999 and judgment delivered on 20 July 1999, dismissing the appeal.

20. According to the Government, the Supreme Court invited the applicant’s lawyer to re-confirm his position, recorded during the first hearing, that all grounds of appeal, except ground 3 and 4 had been withdrawn, which he did. It was also confirmed that no issue as to the constitutionality of the provisions of the Public Service Law regarding the loss of retirement benefits was raised, but rather that this point was raised only in support of the applicant’s main allegation that, although the Public Service Commission had considered a number of mitigating factors, the imposition of the ultimate disciplinary sanction of dismissal upon the applicant was in flagrant violation of the principle of proportionality and an abuse of the limits of their discretion.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. At the material time, section 79 of Public Service Law No. 33/67 read as follows:

“1. In accordance with the present law, the following disciplinary penalties may be imposed: ...

1 reprimand

2 severe reprimand

3 disciplinary transfer

4 interruption of annual salary increase

5 suspension of annual salary increase

6 pecuniary penalty which cannot exceed three months' salary

7 reduction in the salary scales

8 reduction to the ranks

9 compulsory retirement

10 dismissal. ...

7. Dismissal entails the loss of all retirement benefits.”

22. A revised version of section 79(7) of the Law is today in force in Cyprus and provides as follows:

“Dismissal entails the loss of all retirement benefits. It is understood that a pension is paid to the wife or dependent children, if any, of a public servant who was dismissed as though he had died on the date of his dismissal and which will be calculated on the basis of his actual years of service.”

23. Under the provisions of the Public Service Law, the duties and responsibilities of posts in the public service are stipulated in the relevant “Schemes of Service”, approved by the Council of Ministers. According to the Scheme of Service for the post of the Governor of the Department of Co-operative Development held by the applicant, the duties and responsibilities were as follows:

“Management of the Department of Co-operative Development and responsibility for the promotion, development and orderly operation of the co-operative movement in the island. Exercise of the power and duties provided by the relevant laws and regulations. Advisor to the Minister of Finance on co-operative matters. Represents the Co-operative Department in various committees and bodies. Performance of any other duties which may be assigned to him.”

24. A public servant's entitlement to a pension is governed by the Republic's Pensions Law, Cap. 311. Section 6 of this Law, which was in force at the time of the applicant's dismissal, provided that no pension, gratuity or other allowance shall be granted except upon retirement from the public service in one of the cases specifically enumerated. Section 6 (f) referred to “the case of termination of employment in the public interest as provided in this Law”, that is section 7 of the Law, which in turn provided as follows:

“Where an officer's service is terminated by the Council of Ministers on the ground that, having regard to the conditions of the public service, the usefulness of the officer thereto and all the other circumstances of the case, such termination is desirable in the public interest, and a pension, gratuity or other allowance cannot otherwise be granted to him under the provisions of this Law, the Council of Ministers may, if they think fit, grant such pension, gratuity or other allowance as they think just and proper, not exceeding in amount that for which the officer would be eligible if he retired from the

public service in the circumstances described in paragraph (e) of section 6 of this Law.”

25. Article 166 § 1 of the Constitution reads as follows:

“There shall be charged on the Consolidated Fund, in addition to any grant, remuneration or other moneys charged by any other provision of this Constitution or law

(a) all pensions and gratuities for which the Republic is liable ...”

THE LAW

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

26. The applicant alleges a violation of Article 1 of Protocol No. 1, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

27. The applicant submits that his contributions during 20 years of employment, his employer’s undertaking to finance a pension, his retirement benefits and his pension amount to possessions within the meaning of Article 1 of Protocol No. 1. Indeed this is indirectly admitted by the Government which amended section 79(7) so that the wife and children of a dismissed public servant would be allowed to receive a pension as if he had died on the day he was dismissed. The applicant further submits that he was deprived of his pension solely by the Public Service Commission’s decision and not as a result of it being in the public interest or subject to the conditions provided for by Cap. 311.

