



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

CASE OF AZINAS v. CYPRUS

(Application no. 56679/00)

JUDGMENT

STRASBOURG

28 April 2004

In the case of Azinas v. Cyprus,

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

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Mr G. BONELLO,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mr L. GARLICKI, *judges*,
Mr D. HADJIHAMBIS, *ad hoc judge*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 4 June 2003, 24 September 2003 and 31 March 2004,
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 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, in particular, a violation of 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. Mr L. Loucaides, the judge elected in respect of Cyprus, withdrew from sitting in the case (Rule 28 of the Rules of Court). The Government accordingly appointed Mr D. Hadjihambis to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). On 19 June 2001 the application was declared partly admissible by a Chamber of that Section, composed of Mr J.-P. Costa, Mr W. Fuhrmann, Sir Nicolas Bratza, Mrs H.S. Greve, Mr K. Traja, Mr M. Ugrekhelidze, Mr D. Hadjihambis, judges, and Mrs S. Dollé, Section Registrar.

5. 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. On 20 June 2002 a Chamber of that Section, composed of Mr G. Ress, Mr I. Cabral Barreto, Mr L. Caflisch,

Mr R. Türmen, Mr B. Zupančič, Mrs Greve, Mr Hadjihambis, judges, and Mr V. Berger, Section Registrar, found a violation of Article 1 of Protocol No. 1 (six votes to one). It reserved the question of application of Article 41 (unanimously). The dissenting opinion of Mr Hadjihambis was annexed to that judgment.

6. On 13 September 2002 the Government requested that the case be referred to the Grand Chamber, in accordance with Article 43 of the Convention and Rule 73. A panel of the Grand Chamber accepted this request on 6 November 2002.

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

8. The parties filed observations on the preliminary issues of *ratione temporis* competence and exhaustion of domestic remedies and on the question of a violation of Article 1 of Protocol No. 1.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 4 June 2003 (Rule 71).

There appeared before the Court:

(a) *for the Government*

Mr N. EMILIOU, Permanent Representative of Cyprus	
to the Council of Europe,	<i>Delegate of the Agent,</i>
Mr V. LOWE, Barrister-at-Law,	
Mr G. GOODWIN-GILL, Barrister-at-Law,	<i>Counsel,</i>
Mrs C. PALLEY, Barrister-at-Law,	
Mrs M.-A. STAVRINIDES, Barrister-at-Law,	
Counsel of the Republic, Law Office of the Republic,	<i>Advisers;</i>

(b) *for the applicant*

Mr C. GREENWOOD QC,	
Mr D. SCOREY, Barrister-at-Law,	
Mr A. DEMETRIADES, Barrister-at-Law,	<i>Counsel,</i>
Ms L. CARYOLOU, Advocate,	<i>Adviser.</i>

The Court heard addresses by Mr Greenwood, Mr Demetriades, Mr Lowe and Mr Goodwin-Gill as well as their replies to questions from the Court. The Court authorised the parties to submit written observations in reply to these questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1927 and lives in Nicosia.

11. 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 by reason of the fact that on 8 April 1981 he had been found guilty by the Nicosia District Court of stealing, breach of trust and abuse of authority. He had been sentenced to eighteen months' imprisonment. His appeal against both conviction and sentence had been dismissed by the Supreme Court on 16 October 1981.

12. 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 sanction of dismissal also resulted in the forfeiture of the applicant's retirement benefits, including his pension, in accordance with section 79(7) of the Public Service Law (no. 33/67), from the date of his conviction by the District Court. In Cyprus, pensions are part of the overall employment contract offered to public servants. The pension scheme is non-contributory.

13. 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.

14. By a judgment delivered on 12 June 1991, the Supreme Court rejected the applicant's application and confirmed the Public Service Commission's decision. In particular, the Supreme Court held:

“It has been established by case-law that the Supreme Court does not have the authority to intervene on the subject of the sanction imposed unless it is evident that the disciplinary body has exceeded the limits of its discretionary power.

The Supreme Court's powers in such issues bear no resemblance to its powers while exercising its jurisdiction over the appeal of the district courts' judgments, on which it has the authority to intervene when the decision on the sentence is either incorrect from the outset, evidently excessive or insufficient.

The assessment of the severity of such a disciplinary sanction is outside the limits of this Court's authority (see, among others, *Cristofides v. CY.T.A.*, (1979) 3 C.L.R. 99, and *Papacleovoulou v. the Republic*, (1982) 3 C.L.R. 187, 196-197).

It has been repeatedly established ... in a series of judgments that an administrative court, during the judgment of an appeal against the imposition of a disciplinary sanction, does not as a rule have the authority to intervene in the essential judgment and assessment of the facts by the competent body. ...

Section 79(1) of Law no 33/67 enumerates a limited number of disciplinary sanctions that can be imposed under the provisions of the same Law. These sanctions include the sanction of dismissal, which, according to section 79(7) of Law no 33/67, results in the loss of all the entitlements upon discharge.

Having carefully examined the case file, as well as the relevant verbatim record, where the *ratio decidendi* and the statement of reasons are included in detail, I judge that the Public Service Commission imposed the sanction of dismissal on the applicant justly and lawfully, without exceeding the limits of its discretionary power. The Public Service Commission, as it is explicitly reported in the relevant transcript (see Appendix 8 of the Plea) took into account the applicant's various mitigating circumstances before reaching a decision. The Public Service Commission's discretionary power was not related to pension issues, but only to the matter of the sanction. The sanction imposed on the applicant entailed, according to the same Law, the forfeiture of all his entitlements upon discharge.

The judgment in *Makrides v. the Republic*, 2 R.S.C.C. 8, which the applicant's lawyer cited in order to support his submission that the provisions concerning the deprivation of an employee's pension rights are unconstitutional with respect to Article 23 §§ 1 and 2 of the Constitution, does not apply to the present case.

