



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

FIRST SECTION

CASE OF ZEMAN v. AUSTRIA

(Application no. 23960/02)

JUDGMENT

STRASBOURG

29 June 2006

FINAL

29/09/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zeman v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 8 June 2006,

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

PROCEDURE

1. The case originated in an application (no. 23960/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Walter Zeman (“the applicant”), on 10 June 2002.

2. The applicant was represented by Mr Johann Stöhr, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Mr F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged that the reduction of his survivor’s pension under the amended Pension Act and the Pension Allowance Act was discriminatory and violated his right to property.

4. The application was allocated to the First 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.

5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1)

6. By a decision of 30 June 2005 the Court declared the application admissible.

7. Neither the applicant nor the Government filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1939 and lives in Vienna.

9. At the time of the events the applicant was a civil servant in the administration of the Vienna Municipality. On 21 June 1988 the applicant's wife, who was also a civil servant in the administration of the Vienna Municipality, died. During her working life she had paid contributions to the pension scheme established under the Pension Act (*Pensionsordnung*) and the Pension Allowance Act (*Ruhe- und Versorgungsgenußzulagen-gesetz*).

10. By decision of 22 August 1988 the Vienna Municipality (*Stadtwerke*) granted the applicant a survivor's pension (*Versorgungsgeld- und Versorgungsgeldzulage*) under the relevant provisions of the Pension Act of 1966, and the Pension Allowance Act. Section 15 of the Pension Act in force at the relevant time provided for a survivor's pension in the amount of 60 % of the retirement pension of the applicant's late wife. Hereto was added a proportionate supplementary allowance under Section 6 of the Pension Allowance Act.

11. According to the transitory provision contained in Article II of the Pension Act the monthly payments to which the applicant was entitled amounted to one-third of the survivor's pension from 1 July 1988, two-thirds of the survivor's pension from 1 January 1989 and the full survivor's pension from 1 January 1995.

12. On 1 January 1995 the fourteenth amendment of the Pension Act of 1966 came into force and Article II became invalid with effect from that day.

13. According to Section 15 of the amended Pension Act the survivor's pension amounted to between 40 and 60% of the retirement pension of the deceased civil servant, the concrete percentage to be calculated on the basis of the retirement pensions of both spouses.

14. According to Section 64e of the Amended Pension Act, former Section 15 was still applicable to entitlements to a widow's pension or a pension of a widower who was incapable of gainful employment and indigent, which had been acquired prior to 1 January 1995.

15. On 2 January 1995 the Vienna Municipality reduced the amount of the applicant's survivor's pension to 40% of his late wife's retirement pension.

16. On 16 January 1995 the applicant appealed against this decision.

He submitted that, had he been a woman in a similar position, former Section 15 of the Pension Act would have applied to him and he would have been entitled to a survivor's pension in the amount of 60% of his late wife's

retirement pension instead of the 40% which he received now under the amended Pension Act and the Pension Allowance Act. This violated his constitutional right to equal treatment.

17. On 16 May 1995 the Appeals Board of the Vienna Municipality (*Berufungssenat*) dismissed the appeal.

18. On 13 July 1997 the applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*).

19. On 8 October 1997 the Constitutional Court declined to deal with the applicant's complaint for lack of prospects of success.

20. On 19 December 2001 the Administrative Court (*Verwaltungsgerichtshof*) to which the case had been transferred upon the applicant's request, dismissed the applicant's complaint.

21. It referred, *inter alia*, to case-law of the Constitutional Court concerning similar provisions of the Pension Act 1965. The Constitutional Court had found that in the light of continuing change in attitudes towards the equality of sexes, an exclusion of a widower from survivor's payments would, as a rule, constitute a violation of the principle of equal treatment.

22. There was, however, no constitutional concern about provisions which, in the course of an adjustment process, provided for equal rights of widows and widowers to a survivor's pension as of a certain date, but maintained differences as regards the entitlement to survivor's pensions acquired prior to that date. This decision was served on the applicant's counsel on 25 January 2002.

II. RELEVANT DOMESTIC LAW

23. In its 1986 version the relevant provisions of the Vienna Pension Act (*Pensionsordnung für Wien, LGBl Nr. 34/1986*) read as follows:

Section 14 (1)

"The surviving spouse of a civil servant is entitled to a monthly pension if the civil servant himself had such a claim on the day of his death, or if he would have had such a claim upon retirement on that day."

Section 15(1)

"A survivor's pension shall amount to 60 % of the civil servant's retirement pension....."

