CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71477/01
by Norbert ACKERMANN and Ingo FUHRMANN
against Germany

The European Court of Human Rights (Third Section), sitting on 8 September 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr L. CAFLISCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr V. ZAGREBELSKY,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 7 May 1999,

Having deliberated, decides as follows:

THE FACTS

The applicants, Norbert Ackermann and Ingo Fuhrmann, are German nationals who were born in 1963 and 1942 respectively and live in Mannheim and Düsseldorf in Germany.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The proceedings concerning the first applicant

The first applicant works as a commercial clerk (*kaufmännischer Angestellter*) in a private enterprise. He is unmarried and his yearly contributions to the statutory old-age insurance for employees amounted in 2002 to EUR 10,314 and in 2003 to EUR 11,934.

On 24 April 1995 the first applicant filed a request to be exempted from his obligation to contribute to the statutory old-age insurance for employees (*gesetzliche Rentenversicherung*). He argued that the compulsory insurance violated his right to equal treatment as guaranteed by Article 3 of the German Basic Law.

On 5 September 1996 the National Health Insurance for Employees (*Deutsche Angestellten Krankenkasse, DAK*) rejected the applicant's request, finding that the applicant, as an employee, was subject to the obligatory old-age insurance under section 1 of the sixth book of the Social Law Code (*SGB VI*, see relevant domestic law below), and that he did not meet the requirements to be exempted under sections 5 or 6 of that same law.

On 11 February 1997 the National Health Insurance rejected the applicant's objection.

On 28 February 1997 the applicant lodged a motion with the Mannheim Social Court *(Sozialgericht*) with a view to being exempted from the obligatory insurance and to being reimbursed his contributions since 1995, alternatively to reduce his monthly contributions to an acceptable degree and to reimburse the exceeding part.

He submitted a statement on political, economic and legal aspects of the compulsory insurance scheme. He argued that the obligatory old-age insurance deprived him of the possibility to provide for old age under a private pension scheme, which would yield considerably higher returns on his investments. The pension which he was likely to receive under the statutory old-age insurance was totally disproportionate when compared to his own contributions. This was partly due to the fact that the contributions under the compulsory insurance were not exclusively used to finance contribution-based pensions, but also to finance so called "extrinsic benefits" (*versicherungsfremde Leistungen,* see relevant domestic law below), including costs incurred by the German reunification.

He further alleged that he was discriminated against when compared to the older generation who currently profited from higher pensions than those which he himself would receive on reaching pension age. Moreover, he complained about discrimination when compared to the group of earners who were not subject to the obligatory insurance system such as self-employed persons and civil servants.

On 10 July 1998 the Mannheim Social Court rejected the applicant's motion. It noted, first, that the legal provisions for exemption did not apply to the applicant. Secondly, the Social Court found that the compulsory

insurance did not violate the applicant's rights under the Basic Law. It noted that the legislator had been granted a wide margin of appreciation when taking measures in the social-political area. The Welfare State was obliged to provide for every citizen's basic needs. Accordingly, the legislator was entitled to limit the risk of social neediness by introducing a compulsory insurance scheme. It followed that the compulsory insurance as such did not violate the applicant's rights under the Basic Law. The Social Court finally found that the selection of the group of people who were subject to the compulsory insurance scheme was not arbitrary and thus did not violate the applicant's right to equal treatment.

On 12 May 2000 the Baden-Württemberg Social Court of Appeal (*Landessozialgericht*) rejected the applicant's appeal. Confirming the Social Court's reasoning, that court emphasised that the applicant's arguments did not sufficiently take into account the concept of solidarity. Furthermore, the Court of Appeal referred to the decisions of the Federal Social Court (*Bundessozialgericht*) of 29 January 1998 and of the Federal Constitutional Court (*Bundesverfassungsgericht*) of 29 December 1999, according to which the financing of so-called extrinsic benefits did not violate the applicant's rights. The old-age insurance scheme was based on the idea of solidarity and of social compensation (*sozialer Ausgleich*) which traditionally included an element of social welfare. Even though pension claims had a personal character, they also had to be seen in a distinctly social context. It followed that the legislator was allowed to limit pension claims and to modify benefits as long as these measures served the public welfare and respected the principle of proportionality.

The Social Court of Appeal further found that the applicant advocated a position which was focused on the interests of an insured person who did not become unfit for work, who did not need rehabilitation measures and whose contributions did not benefit a surviving spouse. This line of argument neglected the principles of insurance and of solidarity in an unacceptable way. It finally noted that, during proceedings, the legislator had raised the tax-based financing of the extrinsic benefits and had stabilised the rates of contribution.

With his appeal on points of law before the Federal Social Court, the applicant argued that the insurance system amounted to an expropriation for the following reasons: for the applicant, as a single male, the returns would be lower than his contributions. This was due to four factors: the fact that the contributions also covered so-called "extrinsic benefits", including the costs incurred by the German reunification, the principle of social compensation, the fact that the impact of the negative growth of population was not compensated by a capital reserve, and the additional costs incurred by women's higher life expectancy. He alleged that the legislator had overstepped his competencies under the Basic Law, and that his obligation

to contribute to the insurance scheme violated his right to freedom of action and to equal treatment under the Basic Law.