The submission by the applicant's lawyer that there is a contradiction with Article 28 of the Constitution remains unproved.”

15. The Supreme Court stated that it could review neither the severity of the sanction imposed by a disciplinary body, save if the latter had exceeded the limits of its margin of appreciation, nor the manner in which the body had 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 retirement benefits being the normal consequence of the particular sanction imposed by the commission.

16. On 18 July 1991 the applicant appealed on points of law to the Supreme Court sitting as a court of appeal. 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 Article 23 §§ 1 and 2 of the Constitution.

17. 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. Amended grounds 3 to 5 read as follows:

“(3) The finding of the first-instance court that the sanction that was imposed on the applicant by the Public Service Commission was not excessively onerous and disproportionate to the gravity of the offence committed and/or that the Public Service Commission took fully into account the mitigating circumstances during the consideration of the sanction and/or did not exercise its discretionary power in breach of procedure in determining the sanction is erroneous.

According to Article 12 § 3 of the Constitution, the law cannot provide for a penalty that is disproportionate to the gravity of the offence. The above constitutional requirement introduces in Cyprus the principle of proportionality, according to which there must be a connection (reasonable relation) between the measure taken and the intended purpose; the measure is proportionate only if it is necessary in relation to the facts of the case.

Despite the fact that during the assessment of the penalty the criminal court as well as the administrative body took into account and accepted a series of mitigating circumstances, and in particular that the applicant did not obtain any material gain, the sanction which was finally imposed on him is the heaviest sanction provided by law.

This is a sufficiently serious breach of the principle of proportionality, which was introduced by Article 12 § 3 of the Constitution and is applied in Cypriot jurisprudence and the practice of law itself, particularly in the interpretation of Article 23 of the Constitution. It also constitutes an act beyond the extreme limits that define the framework of actions of the administration when exercising its discretionary power.

(4) The finding of the court that the Public Service Commission imposed the sanction of dismissal on the applicant correctly and lawfully and without exceeding the limits of its discretion is erroneous.

The principle of a sanction that is not disproportionate to the gravity of the offence and the principle of proportionality during the assessment of the sanction in administrative proceedings certainly define the framework and/or limits of the administrative authority of the administrative body.

The fact that the administrative body adopted and/or took into account the serious mitigating circumstances in favour of the applicant during the assessment of the sanction, but did not avoid imposing the heaviest sanction provided for by law, is an act that lies beyond the extreme limits of the exercise of its discretionary power.

(5) The finding of the first-instance court that the loss of the applicant's pension rights is not contrary to Article 23 §§ 1 and 2 of the Constitution is erroneous.”

18. In his opening address on 14 September 1998, the applicant's lawyer, Mr Efstathiou, stated that he would only deal with the third and fourth grounds of the appeal. In particular, according to the verbatim record of the hearing on that date, the following exchange took place between the applicant's lawyer and the Supreme Court:

“Mr Efstathiou: ...

I will be very brief. Essentially, I will only deal with grounds 3 and 4 of the appeal.

Judge Chrysostomis: Do you withdraw the others?

Mr Efstathiou: Indeed, I do.

The Court: The remaining grounds of appeal are dismissed and we shall hear your position on grounds 3 and 4.

Mr Efstathiou: I will not deal with these grounds, because ground 1 is badly worded, while ground 2 is covered by grounds 3 and 4.

...

The penalties that can be imposed by the court are listed in section 79(1) of Law no. 33/67. These penalties go from (a) to (j), which means that ten different disciplinary sanctions can be imposed according to the gravity of the offence, each one more severe than the previous one, while the maximum sanction is dismissal. Section 79(7) states that dismissal entails the loss of all entitlements upon discharge.

I shall deal with the amended grounds 3 and 4, and thus ground 5 emanating from them.

Judge Chrysostomis: Will you deal with grounds 3 and 4 as a whole?

Mr Efstathiou: As a whole and the consequences thereof.

...

We cannot, therefore, and with all due respect to the court that delivered the judgment, accept that this Court cannot, in fact, intervene in the decisions of the Public Service Commission, when these deal with issues of sanction. It would, indeed, be extraordinary if this Court were competent to address the decisions of criminal courts, but not competent to address and examine whether the commission, which is a disciplinary court, exceeded the limits of its discretionary power. Not only would this be completely alien to the organisation and construction of the jurisprudence, it would also be extraordinary, because a court could intervene – and I am not saying that it would intervene on appeal, no it is not that. Given that the Court intervenes, why shouldn't it – even more so – intervene there?

...

Judge Chrysostomis: On the issue of disciplinary sanctions.

Mr Efstathiou:

...

When you examine the case, I plead with you to take into account the fact that the dismissal of the appellant resulted in forfeiture of his pension rights. This means that the consequence of his dismissal entailed the additional misfortune of the loss of his pension rights, which were a result of twenty years of contributions to the State. This service of twenty years and more, I submit with respect, creates for the appellant parallel rights to receive a pension, autonomous rights which are based on a legal framework that is independent and autonomous in comparison to other legislative regulations. The creation of public servants' pension funds is regulated separately and is created through deducting part of their emoluments. Thus, by imposing this sanction on the appellant, other parallel and autonomous rights were infringed, which should not escape the attention of the Supreme Court of Cyprus. These are acquired rights to which an employee is entitled to for every month of offering his service to the State, in parallel with the right to acquire the payment of a salary. For every month of work, he receives his salary and also has another entitlement, which is preserved in order to be given to him when he is discharged, and which at the same time constitutes an autonomous right. This is the right every employee has to a pension as part of his emoluments. He has another benefit, secret, hidden, but 'activated' from the day he leaves the service.

Consequently, the imposed sanction of dismissal has the following direct consequences, which are all contrary to constitutional rights and the fundamental principles of law and jurisprudence. [Firstly, it] renders the sanction particularly onerous and reinforces the argument that it was disproportionate to the gravity of the offence, which apart from constituting an abuse of discretionary power, violates Article 12 § 3 of the Constitution, which states that a penalty shall not be disproportionate to the gravity of the offence.