Article II (2)

"The monthly instalments to which the widower or the former husband are entitled, are - from 1 August 1986 onwards the amount of one third; - from 1 January 1989 onwards the amount of two thirds; - and from 1 January 1995 onwards the full

amount. If the widower or former husband is incapable of gainful employment and indigent, this restriction does not apply."

24. On 1 January 1995, when the fourteenth amendment to the Pension Act came into force, the relevant provisions of this Act were amended as follows:

Section 15

"1. A survivor's pension shall amount to a certain percentage of the civil servant's retirement pension ...

3. ...the percentage shall lie between 40 and 60 ..."

Section 64e (1)

"Provided the entitlement [to a survivor's pension] had been acquired before 1 January 1995, Section 15 of the Pension Act as in force on 31 December 1994 is still applicable

- to the survivor's pension of a widow...

- to the survivor's pension of a widower, if he is incapable of gainful employment and indigent...."

25. The Pension Act has meanwhile repeatedly been amended. Current Section 72 § 1 reads:

"Provided the entitlement [to a survivor's pension] had been acquired before 1 January 1995, Section 15 of the Pension Act as in force on 31 December 1994 is still applicable

- to the survivor's pension of a widow...

- to the survivor's pension of a widower, if he is incapable of gainful employment and indigent...."

26. Section 6 of the Pension Allowance Act (*Ruhe- und Versorgungsgenüßzulagengesetz*) grants a survivor entitled to a survivor's pension [under the Pension Act] a supplementary pension allowance amounting to a certain percentage of the civil servant's retirement supplementary allowance. The percentage corresponds to the percentage relied on when calculating the survivor's pension under the Pension Act.

THE LAW

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

27. The applicant complained under Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention that the reduction of his survivor's pension under the amended Pension Act was discriminatory and violated his right to property.

Article 1 of Protocol 1 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.”

Article 14 reads as follows:

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

28. In its admissibility decision of 30 June 2005 the Court held that the amendment of the Pension Act leading to the reduction of the applicant's entitlement to 40 % of his late wife's retirement pension, affected the applicant's property interests protected in Article 1 of Protocol No. 1. Accordingly, Article 14 is also applicable. The Court will now consider whether there has been a breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

29. The Government argued that the re-assessment of the widower's pension of the applicant was reasonable and justified as it served the legitimate aim of preventing excessive benefits.

30. The fourteenth amendment of the Pension Act provided for equal rights of widows and widowers to a survivor's pension as from 1 January 1995. The differences between widows and widowers as regards the entitlement to a survivor's pension acquired prior to that date were in line with the gradual adjustment process between widows' and widowers' pensions. Widows and widowers who were incapable of gainful employment and indigent already received a survivor's pension in the amount of 60 % of their late spouse's retirement pension before

1 January 1995, so that a new assessment of their pensions would have interfered with their acquired pension rights and violate their confidence.

31. The applicant submitted that the discrimination of widows and widowers under the amended Pension Act in fact prolongates the discrimination of widows and widowers in respect of entitlement to a survivor's pension before 1 January 1995. He maintained that there is no reason why excessive benefits should only be prevented when paying survivor pensions to widowers but not also to widows who had acquired a survivor's pension before 1 January 1995. He submitted that his position as a widower was just as well worth protecting than those of widows.

32. The Court recalls that Article 14 does not prohibit a Member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article (see "*Case relating to certain aspects of the laws on the use of languages in education in Belgium*" v. *Belgium (Merits)*, judgment of 23 July 1968, Series A no. 6, § 10 and *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV). A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports of Judgments and Decisions 1997-I*, § 39).

33. The scope of this margin will vary according to the circumstances, the subject-matter and the background (see *Petrovic v. Austria*, judgment of 27 March 1998, *Reports 1998-II*, § 38). As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see *Van Raalte*, cited above, § 39, and *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, § 67). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for example, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 46; *National and Provincial Building Society and Others v. the United Kingdom*, judgment of 23 October 1997, *Reports 1997-VII*, § 80). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (*ibid.*).

34. Finally, since the applicant complains about inequalities in a welfare system, the Court underlines that Article 1 of Protocol No. 1 does not include a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amounts of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 53, 12 April 2006).

35. In the instant case, the amended Pension Act provided for a new assessment of survivor's pensions. The more favourable provisions of the former Pension Act were still applicable to widows who had acquired entitlement before 1 January 1995, whereas they were only applicable to widowers who had acquired entitlement before 1 January 1995 and provided they were incapable of gainful employment and indigent. This constitutes a "difference in treatment" between persons in a similar situation, based on gender. It remains to be determined whether there was a reasonable and objective justification for this different treatment.