A. Whether there was a “possession” within the meaning of Article 1

28. The Government claim that the applicant’s retirement benefits and pension do not amount to “possessions” within the meaning of Article 1 of Protocol No. 1. The Government submit that its public servants do not participate in a contributory pension scheme, by which a standard deduction would have had to be made from their monthly salary. All pensions and gratuities for which the Republic is liable are charged on the Consolidated Fund under Article 166 § 1 of the Constitution, which sets as a criterion the establishment of “liability” of the Republic to payment of a specific pension; it does not speak of pensions being payable as of right. According to a well-established case-law of the Supreme Court, Sections 5, 6 and 7 of Cap. 311, the law governing public servants’ pensions in Cyprus must be read in the light of the Public Service Law and the exclusive competence of the Public Service Commission to impose the dismissal of a public servant as a disciplinary punishment. At the time of commencement of the disciplinary proceedings against him, the applicant did not satisfy any of the conditions set by Section 6, so as to be considered eligible for pension under the Law, since he had not retired from the public service in one of the circumstances expressly enumerated in paragraphs (a)-(j) of Section 6.

29. Moreover, the amendment introduced in 1990 to the Public Service Law has no retrospective application to the applicant and has not altered or affected the previous non-proprietary character of the pensions system. Payment of pension to the wife and children was approved purely on humanitarian and equitable grounds, in that the State decided not to allow the innocent family of a public servant at fault to suffer as an indirect consequence of his wrongdoing.

30. The applicant submits that pension constitutes an integral part of the employment contract that the Government offers to all of its employees, namely the civil servants. A civil service position is accompanied by a compulsory retirement scheme, which includes a monthly pension and a lump sum. This is part of the overall employment package which the Government undertakes to finance and pay at the end of one’s employment; civil servants contribute with their years of service and by having a certain amount cut off from their salary by way of taxes.

31. The applicant further submits that Law 9/67 amended Section 3 (1) of Cap. 311 and the Regulations issued under Cap. 311 by imposing an obligation to grant pension to every officer holding a pensionable office under the Government of Cyprus.

32. The Court notes that the right to a pension is not, as such, guaranteed by the Convention. However, the Court also reiterates that, according to the case-law of the Convention institutions, the right to a pension which is based on employment can in certain circumstances be assimilated to a property right.

33. This may be the case where special contributions have been paid: in its judgment in the case of *Gaygusuz v. Austria* (16 September 1996, *Reports of Judgments and Decisions* 1996-IV, §§ 39-41), the Court held that entitlement to a social benefit is linked to the payment of contributions, and when such contributions have been made, an award cannot be denied to the person concerned. That case concerned the issue of emergency aid granted by the State to people in need, which, the Court held, was a pecuniary right for the purposes of Article 1 of Protocol No. 1. The Court found a violation of Article 14 of the Convention combined with Article 1 of Protocol No. 1 because the Government had refused to grant the award on grounds of nationality.

34. This may also be the situation where an employer, as in the present case, has given a more general undertaking to pay a pension on conditions which can be considered to be part of the employment contract (No. 12264/86, *Sture Stigson v. Sweden*, European Commission of Human Rights, decision of 13 July 1998, unpublished). Having regard to the relevant provisions of the Pension Law, Cap.311, in particular Section 6 (f), the Court notes that the applicant, when entering the public service in Cyprus, acquired a right which constituted a “possession” within the meaning of Article 1 of Protocol No. 1. This conclusion is reinforced by the revised version of section 79(7) of the Public Service Law No. 33/67, which now provides that a pension will be paid to the wife and children of a dismissed public servant, as though he had died on the date of his dismissal.

B. Whether there was an interference which was justified

35. The Government submit that deprivation of the applicant’s pension by virtue of Section 79(7) of the Public Service Law is consistent with Article 1 of Protocol No. 1. The fact that the disciplinary punishment of dismissal was followed by ineligibility to all retirement benefits was strictly a matter of application of an express legislative provision, namely Section 79(9) of Law 33/67 and not an issue within the Public Service Commission’s discretion. All matters pertaining to the disciplinary control of public servants, including their dismissal in the context of disciplinary proceedings, fall exclusively within the ambit of the Public Service Law and not the Pensions Law, Cap 311.