Secondly, it denies the applicant's right of property by which he is entitled to a pension for which he has contributed part of his salary. The new Law no. 1/90 contains a revised section 79, which represents a somewhat incomplete regulation of this issue. Namely, when a public servant is dismissed, a pension is paid to his dependants as though he had died. This is unpleasant, but represents a solution that was found and agreed upon at the time.

..."

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. The appeal was heard for a second time on 9 July 1999. The verbatim record of the hearing reads as follows:

"Mr Efstathiou: Your Honours, the facts of this case are, in simple terms, as follows:

...

I will deal with grounds 3 and 4 of the appeal and grounds 5 and 3 emanating from them. I will deal with all of them ...

Ms Koursoumba: In the previous court session, grounds 1, 2 and 5 were withdrawn.

Mr Efstathiou: Indeed, as I have said.

...

Judge Konstantinidis: For the sake of order, I see in the transcript of the previous hearing that you have withdrawn all the grounds of appeal, apart from 3 and 4.

Mr Efstathiou: Indeed.

...

In closing, we conclude that the appellant's twenty and more years of service have brought about pension rights – independent rights that are based on a legal structure which is independent and autonomous compared to other legislative regulations. Everyone contributes to the creation of the capital of the pension; the government also contributes; it is part of the employee's emolument. This sanction ... according to section 79(7) [entails the loss of all retirement benefits].

Therefore, the imposition of the sanction of dismissal, the direct consequence of which is the forfeiture of pension rights, has legal consequences that violate constitutional principles, essential rights and the case-law. The sanction is therefore particularly onerous.

Judge Konstantinidis: You also clarified it last time, but we must bring up the subject once more. We must realise that there is no issue of constitutionality of the law itself but that the subject is being discussed within the framework of the position you are advocating, that it was not reasonably permissible to impose such a sanction.

Mr Efstathiou: Because this is also a consequence of that. It is so. The imposition of the sanction exceeded the limits of the exercise of discretionary power and violated the constitutional principle of Article 12 § 3 that the penalty should not be disproportionate to the gravity of the offence. Thus, the principles of law, the principles of proportionality, the principles of not exceeding the extreme limits of discretionary power and of respect for the appellant's vested rights have been violated. I have told you all this before.”

20. Judgment was delivered on 20 July 1999, dismissing the appeal. The Supreme Court held as follows:

“...

The first-instance court held that the sanction of dismissal imposed on the appellant by the Public Service Commission was just and lawful and within the bounds of its discretion. Also, it stated that the commission had considered the various mitigating circumstances in favour of the applicant before it reached a decision, and that its discretionary power did not concern the issue of the appellant's pension, but only the matter of the sanction. The forfeiture of the appellant's entitlements following discharge was, under the same Law, a consequence of the sanction imposed on him.

In the end, the appeal was limited to two grounds, which are stated in the amended notice of appeal and which are the following:

'(1) The court's finding that the sanction imposed on the appellant by the Public Service Commission was not excessively onerous and disproportionate to the gravity of the offence and/or that the Public Service Commission did take the mitigating circumstances into account in their consideration of the sanction and/or that it did not exercise its discretionary power in breach of procedure in determining the sanction is erroneous.

(2) The court's finding that the sanction of dismissal imposed on the appellant by the Public Service Commission was just and lawful and within the limits of its discretionary power is erroneous.'

The position of the appellant's lawyer is that the principles of law relevant to criminal proceedings are implemented analogously in disciplinary proceedings. Whilst the commission accepted the existence of mitigating circumstances in the case under examination, such as the appellant's long service in the Cypriot struggle for liberation and the Co-operative Movement, and the fact that there was no material gain for him personally, it nevertheless imposed the heaviest sanction on him, rather than a sanction of, for example, compulsory retirement, which would also have resulted in his removal

from service. The appellant stated that the sanction of dismissal was excessively onerous and disproportionate to the gravity of the offence and claimed that the principle of proportionality had been infringed, and thus argued that the commission had exceeded the extreme limits of its margin of discretion. In clarifying this position, he stated that he did not request the Court to change the case-law and interfere with the sanction imposed, but to declare the decision null and void on the ground that it exceeded the extreme limits of the commission's margin of discretion.

The respondent's lawyer contended that the judgment of the first-instance court was just and challenged the claims of the appellant's lawyer by arguing that the Supreme Court does not have the authority to interfere in matters of sanction, unless the disciplinary body had clearly exceeded the extreme limits of its margin of discretion. She also stated that the assessment of the facts and the severity of the sanction were beyond the jurisdiction of the Supreme Court.

We concur with the opening address of the respondent's lawyer. In fact, it has been established, under Article 146 of the Constitution, that the Administrative Court is not competent, amongst other things, to determine the severity of a disciplinary sanction.

...

The first-instance court, on examining the issue of the discretionary power of the commission, stated the following on page 9 of its judgment:

'Having carefully examined the case file, as well as the relevant verbatim record, where the *ratio decidendi* and the statement of reasons are included in detail, I judge that the Public Service Commission imposed the sanction of dismissal on the applicant justly and lawfully, without exceeding the limits of its discretionary power. The Public Service Commission, as it is explicitly reported in the relevant transcript (see Appendix 8 of the Plea) took into account the applicant's various mitigating circumstances before reaching a decision. The Public Service Commission's discretionary power was not related to pension issues, but only to the matter of the sanction. The sanction imposed on the applicant entailed, according to the same Law, the forfeiture of all his entitlements upon discharge.'

This conclusion of the first-instance court is correct. The commission chose to impose the severest sanction. This decision was within its jurisdiction. It has not been demonstrated that the commission did not act within the extreme limits of its margin of discretion, either due to the fact that it acted irrationally or due to the fact that it acted in breach of the principles of good administration, the latter including the principle of proportionality, on which the appellant's lawyer has essentially based his case.