36. The Government referred in this regard to the gradual adjustment process between widows' and widowers' pensions which was found to be in conformity with the Austrian constitutional law by the Constitutional Court. As from 1 January 1995 widows and widowers were treated equally. Against this background, the Constitutional Court had no concerns that the legislation maintained different survivor's payments when entitlement had been acquired prior to that date. Widows and widowers who were incapable of gainful employment and indigent, already received a full survivor's pension in the amount of 60 % of their late spouse's retirement pension before 1 January 1995, so that a new assessment of their pensions would have interfered with their existing pension rights.

37. The Court notes that this argumentation may be summarised to the statement that the impugned inequality between widows and widowers was linked to their prior differential legal situation which, in itself, was objectively justified.

38. The Court observes that it was recently called upon to decide whether differences in a system of earning-related benefits arising from the link to differential pension ages of women and men were discriminatory contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol no. 1 of the Convention (see *Stec and Others v. United Kingdom*, cited above). In this case the Court found no violation of the Convention as it considered that the respondent State's decisions as to the precise timing and means of putting right the inequality in pension age did not exceed the wide margin of appreciation allowed in such a field and the link of eligibility for the benefits to the pension system was consistent with the purpose of the benefits.

39. The Court considers that in the present case the gradual adjustment of existing differences in the payment of survivor's pensions may be acceptable under the Convention for reasons similar to those given in the *Stec* case. However, unlike in the *Stec* case, the reform towards equality between women and men in the present case was already effectively under way and the final target of equal treatment should have been reached on 1 January 1995. At this date, the applicant would have reached entitlement to a full survivor's pension in the amount of 60 % of his late wife's retirement pension.

40. The Court finds that very strong reasons have to be put forward in order to explain the amendment in the relevant legislation in December 1994 which introduced further differentiation and thereby frustrated the planned equalisation for part of the widowers, including the applicant, at the very last moment. However, the Government have not forwarded any convincing reason why, contrary to the prior assessment expressed in the Vienna Pension Act of 1986 that equal treatment of widows and widowers should be reached by 1 January 1995, a more favourable treatment of widows suddenly appeared to be justified again. Their argument that a new assessment of the pension of those persons who already received the full amount of survivor's pension before 1 January 1995 would have interfered with their existing rights, might equally well apply to persons who, until amendment of the Pension Act in December 1994, were entitled to and trusted to receive the full amount of a survivor's pension as from 1 January 1995. The Court accordingly considers that the subsequent difference in treatment between men and women as regards entitlement to survivor's pensions acquired prior to 1995 was not based on any "objective and reasonable justification".

41. In conclusion, the Court finds that there has, therefore, been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 in this case.

42. The above finding further renders it unnecessary for the Court to consider separately the applicant's complaint under Article 1 of Protocol No. 1 taken alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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."

44. In respect of pecuniary damage the applicant claimed 60,552.01 EUR as compensation for the part of his survivor's pension he

lost due to the impugned reduction until August 2005, when he filed his just satisfaction claims, including 4 % interest rate. He further requested that the Court take also account of the respective amounts from August 2005 until the Court's judgment. The applicant calculated his claims on the basis of gross survivor's payments as he submitted that it was the duty of the Republic of Austria to assess and deduct taxes and social contributions from these payments.

45. In respect of costs and expenses, the applicant claimed 3,533.03 EUR in respect of the costs of the domestic proceedings and 7,531.86 EUR in respect of the costs of the proceedings before the Court. Both sums include VAT.

46. The Government pointed out that there must be a causal link between the violation found and the presumed damage. Moreover, it is not for the Court to speculate what the outcome of the proceedings would have been, had the authorities or courts acted in conformity with the requirements of the Convention. The Pension Act as in force before 31 December 1994 raised expectations among male survivors that they would be entitled as of 1 January 1995 to a widower's pension in the full amount, however, the applicant was never actually entitled to the full amount.

47. As regards the costs claim, they asserted that the sum claimed for representation in the proceedings before the Vienna Municipality, namely 608.23 EUR, was not necessarily incurred since there was no obligation to be represented by counsel. The sum claimed for proceedings before the Court was excessive.

48. The Court considers the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicant (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 of the Convention;
2. *Holds* that it is unnecessary to examine the applicant's further complaint under Article 1 of Protocol No. 1 of the Convention taken alone;
3. *Holds* that the question of the application of Article 41 is not ready for decision; accordingly,
 - (a) *reserves* the said question in whole;

- (b) *invites* the Government and the applicant to submit, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court 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 29 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President