36. The Government further contend that the deprivation was in the public interest within the meaning of Article 1. That the Public Service Law includes an express provision that the most serious disciplinary penalty, dismissal, brings about ineligibility for all retirement benefits, constitutes the strongest warning message to all public officers that protection of the integrity of the public service, maintenance of proper conduct of government and constant reinforcement of the public’s trust in the proper functioning thereof are among the highest priorities for the State and demand strict and constant allegiance of every public officer to the laws of

the Republic. When this duty of allegiance is breached by criminal conduct, the State, as the officer's employer, has every right to impose strict disciplinary penalties, which not only punish the wrongdoer in an exemplary manner, but also constitute a deterrent to others.

37. The Government reiterate that the applicant's conviction was directly connected with the exercise of his duties as the highest ranking officer in the Co-operative Development Department, including six counts of abuse of trust by a public servant, six counts of stealing by agent and another six counts of abuse of trust by a public servant affecting the public. The trial was one of the longest in the history of Cyprus justice.

38. The Government further points out that at least six European States, namely France, Greece, Austria, Belgium, Ireland and the United Kingdom apply legislation similar to that of the Republic, whereby, upon dismissal of a public servant, pension benefits are forfeited, either automatically, or at the discretion of the authorities.

39. In the alternative, the Government rely on the second paragraph of Article 1 of Protocol No. 1. The forfeiture of retirement benefits is a *sui generis* penalty operating beyond the limits of the discretion of the Public Service Commission, being attached automatically to the disciplinary sanction of dismissal. It operates as a penalty in the sense that it strips the offending public servant upon dismissal of any eligibility to retirement benefits, but at the same time operates as a legislative tool for the State to secure the "payment" of this sanction. Finally, this penalty is compatible with the principle of proportionality in the present case: if one compares the actual amount of pension and gratuity to which the applicant would have been entitled (12.319,29 Cypriot pounds of gratuity and gross pension of 118.794,70 Cypriot pounds for the period 9.4.1981-31.8.2001) with the respective amounts stated in the particulars of the offences of stealing, abuse of office and abuse of trust (105.894,09 Cypriot pounds for the stealing and 168.871,84 for the offences of abuse), the proportionality of the penalty becomes even clearer.

40. The applicant contends that although the interference may have been in accordance with the existing legislation, it was wholly disproportionate because of its severity and its continuous nature. He reminds that he was convicted of certain offences and sentenced to 18 months imprisonment which he served; thus he was punished and has paid his debt to the society. The deprivation of his pension does not compensate the amounts of money in relation to which he was convicted and which had served for charitable purposes and not for the applicant himself. He maintains that his triple punishment (criminal conviction, loss of employment and deprivation of pension) is not justified, in particular in view of the fact that the Public Service Commission had the discretion to impose a less harsh punishment, which would not have entailed the forfeiture of his pension rights. The deprivation of his pension is suffered and felt each and every month he

should have received it; it is actually analogous to a life sentence in that its effects will continue for an indeterminate period of time.

41. The applicant further refers to a dissenting opinion of a judge in the case of *Pellegrin v. France* ([GC] n°28541/95, CEDH-VIII) according to which “no State authority can have discretion as to whether or not to pay the salaries of its serving employees, or to refuse to pay their pensions These are issues which are not linked to any discretionary power; discretion may be exercised only in relation to recruitment or termination of public contracts, but not to the economic consequences thereof”.

42. Finally, the applicant disputes the subsidiary allegations of the Government. He points out that had the Government wished to recover from him any amount in relation to which he was convicted, they would have instituted appropriate civil proceedings against him, but they did not do so.

43. The Court considers that the forfeiture of the retirement benefits constituted an interference with the applicant’s property right. The interference in question was neither an expropriation nor a measure to control the use of property; it therefore falls to be dealt with under the first sentence of the first paragraph of Article 1. Accordingly, it must be determined whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.