The fact that the Public Service Commission imposed the severest sanction provided for by the relevant law even though it had established the existence of mitigating circumstances does not demonstrate that it did not act within the extreme limits of its margin of discretion. Evidently, as shown by its decision, it deemed that, despite the existence of mitigating circumstances, the seriousness and the effects of the offence were such that it was justified in imposing the severest sanction provided for by law. This follows from the commission's decision, in which, while highlighting the seriousness of the offences, it also referred to parts of the decision of the criminal court. Below is a quote from the Public Service Commission's decision:

'The Commission has no other choice but to consider the offences, on the grounds of which the public servant in question was sentenced to prison, as being of the gravest nature. As the judge who tried the case aptly said:

“The one and only aim of his actions was to promote himself as a person who could easily solve all of the problems on the island due to the financial strength of the Co-operative Movement, which he claimed to have founded himself. I should, at this point, underline the fact that he was managing the resources of the Mutual Fund as though they were his private property. However, he

had no right to use the Fund's resources for purposes other than those for which the Co-operative Institutions had entrusted him with significant sums of money.

His bad faith is also evident, amongst other things, in the fact that he took great care to conceal the source of the funds whenever he made payments for purposes other than those for which he had been entrusted with the money. He viewed the Fund an inexhaustible source of resources that allowed him to be popular with those in positions of power as well as his friends.

The fact that large sums of money were given away to charities does not exonerate the defendant from responsibility for his actions. Philanthropic acts using funds provided by others do not constitute charity at all, but are merely acts of exploitation and self-promotion.” ’

Following this and prior to reaching a decision on the sanction to be imposed, the commission also stated the following:

'A high-ranking official who shows such disregard for his responsibilities and duties as in the present case and who, additionally, so openly violates the law and/or the regulations of service in order to promote himself as a benefactor of society places himself out of the public service.'

For all the above reasons, the appeal is dismissed with all expenses to be paid by the appellant.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. At the material time, the relevant parts of section 79 of the Public Service Law (no. 33/67) read as follows:

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

- (a) reprimand
- (b) severe reprimand
- (c) disciplinary transfer
- (d) interruption of annual salary increase
- (e) suspension of annual salary increase
- (f) pecuniary penalty which cannot exceed three months' salary
- (g) reduction in the salary scales
- (h) reduction to the ranks
- (i) compulsory retirement
- (j) dismissal.

...

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

22. A revised version of section 79(7) of the Law is now 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 for posts in the public service are set out in the relevant “schemes of service”, approved by the Council of Ministers. According to the scheme of service for the post of 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. Adviser 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, Chapter 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. Until 1967, section 5(1) of Chapter 311 provided as follows:

“No officer shall have an absolute right to compensation for past services or to pension, gratuity or other allowance; nor shall anything in this Law affect the right of the Crown to dismiss any other officer at any time and without compensation.”

This section was repealed by Law no. 9/1967, which came into force on 1 April 1967. Furthermore, section 3(1) of the same Law, which read:

“Pensions, gratuities and other allowances may be granted by the Governor in accordance with the regulations contained in the Schedule to this Law to Officers who have been in the service under the Government of Cyprus ...”

was amended by Law no. 9/1967 by replacing the word “may” with the word “shall”.

Regulation 4, issued under Chapter 311, which provided:

“Subject to the provisions of the Law and of these Regulations, every officer holding a pensionable office under the Government of Cyprus, who has been in the service under the Government of Cyprus in a civil capacity for ten years or more, may be granted on retirement a pension at the annual rate of one six-hundredth of his pensionable emoluments for each complete month of his pensionable service.”

was also amended by Law no. 9/1967 by replacing the word “may” with the word “shall”.

26. 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 ...”

27. Article 169 § 3 of the Constitution reads as follows:

“Treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto.”

28. The relevant parts of Article 23 of the Constitution read as follows:

“1. Every person, alone or jointly with others, has the right to acquire, own, possess, enjoy or dispose of any movable or immovable property and has the right to respect for such a right. The right of the Republic to underground water, minerals and antiquities is reserved.

2. No deprivation or restriction or limitation of any such right shall be made except as provided in this Article.

3. Restrictions or limitations which are absolutely necessary in the interests of public safety or public health or public morals, or town and country planning or the development and use of any property for the promotion of the public benefit or for the protection of the rights of others, may be imposed by law on the exercise of such a right.

Just compensation shall be promptly paid for any such restrictions or limitations which materially decrease the economic value of the property; in case of disagreement, such compensation is to be determined by a civil court.

4. Any movable or immovable property or any right over or interest in any such property may be compulsorily acquired by the Republic, or by a municipal corporation or by a Communal Chamber for educational, religious, charitable or sporting institutions, bodies or establishments within its competence and only from the persons belonging to its respective community, or by a public corporation or a public utility body on which such a right has been conferred by law and only –

(a) for a purpose which is to the public benefit and shall be specially provided by a general law for compulsory acquisition which shall be enacted within a year from the date of the coming into operation of this Constitution;

(b) when such purpose is established by a decision of the acquiring authority and made under the provisions of such law stating clearly the reasons for such acquisition;

(c) upon payment in cash and in advance of just and equitable compensation, to be determined in case of disagreement by a civil court.

...”

29. The relevant parts of Article 146 of the Constitution read as follows:

“1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or an omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

2. Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission.

3. Such a recourse shall be made within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse.

4. Upon such a recourse the Court may, by its decision

(a) confirm, either in whole or in part, such decision or act or omission; or

(b) declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever; or

(c) declare that such omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed.

5. Any decision given under paragraph 4 of this Article shall be binding on all courts and all organs or authorities in the Republic and shall be given effect to and acted upon by the organ or authority or person concerned.

...”

30. The applicant attached to his further observations on the merits (dated 8 January 2002) in reply to the Government's observations a document established by the Pancyprian Public Employees' Trade Union on 7 January 2002, in which the following is specified:

“It is a well-known fact that the pension constitutes an integral part of the employment contract that the Cyprus government offers to all of its employees, namely civil servants.

This is a hard-earned right that the unions have secured over the years and the government has undertaken to pay such a pension as part of the employment contract. This can also be seen from the schemes of service that the government has.

A civil service position is accompanied by a compulsory retirement scheme, which consists of receiving certain retirement benefits at the end of one's employment, which include a monthly pension and a lump sum.

This is part of the overall employment package the government undertakes to provide, and civil servants contribute with their years of service and by having a certain amount deducted from their salary by way of taxes. This package is based on the employment relationship and the government has undertaken to finance it and provide it at the end of an employee's career.”

THE LAW

I. SCOPE OF THE GRAND CHAMBER'S JURISDICTION

31. The applicant submitted that the power to refer a case to the Grand Chamber in accordance with Article 43 of the Convention was limited. Such a referral was an exceptional procedural step, and the Court's jurisdiction had to be exercised carefully. In the present case, only one of the three grounds relied on by the Government for referring the case qualified for review under Article 43 § 2, namely the ground regarding the Court's jurisdiction *ratione temporis*. In effect, he contended, it was clear from the emphasis the Government put on the three points in their request for referral that the most important one was that of the jurisdiction *ratione temporis*. This was the only ground which raised a question affecting the interpretation or application of the Convention or that could be said to raise a serious issue of general importance for the purposes of Article 43 of the Convention.

32. The Court considers that it is now well-established case-law that “the case” referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, the scope of its jurisdiction in “the case” being limited only by the Chamber's decision on admissibility. This does not mean, however, that the Grand Chamber may not also examine, where appropriate, issues relating to the admissibility of the application in the same manner as this is possible in normal Chamber proceedings, for example by virtue of Article 35 § 4 *in fine* of the Convention (which empowers the Court to “reject any application which it considers inadmissible ... at any stage of the proceedings”), or where such issues have been joined to the merits or where they are otherwise relevant at the merits stage (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII, and *Perna v. Italy* [GC], no. 48898/99, §§ 23-24, ECHR 2003-V). Thus, even at the merits stage and subject to Rule 55 of the Rules of Court, the Court may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see, *mutatis mutandis*, *Odièvre v. France* [GC], no. 42326/98, § 22, ECHR 2003-III).

33. This being so, the scope of the case before the Grand Chamber is not limited in the way suggested by the applicant.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

Non-exhaustion of domestic remedies

1. The Government's submissions to the Grand Chamber

34. In their request for the referral of the case to the Grand Chamber and, subsequently, in their observations, the Government reiterated the objection they had pleaded before the Chamber as to the non-exhaustion of domestic remedies. They underlined that the applicant expressly withdrew the allegation of a violation of a property right which was never raised, argued or adjudicated upon, even in the remotest way. The applicant referred to the retirement benefits only in the context of challenging dismissal as a disproportionate sanction. Thus, the Supreme Court did not in substance deal with or have the opportunity of dealing with an alleged property violation. However, before the Supreme Court, constitutional matters must be specifically raised and pleaded

by the party concerned; they are not examined by the court *proprio motu*. The Chamber appeared to have misunderstood the nature of the proceedings in the domestic courts. The issue of non-exhaustion was a real question of admissibility and the Court was empowered under Article 35 § 4 to deal with it at this stage.

2. The applicant's submissions to the Grand Chamber

35. The applicant maintained that the question of exhaustion of domestic remedies had already been settled by the Chamber in its final decision on admissibility of 19 June 2001. The Government had failed to raise it again at the merits stage before the Chamber and it was doubtful that they even could have done so. Thus, they were estopped from doing so before the Grand Chamber.

3. The Chamber's decision

36. In its admissibility decision of 19 June 2001, the Chamber held that by challenging the legality of the decision of the Public Service Commission to impose the sanction of dismissal, the applicant had also contested, albeit implicitly, the forfeiture of his retirement pension. The Chamber noted that the Supreme Court, sitting as a first-instance court, had held that the discretionary power of the commission concerned only the nature of the sanction, the loss of retirement benefits being the normal consequence of that particular sanction. The Supreme Court, sitting as a court of appeal, had upheld that conclusion. Finally, the Chamber noted that the applicant's lawyer had expressly stated before the Supreme Court that he maintained the third and fourth grounds of appeal, which, in the Chamber's view, also covered the fifth ground.

4. The Court's assessment

37. As in *Odièvre*, cited above, the Grand Chamber is not precluded from examining the Government's objection of non-exhaustion of domestic remedies since, in accordance with Rule 55 of the Rules of Court, they duly raised this objection at the admissibility stage before the Chamber.

38. While in the context of machinery for the protection of human rights the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge impugned decisions which allegedly violate a Convention right. It normally requires also that the complaints intended to be made subsequently at the international level should have been aired before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I).

The object of the rule on exhaustion of domestic remedies is to allow the national authorities (primarily the judicial authorities) to address the allegation made of violation of a Convention right and, where appropriate, to afford redress before that allegation is submitted to the Court (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). In so far as there exists at national level a remedy enabling the national courts to address, at least in substance, the argument of violation of the Convention right, it is that remedy which should be used. If the complaint presented before the Court (for example,

unjustified interference with the right of property) has not been put, either explicitly or in substance, to the national courts when it could have been raised in the exercise of a remedy available to the applicant, the national legal order has been denied the opportunity to address the Convention issue which the rule on exhaustion of domestic remedies is intended to give it. It is not sufficient that the applicant may have, unsuccessfully, exercised another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of violation of a Convention right. It is the Convention complaint which must have been aired at national level for there to have been exhaustion of “effective remedies”. It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument (see *Van Oosterwijck v. Belgium*, judgment of 6 November 1980, A Series no. 40, pp. 16-17, §§ 33-34).