44. The Court does not doubt that it was necessary for the national authorities to take disciplinary measures in addition to the criminal conviction of the applicant. The applicant, a public servant at a high level of hierarchy and responsible for a vital sector of the social and economic life of the Republic, was found guilty of serious offences incompatible with his functions and the duty of loyalty which he was subject to. The Public Law Commission was entitled to choose among the possibilities offered to it by Section 79(1) the sanction it considered most appropriate; it opted for dismissal. However, the imposition of this sanction entailed automatically, by application of Section 79(7), the forfeiture of the applicant’s retirement benefits. Whilst the imposition of the sanction may be said to be aimed at protecting the public and safeguarding its trust in the integrity of the administration, in the Court’s view, the retrospective forfeiture of the individual’s pension cannot be said to serve any commensurate purpose.

The Court notes that the applicant was not only dismissed from his post but was also sentenced to 18 months’ imprisonment for a very serious offence, namely misappropriating substantial amounts of money for purposes which had nothing whatever to do with the Department of Co-operative Development, of which he was the director. Although the embezzled amounts had been given to charitable purposes and to the President of the Republic Assistance Fund, the domestic courts could in addition have ordered him to pay a substantial fine, but did not. The domestic courts upheld the decision of the Public Service Commission to dismiss the applicant and to deprive him of his retirement benefits including

his pension; thus they exposed him and, above all his family, to great hardship and distress.

Thus, the consequences of the combination of paragraphs (1) and (7) of Section 79 – as it was in force at the material time – were particularly harsh because the applicant and his family were deprived of any means of subsistence. Subsequently, the Cypriot legislator, recognising the economic and emotional hardship which such a system engenders, amended paragraph (7) of that Section so that at least the family of a dismissed public servant would not have to suffer from his conduct.

45. The Court considers that Section 79(1) and (7), as it was applied to the applicant, upset to his detriment the balance that must be struck between the protection of the individual's right of property and public interest requirements.

46. There has therefore been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

48. The applicant submits that he is entitled by way of pension for the period 9 April 1981-31 August 2001 to the total sum of 119,486.96 Cyprus pounds (plus interest of 134,597.90 Cyprus pounds) and to a lump sum of 12,319.00 Cypriot pounds (plus interest of 47,768.01 Cypriot pounds) as a gratuity in recognition of his years of service. Both sums are evidenced by the letters of 4 October and 27 September 2001 respectively of the Accountant General.

49. The Government submit that the claim is highly exaggerated and inflated: the applicant's figure is calculated on the basis of the gross amount of pension, in spite of the fact that pensions are subject to income tax, and includes capitalisation of interest although this is prohibited by law. Moreover, the applicant should not have applied the current rate of interest under the Courts of Justice Law (8%), which entered into force on 29 November 1996, across the whole period from 1981 to date.

50. Above all, the Government draw the attention of the Court to the fact that according to their declaration recognising the right of individual petition, Cyprus is only answerable for facts or events arising after 31 December 1988. All acts of deprivation inflicting pecuniary damage which took place in the period from 8 April 1981 (the date of the applicant's conviction) up to 31 December are not acts for which Cyprus is answerable, just as in the *Loizidou* judgment Turkey was not answerable for acts before she accepted the Court's jurisdiction. In its judgment of 28 July 1998 the Court held that the applicant was “entitled to a measure of compensation in

respect of losses directly related to this violation of her rights as from the date of Turkey's acceptance of the compulsory jurisdiction of the Court, namely 22 January 1990, until the present time. Applying the same principle by analogy in the present case, it follows that the claim to pay a lump sum as a gratuity plus interest and pension plus interest for the period 9 April 1981 – 31 December 1988 fall *ratione temporis* outside the competence of the Court.