39. The Court notes that the Convention forms an integral part of the Cypriot legal system, where it takes precedence over any contrary provision of national law (Article 169 § 3 of the Constitution – see paragraph 27 above). It further notes that Article 1 of Protocol No. 1 is directly applicable within the Cypriot legal system. The applicant could therefore have relied on that provision in the Supreme Court or on arguments to the same or like effect based on domestic law, namely, Article 23 of the Constitution which guarantees the right of property (see paragraph 28 above), and complained of a violation thereof in his case.

40. However, the applicant did not cite Article 1 of Protocol No. 1 before the Supreme Court sitting as a court of appeal. Even if in the fifth ground of the notice of appeal to the Supreme Court it was pleaded that the forfeiture of the retirement benefits upon the applicant's disciplinary dismissal violated the right of property under Article 23 of the Constitution, counsel for the applicant expressly withdrew that ground, along with two others, at the first hearing of the appeal on 14 September 1998. The Supreme Court immediately dismissed the withdrawn grounds and proceeded to hear counsel on the remaining two grounds only, namely the third and fourth, in which it was maintained that, by imposing the sanction 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 discretionary power (see paragraphs 17-18 above). At the second hearing of the appeal on 9 July 1999, the Supreme Court explicitly enquired of the applicant's counsel whether he was arguing unconstitutionality, and counsel thereupon reaffirmed that he had withdrawn the first, second and fifth grounds at the first hearing and was only arguing the third and fourth (see paragraph 19 above). It transpires from the records of the hearings before the Supreme Court that, in both hearings, the applicant's counsel referred to the forfeiture of retirement benefits in order to show that the sanction of dismissal was disproportionately severe in the circumstances and that a lighter sanction should have been imposed instead. It was for this reason that the Supreme Court never ruled on whether the applicant's dismissal violated his property right to a pension.

41. In sum, the applicant did not provide the Cypriot courts with the opportunity which is in principle intended to be afforded to a Contracting State by Article 35 of the Convention, namely the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it (see, among other authorities,

Guzzardi v. Italy, judgment of 6 November 1980, Series A no. 39, p. 26-27, § 72, and *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 19, § 36). The objection that the relevant “effective” domestic remedy was not used by Mr Azinas in the instant case is therefore well-founded.

42. Consequently, the application must be rejected as inadmissible, in accordance with Article 35 §§ 1 and 4 *in fine* of the Convention.

43. In view of this conclusion, it is not necessary for the Court to examine the various arguments submitted to it concerning the Government's objection that the subject-matter of the application was outside the Court's jurisdiction *ratione temporis*, and in particular the Government's argument that it was open to the Court to entertain this objection despite the fact that they waited until filing their observations on just satisfaction before raising it for the first time (see Rule 55 of the Rules of Court).

FOR THESE REASONS, THE COURT

Rejects by twelve votes to five the application as inadmissible.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 April 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Wildhaber joined by Mr Rozakis and Mrs Mularoni;
- (b) concurring opinion of Mr Hadjihambis;
- (c) joint dissenting opinion of Mr Costa and Mr Garlicki;
- (d) dissenting opinion of Mr Ress.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE WILDHABER
JOINED BY JUDGES ROZAKIS AND MULARONI

I agree with the majority that the applicant has failed to exhaust domestic remedies. But given the importance of the issues arising on the merits, I wish to add that there would in my opinion have been no violation of Article 1 of Protocol No. 1.

Firstly, the applicant's pension rights did not amount to a sufficient proprietary interest in law to attract the application of Article 1 of Protocol No. 1. His pension rights as a civil servant were non-contributory and contingent on the fulfilment of certain legal conditions. The entitlement to a pension could be suspended where a civil servant – as in the instant case – was dismissed from service as a disciplinary sanction because of serious professional misconduct (stealing, breach of trust and abuse of authority). Under such circumstances, the applicant had no “legitimate expectation” of receiving a pension.

Secondly, even assuming that the applicant's entitlement to a pension amounted to a “possession” within the meaning of Article 1 of Protocol No. 1, the interference with the enjoyment of that “possession” was justified. Indeed, according to existing case-law, the right to a pension based on employment can in certain circumstances be assimilated to a property right, although in principle it cannot be interpreted as entitlement to a pension of a particular amount¹.

In this case, however, the applicant, a high-ranking civil servant, was sentenced to eighteen months' imprisonment on counts of stealing, breach of trust and abuse of authority. The Public Service Commission concluded that he had managed the resources of his department as if they were his private property and spent them for purposes other than those of the department. For this breach of the special bond of trust and loyalty which is required from a high-ranking civil servant he was dismissed. The fact that the sanction of dismissal brought about the forfeiture of the applicant's retirement benefits resulted from an express legislative provision. In my view, the application of this provision in the instant case struck a fair and just balance between the protection of the applicant's property rights and the requirements of public service.

Accordingly, even if the applicant had exhausted domestic remedies, there would have been no violation of Article 1 of Protocol No. 1.

1. See *Müller v. Austria*, no 5849/72, Commission's report of 1 October 1975, Decisions and Reports (DR) 3, p. 25; *X v. Austria*, no 7624/76, Commission decision of 6 July 1977, DR 19, p. 100; *T. v. Sweden*, no. 10671/83, Commission decision of 4 March 1985, DR 42 p. 229; *Sture Stigson v. Sweden*, no. 12264/86, Commission decision of 13 July 1988, DR 57, p. 131; *Skórkiewicz v. Poland* (dec.), no. 39860/98, 1 June 1999; *Domalewski v. Poland* (dec.), no. 34610/97, ECHR 1999-V; *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X; and, as to entitlements to social benefits, see also *Gaygusuz v. Austria*, judgment of 6 September 1996, *Reports of Judgments and Decisions*, 1996-IV, and *Koua Poirrez v. France*, no. 40892/98, ECHR 2003-X.