51. According to the Government, the monthly pension hypothetically payable as from 1st January 1989 and due on 31 January 1989 was 379.42 Cypriot pounds per month before deduction of any amounts deductible by law. The Government admits that the following amounts could be awarded as pecuniary damage, depending on the variables the Court wishes to take into account: if the Court upholds the objection *ratione temporis*, 98,854.51 Cypriot pounds or 123,943.55 Cypriot pounds respectively if the damage is to be calculated on the basis of the net hypothetical pension payable to the applicant or on the gross hypothetical pension. If the Court rejects the Government's objection, then these amounts should attain, for the period 9 April 1989 to 30 September 2001, 168,884.39 and 208,927.22 Cypriot pounds respectively, bearing in mind that the applicant will be liable for subsequent payments of any amounts due under Cypriot laws.

52. For non-pecuniary damage, the applicant claims 20,000 Cypriot pounds. The deprivation of his pension brought about stress and anguish to himself and his family to such an extent that his wife allegedly developed cancer in October 1985 and died in September 1986. The applicant himself had to undergo a very difficult by-pass heart surgery in 1990. He had to bear the expenses for this operation as well as the expenses for tests and treatments because his health care benefits were also taken away together with his pension.

53. The Government contend that the applicant's claims are unsubstantiated. They stress that the applicant was, at the time of his dismissal, the owner of substantial and valuable immovable property, all of which he subsequently transferred to his children. He was also the major shareholder and director of a number of private limited companies.

54. The applicant claims 2,000 Cypriot pounds for the proceedings before the domestic courts and 4,606.50 Cypriot pounds, including VAT for those before the Court. He specifies that due to the novelty and the complexity of the case, he sought the advice of a specialised counsel, namely Mr David Scorey, Barrister of Essex Court Chambers, whose fees are included in the above-mentioned amount.

55. The Government consider the claims exaggerated, in particular those related to the domestic proceedings. They stress that not all costs claimed by the applicant were incurred in order to obtain redress for violation of Article 23 of the Constitution (the equivalent of Article 1 of Protocol No. 1). Not only was the specific ground of appeal concerning violation of

Article 23 expressly withdrawn at the hearing stage, but also any argument made by the applicant's lawyer regarding the effect of Section 79(7) of Law 33/67 was directed to the main argument of the appeal, which was to attack the decision of the Public Service Commission to impose upon the applicant the disciplinary sanction of dismissal.

56. In the circumstances of the case, the Court considers that the question of the application of Article 41 is not ready for decision and that it must be reserved, having regard to the possibility of an agreement between the respondent State and the applicant (Rule 75 §§ 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol No. 1 ;
2. *Holds* unanimously that the question of the application of Article 41 of the Convention is not ready for decision ;
accordingly,
 - (a) *reserves* the said question in whole;
 - (b) *invites* the Government and the applicant to notify the Court, within the forthcoming six months, of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 20 June 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Hadjihambis is annexed to this judgment.

G.R.
V.B.

DISSENTING OPINION OF JUDGE HADJIHAMBIS

I find myself in dissent from the judgment to the extent and for the reasons which follow.

In order to determine whether there is a violation of Article 1 of Protocol No. 1, it is essential in the first place to establish what the dispute before the competent court in Cyprus was.

By his recourse no. 415/82, the applicant challenged the legality of the decision of the Public Service Commission as to his dismissal, which automatically carried with it under Law 33/67 the forfeiture of his retirement benefits, including his pension. The challenge was on four grounds:

- a. that the Public Service Commission was not properly constituted;
- b. that his disciplinary dismissal and consequent forfeiture of his retirement benefits constituted a second punishment after his criminal conviction and sentence, in violation of Article 12 (2) of the Constitution prohibiting double punishment;
- c. that the automatic forfeiture of his retirement benefits upon his disciplinary dismissal under the law (Law 33/67) and the absence of discretion in the Public Service Commission in the matter violated Article 12(3) of the Constitution which provides that the punishment must not be disproportionate to the offence;
- d. that the forfeiture of his retirement benefits upon his disciplinary dismissal violated Article 23 (1)(2) of the Constitution which guarantees the right to property.

In the appeal (no. 1389), ground (a) was raised as ground (1) of the appeal. This ground was, however, expressly withdrawn at the hearing of the appeal and so was never argued or adjudicated upon, nor was it taken up in this application.

Ground (b) was raised as ground (2) of the appeal. This was also expressly withdrawn at the hearing of the appeal and so also was never argued or adjudicated upon, nor was it taken up in this application.

Ground (c) was not raised as such in the appeal. It was raised, as grounds 3 and 4 of the appeal (as amended), as a complaint that the Public Service Commission had not exercised its discretion lawfully in imposing upon the applicant the severest disciplinary sentence of dismissal. The argument now was no longer that Law 33/67 was contrary to Article 12 (3) of the Constitution by providing a mandatory forfeiture of retirement benefits which might be disproportionate to the offence, but that, by imposing the sentence of dismissal which involved the forfeiture of the

applicant's pension, despite the mitigating circumstances in favour of the applicant, the Public Service Commission had not lawfully exercised its discretion. This was consequent upon the finding of the Court at first instance that the Public Service Commission had not exceeded the limits of its discretion in imposing the severest sentence of dismissal. The proportionality of the sentence therefore was raised only as a matter of public law as to the limits of administrative discretion which defined its legality and was not raised as a matter of administrative action violating the right to property. This was an entirely different matter. And it meant that the Supreme Court in its appellate jurisdiction, as the competent Cypriot Court, being asked to concern itself with the limited issue of administrative law, was never invited to consider the legality of dismissal as regards proportionality under Article 12 (3) of the Constitution and by equivalence, the compatibility of dismissal with Article 1 of Protocol No. 1 in terms of the extent to which an interference with property rights may be justified in the public interest.

Furthermore and most important, ground (d) was raised as ground (5) of the appeal. However, ground (5) was also expressly withdrawn and was never argued or adjudicated upon. The record is clear throughout as to this. At the outset of his address at the first hearing of the appeal, learned counsel for the applicant declared that he would deal only with grounds 3 and 4 of the appeal. Asked by the Court whether he withdrew the other grounds he replied affirmatively, whereby the Court dismissed the other grounds 1, 2 and 5 and proceeded to hear learned counsel only on grounds 3 and 4. Indeed, learned counsel could not thereafter have argued ground 5 since this had already been dismissed by the Court as withdrawn. The reference of the applicant in paragraph 72 of his observations to learned counsel saying later on that "I shall deal with the amended grounds 3 and 4 and thus ground 5 emanating from them" is entirely out of context and does not have the meaning which the applicant suggests, as evidenced by the Court's immediately following observation that he was referring to grounds 3 and 4 of the appeal, that the Public Service Commission, failing to take properly into account the mitigating circumstances in favour of the applicant, had not lawfully exercised its discretion as to the appropriate disciplinary sentence in all the circumstances. Learned counsel argued that Law 33/67 provided ten alternative disciplinary sentences and that the Public Service Commission ought not, in the mitigating circumstances, to have chosen the severest one of dismissal, but could have chosen the sentence of compulsory retirement instead. It was in this context and in this context only that he referred to the forfeiture of the applicant's retirement benefits upon dismissal, in order to show that dismissal, involving the forfeiture of retirement benefits, was too severe and disproportionate a sentence to impose in the circumstances, and not in order to dispute the constitutionality of forfeiture of retirement benefits upon dismissal. This was made absolutely clear throughout the address and was confirmed by learned

counsel when asked specifically by the Court at the end of his address, saying that his reference to the forfeiture of retirement benefits upon dismissal was in order to show that the sentence of dismissal which was imposed was disproportionately severe in the circumstances and a lighter sentence should have been imposed instead. Learned counsel also made it clear in his reply that “Whatever I said about pension and the others was in order to show the severity and the terrible consequences of this decision upon the applicant’s life”. The same line was followed during the second hearing of the appeal, when learned counsel agreed and reaffirmed that he had withdrawn grounds 1, 2 and 5 and only argued grounds 3 and 4, repeating in effect what he had said at the first hearing of the appeal as to grounds 3 and 4. When at the end of his address he concluded saying that the disciplinary sentence of dismissal, with the consequent forfeiture of retirement benefits, made the sentence especially onerous, he clarified, in answer to the Court, that his argument was limited to showing that the sentence of dismissal imposed was, in the circumstances, disproportionate to the severity of the offense. Consequently, the Court itself in its judgment did not deal with ground 5 but only with grounds 3 and 4 of the appeal.