CONCURRING OPINION OF JUDGE HADJIHAMBIS

I agree with the majority judgment that the Court is unable to consider the merits of the case by reason of the applicant's failure to exhaust domestic remedies. I nevertheless feel it fair, if not necessary, to reiterate the view I expressed in my minority judgment when the case was before the Chamber that, had I considered the complaint admissible, the applicant's right to a pension amounted to a "possession" within the meaning of Article 1 of Protocol No. 1. Indeed, as in the present case, although the public servant does not make contributions under the pension scheme, employment is entered into in circumstances involving a general undertaking and a corresponding expectation that a pension will be payable as an integral part of the conditions of service. As to whether there would have been a violation of this right, I would still not express an opinion.

JOINT DISSENTING OPINION OF JUDGES COSTA AND GARLICKI

(Translation)

1. The present case concerns a high-ranking Cypriot official with twenty-two years in public service, on whom a heavy disciplinary penalty was imposed in 1982 after he was sentenced to a term of imprisonment by the Nicosia District Court. The penalty imposed was dismissal and, in accordance with the Public Service Law, he was deprived of all his retirement benefits.

2. The path taken by the application in the Court is as follows: in June 2000 it was declared partly admissible and partly inadmissible. A year later a single complaint – that concerning the peaceful enjoyment of possessions – was declared admissible in the final decision on admissibility, after a preliminary objection raised by the Government of failure to exhaust domestic remedies was dismissed. A year on from that, the complaint was upheld by a Chamber in a judgment in which it found a violation of Article 1 of Protocol No. 1. Finally, at the Government's request, the case was referred to the Grand Chamber, which, by a majority, decided in the present judgment to declare the application inadmissible for failure to exhaust domestic remedies.

3. We are in the minority and do not share our colleagues' view that there has been a failure to exhaust domestic remedies.

4. We do not seek here to contest the Grand Chamber's jurisdiction to allow the objection even though it had been dismissed in the admissibility decision. Whatever reservations one might have on the subject, paragraph 37 of the judgment rightly states that, in accordance with the judgment in *Odièvre v. France* ([GC], no. 42326/98, § 22, ECHR 2003-III), the Grand Chamber may reconsider a decision to declare an application admissible. As authority for that proposition, the relevant paragraph in *Odièvre* cites Article 35 § 4 of the Convention (“The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings”). This precedent, which comes from a decision of the Grand Chamber of the Court, must be followed.

5. However, it is our view that the applicant did exhaust domestic remedies.

6. Under the well-established case-law of the Commission and the Court, the rule requiring the exhaustion of domestic remedies “according to the generally recognised rules of international law” (see Article 35 § 1 of the Convention, which sets out the admissibility criteria), thus reflecting the *subsidiary* nature of the system of European human rights protection, contains two requirements:

(a) the applicant must have made use of the remedies afforded by the legal system of the respondent State; and

(b) the applicant must have raised, at least *in substance*, the complaints he or she intends to refer to the Court (see, among many other authorities, *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, pp. 26-27, § 72).

7. The fact that the Court only requires complaints to have been raised in substance is not indicative of any laxity on its part, even though, as Professor Sudre has correctly noted: “the European Court has interpreted the exhaustion rule in a way that favours the victim” (*Droit européen et international des droits de l'homme*, PUF, 2003, p. 538). Implicit in the generally recognised rules of international law, particularly where human

rights courts are concerned, is the notion that the rule of exhaustion of domestic remedies must be applied with “a certain degree of flexibility and without excessive regard for matters of form” (see, among other authorities, *Guzzardi*, cited above, p. 26, § 72, in which the Court clearly rejected the Italian Government's argument that the notion of a remedy exercised “in substance” would be “extremely ambiguous” and signify an “ectoplasm of a remedy”). The Court has on numerous occasions dismissed objections of failure to exhaust domestic remedies where it has found that the complaint had been raised in the domestic courts “in substance” (see, among other authorities, *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, p. 20, § 32; *Botten v. Norway*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p.140, § 36; and also *Fressoz and Roire v. France* [GC], no. 29183/95, § 39, ECHR 1999-I. In this latter judgment, the Court accepted that “freedom of expression was in issue, if only implicitly, in the proceedings before the Court of Cassation”).

8. In the present case, it is common ground that Mr Azinas made use of the legal remedies afforded by the Cypriot legal system, since he challenged the disciplinary penalty (dismissal, with loss of retirement benefits) in the Supreme Court and subsequently appealed to the same court, sitting as a court of appeal. The sole issue, therefore, is whether the complaint of a breach of his right to the peaceful enjoyment of his possessions was raised at least in substance.

9. In his appeal against the first judgment, the applicant lodged five grounds of appeal with the Supreme Court, in the fifth of which he argued that the forfeiture of his retirement benefits contravened Article 23 of the Constitution. Although not identical to Article 1 of Protocol No. 1, Article 23 of the Constitution does afford like protection of the right of property and to peaceful enjoyment of possessions *in substance*. In this ground of appeal, the applicant expressly contested the Supreme Court's finding in its first judgment that the loss of retirement benefits did not contravene Article 23 of the Constitution. Therefore, the complaint based, in substance, on the right to protection of property (as guaranteed by Article 1 of Protocol No. 1) was raised both at first instance and on appeal.