It is clear from the above that, as the Government submit, the issue which is now raised in the application as to the alleged violation of a property right under Article 1 of Protocol No. 1 was expressly withdrawn by the applicant as an issue from the consideration of the competent Cypriot courts and was never raised, argued or adjudicated upon even to the remotest extent before them. I cannot agree with the submission of the applicant in paragraphs 67 and 72 of his observations that, though ground 5 of the appeal was withdrawn, the legality of the provision of Law 33/67 for forfeiture of retirement benefits upon dismissal was substantially brought before the Court through grounds 3 and 4 of the appeal. Grounds 3 and 4 of the appeal, which have already been discussed, did not, directly or indirectly, expressly or implicitly, raise this issue. On the contrary, grounds 3 and 4 of the appeal, and the entire arguments proposed to support them at the hearing, presuppose the legality of the provisions of Law 33/67 for forfeiture of retirement benefits upon dismissal and proceed on the basis that, because dismissal carries with it the serious consequence of forfeiture of retirement benefits, it was a sentence disproportionate to the seriousness of the offense in the circumstances, particularly in view of the mitigating factors in favour of the applicant. The applicant never argued, and the Cypriot courts consequently never judged, the legality of the provision of Law 33/67 in relation to Article 23 (1)(2) of the Constitution, which is the equivalent of Article 1 of Protocol No. 1.

It is my conclusion that the applicant did not contest, even indirectly or implicitly, the legality of Law 33/67 because he expressly withdrew and never argued the relevant ground 5 of his appeal and grounds 3 and 4 of his appeal did not cover, even implicitly or remotely, ground 5 but were on the contrary based on the legality of Law 33/67.

It is therefore my considered opinion that the dispute in the proceedings before the Cypriot courts did not concern the legality of the provision of Law 33/67 as to forfeiture of retirement benefits upon disciplinary dismissal by reference to its constitutionality (Article 23 (1)(2) of the Constitution) and consequently by equivalence its compatibility with Article 1 of Protocol No. 1. It follows that there was no exhaustion of domestic remedies, which precludes the applicant from raising before this Court a complaint which he chose to withdraw from resolution by the competent domestic court, which he consequently did not argue before such competent domestic court and which, also consequently, such competent domestic court could not and did not consider and adjudicate upon. I would therefore adjudge inadmissible the complaint that there was a violation of Article 1 of Protocol No. 1.

However, in so far as I am in a minority on the matter, I shall also consider the further issues raised. I would have agreed, if I had considered the complaint admissible, that the right to a pension based on employment can, even though the public servant does not make contributions under a pension scheme, amount to a property right and thus to a “possession” within Article 1 of Protocol No. 1, when, as in the present case, the employment was entered into in circumstances involving a general undertaking that a pension would be payable as an integral part of the conditions of service. As to the other aspect of Article 1, that is, whether the forfeiture of the applicant’s pension, as a possession, consequent upon his dismissal could be justified in the public interest by way of exception, I feel that there are strong arguments on both sides. On the one hand, the applicant’s misconduct was particularly reprehensible as an abuse of his position and involving the loss of enormous sums of money and could be said to justifiably attract the most serious sanction provided by law. On the other hand, other sanctions had been imposed upon the applicant, namely a sentence of imprisonment upon his criminal conviction and his dismissal from service, which, as of their nature and extent, expressed the public interest involved and could be said to render the sanction of loss of pension unnecessary. In view of my conclusion that the complaint is inadmissible in any case, I shall not express an opinion on the matter.