10. It is true that in his oral submissions the applicant's lawyer said that he would be very brief and “essentially” would only deal with two grounds of appeal, before adding that he was “withdrawing” the other grounds (including the ground relevant here). However, in our view, it is not possible to sustain – without falling into the trap of undue formalism – that the fifth ground of appeal was no longer before the domestic courts, when it was raised, pleaded and argued before the Supreme Court at first instance and expressly repeated in the notice of appeal. Lastly, the fact remains that the fifth ground was raised at the hearing of the appeal: paragraph 18 of the judgment indicates that, notwithstanding the remarks to which we have referred above, the applicant's lawyer said that he would deal with grounds 3 and 4 “and thus ground 5 emanating from them”. He was also at pains to point out that his client had forfeited his pension rights and stressed the gravity of the breach, which he submitted was unconstitutional, of his client's economic right to a pension.

11. In short, we cannot subscribe to what appears to us to be an unduly strict and formal reading of the exhaustion of domestic remedies rule, and for that reason have voted against allowing the Government's preliminary objection.

12. In view of the finding of the majority of our colleagues, we will comment on the other issues raised by this application only briefly, as, despite their importance and complexity, they are now of purely academic interest.

13. In our opinion, the other preliminary objection raised by the Government – that the Court had no jurisdiction *ratione temporis* – would have had to be dismissed. Cyprus ratified the Convention as early as 6 October 1962, and was thus bound by it from that date onwards. However, as regards applications lodged against it with the Convention institutions, the Convention came into force in respect of Cyprus on 1 January 1989, when its declaration accepting the right of individual petition under Article 25 of the Convention, as worded prior to the entry into force of Protocol No. 11, became effective. Although the applicant was dismissed in 1982, well before that date, it was not until 20 July 1999 that the Supreme Court decided his appeal in a final decision. Had the Supreme Court not chosen to dismiss that appeal, it might have quashed the decision to dismiss the applicant with the result that the Public Service Commission would have had to reconsider the issue in 1999. The relevant date, therefore, is the date of the Supreme Court's final judgment.

14. We also consider that Article 1 of Protocol No. 1 was applicable in the instant case. There is a line of case-law which holds, rightly in our view, that a welfare benefit – even under a non-contributory scheme – may constitute a possession for the purposes of Protocol No. 1 (see *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1142, § 41; *Bucheň v. the Czech Republic*, no. 36541/97, § 46, 26 November 2002; or even more recently, *Koua Poirrez v. France*, no. 40892/98, § 42, ECHR 2003-X). In the instant case, the applicant, who joined the public service in 1960, knew that he was entitled under domestic law to retirement benefits (save in the event of dismissal, which is a rare occurrence). He therefore had at least a legitimate expectation of receiving the benefits one day.

15. The most dubious point is undoubtedly the issue of compliance with Article 1 of Protocol No. 1. The Chamber found in its judgment that there had been a violation, holding that the balance between the protection of the individual's right of property and public-interest requirements had been upset to the applicant's detriment. On the facts of the present case, we would probably have reached the opposite conclusion. Just as the applicant had a legitimate expectation of receiving a pension, he was aware that, by statute, dismissal entailed the forfeiture of his pension rights. In the course of his duties, he committed serious criminal offences which resulted in his receiving an eighteen-month prison sentence. His dismissal in those circumstances was not unjustified, in view of his seniority and the nature of the offences, and on this point we agree with Judge Wildhaber's analysis in his own separate opinion. Lastly, the fact that the benefits that were lost arose under a non-contributory scheme makes it difficult to accept that the financial consequences of forfeiture were “particularly harsh”, as the Chamber said in paragraph 44 of its judgment, especially as the applicant's wife and children have become eligible for a pension under recently introduced legislation (see paragraph 22 of the present judgment). Ultimately, and with the element of uncertainty that is inherent in a hypothetical vote, we would probably have found that there had been no violation of Article 1 of Protocol No. 1.

DISSENTING OPINION OF JUDGE RESS

1. I concur with the dissenting opinion of Judges Costa and Garlicki except for the last point on the violation or non-violation of Article 1 of Protocol No. 1. In this respect I am of the opinion that the judgment of the Chamber and its reasoning were correct and more convincing than the finding of the majority of the Grand Chamber.

2. The applicant exhausted domestic remedies. The respondent State should have been aware that in the domestic proceedings the applicant was also raising the problem of his pension (property) rights within his arguments on proportionality.

Furthermore, the pension rights of public servants relate to services done by the relevant persons and are thus dependent on “contributions” in a more general way. It would be arbitrary to place the dividing line under the property aspect between those public servants who are working within a system of social security contracts where contributions are formally paid and those whose contributions are from the very beginning indirectly deducted from their salaries and thus to be paid by the State.

3. Furthermore, I have no doubt that it was appropriate for the national authorities to take disciplinary measures in addition to the criminal conviction of the applicant and to opt also for his dismissal, in view of the seriousness of the offences, even though the amounts of money embezzled were given for charitable purposes to the President of the Republic Assistance Fund. A disciplinary penalty which retroactively deprived the applicant (and thus his family) of all retirement benefits, amounted in my view to a criminal not a disciplinary penalty. It is possible under Article 6 of the Convention and Article 1 of Protocol No. 1 to include such penalties, even if otherwise defined in domestic law, under the heading of criminal penalties, and indeed rather severe ones. But the domestic courts did not order him to pay in addition to the prison sentence a substantial fine. As a disciplinary penalty, the retroactive forfeiture of the individual's pension cannot be said to serve any commensurate purpose. Furthermore, the retroactive forfeiture of all pension rights as a “criminal penalty” may, when calculated per capita, amount to a sum which under criminal-law aspects may be considered disproportionate for any purpose. Article 1 of Protocol No. 1 makes exceptions for penalties but not for this kind of retroactive forfeiture of all pension rights. The argument that the applicant could have foreseen such effects is not convincing, since the regulation as such, whether foreseeable or not, must be considered particularly harsh and incompatible with the required balance that must be struck between protection of the individual's property rights and the public interest. The fact that the relevant law has been changed and a part of the pension rights reserved for the members of the family shows that the legislature of the respondent State was well aware of the lack of proportionality of the legal rules applicable to the applicant.