On 11 October 2001 the Federal Social Court rejected the applicant's appeal on points of law. It found, *inter alia*, that it was acceptable to subject all employees to an obligatory insurance with a view to their typically higher social vulnerability. Accordingly, the obligation did not depend on the individual persons' ability to provide for themselves. The insurance system was justified by the principle of the Social Welfare State, which obliged the State to provide for the risks of life. Obligatory adherence and contributions were necessary to reach this aim, in particular in order to protect the weaker groups of society. The Federal Social Court did not examine if the assessment of the applicant's future benefits could violate his property rights, as this could only be examined at the time the applicant actually touched his benefits.

With respect to the applicant's complaint about unequal treatment, the Federal Social Court found that it was justified to limit the obligatory adherence to the group of employees, because these were typically more in need of security. This followed from the fact that employees were typically dependant on exploiting their own capacity to work in order to earn their living. The Federal Social Court noted that the legislator had applied similar principles to define the group of self-employed persons who were subject to the obligatory insurance (section 2 of the sixth book of the Social Code, see relevant domestic law below). It further found that the rate of the obligatory contributions did not put an excessive burden on the applicant, which might amount to a violation of his property right.

The fact that the contributions also covered the so-called "extrinsic benefits" did not lead to a violation of the principle of equality, taking into account that these other responsibilities were related to those of the old-age insurance.

In April 2002 the Federal Constitutional Court refused to entertain the applicant's constitutional complaint.

2. The proceedings concerning the second applicant

The second applicant works as an executive employee in a private insurance company.

On 11 April 1993 the second applicant filed a request to be exempted from his obligation to contribute to the statutory old-age insurance for employees and requested to be reimbursed his contributions.

On 29 April 1993 the National Insurance for Employees (*Bundesversicherungsanstalt für Angestellte, BfA*) rejected the applicant's request.

On 25 June 1993 that same authority rejected the applicant's objection.

On 26 July 1993 the applicant lodged a motion with the Düsseldorf Social Court. He alleged that the obligatory adherence to the insurance

scheme amounted to an expropriation and complained about unequal treatment when compared to self-employed persons.

On 3 December 1993 the Social Court rejected the applicant's motion, finding that the differentiation between employees and self-employed persons was not arbitrary, but was justified by the different social vulnerability of these groups. The Social Court further noted that also self-employed persons were increasingly subject to obligatory insurance schemes, for example to the lawyer's insurance. The current rate of contribution was not excessive and thus did not violate the applicant's property rights. The applicant had not established a violation of his future pension claims. The mere apprehension that his pension claims might be reduced in the future did not lead to a violation of the applicant's present property rights.

On 7 December 1994 the North Rhine-Westphalia Social Court of Appeal rejected the applicant's appeal, referring mainly to the Social Court's decision.

On 25 October 1995 the Federal Social Court rejected the applicant's complaint against the denial of leave to appeal (*Nichtzulassungsbeschwerde*) as inadmissible. It found that the applicant had failed to establish that the subject matter of his motion was of fundamental importance or that the lower court had committed a procedural error.

On 17 December 1998 the Federal Constitutional Court refused to entertain the applicant's complaint.

B. Relevant domestic law and practice

1. The rules regulating the adherence to the obligatory old-age insurance

The German Social Code is divided into ten books, namely Book One and then Books Three to Eleven.

The Sixth Book of the Social Code (*SGB VI*) deals with the public old-age insurance scheme (*Gesetzliche Rentenversicherung*).

Section 1 (1) provides that all employees are subject to the obligatory insurance.

Section 2 stipulates that certain groups of self-employed persons are also subject to the obligatory insurance, such as teachers, nursing staff and midwifes, artisans who do not have their own business and persons who mainly work for one single customer.

According to section 5 the following groups of persons are not subject to the obligatory insurance: (1) civil servants and judges; (2) employees of public or clerical entities insofar as they have pension claims under the civil servant's pension scheme or under comparable church regulations;

(3) members of religious orders insofar as their maintenance according to the rules of that order is assured.

Section 6 defines certain groups of persons who are exempt from the obligatory insurance, in particular those who are subject to another obligatory insurance scheme or who have claims which are comparable to those of civil servants.

2. The benefits under the insurance scheme

The amount of the pension paid under the insurance scheme mainly depends on the amount of the insured person's income and the time of contribution.

Besides the pensions and survivor's pensions which are based on the insured person's contributions, the insurance also grants benefits which are not based on contributions. These payments, which are also referred to as "extrinsic benefits" (*versicherungsfremde Leistungen*), include pension claims based on times devoted to the raising of children (*Kindererziehungszeiten*), pensions compensating the effects of war and injustice (*Kriegsfolge- und Wiedergutmachungslasten*) and payments relating to the conversion of pensions following the German reunification.

The general retirement age is 65 (section 35 SGB V). From 1957 until 1992, women were entitled to a pension by the age of 60. In 1992 the legislator gradually adapted women's retirement age to 65 years.

3. The financing of the insurance system

The financing of the benefits under the statutory insurance is organised in a revolving system under which payments made over a certain year are financed from contributions received in that year (*Umlageverfahren,* see section 153 (1) SGB VI).

The financing is based on the contributions of the insured persons (a), which are complemented by a tax-financed federal state subsidy (b).

(a) The contributions are calculated according to the insured person's gross wages, which are taken into account up to a certain limit (*Beitragsbemessungsgrenze*). This limit is calculated on a yearly basis. In 2005, the limit was set at a yearly income of EUR 62,400.

The contribution rates are also fixed on a yearly basis and developed as follows: 1993: 17.5 %, 1994: 19.2 %; 1995: 18.6 %; 1996: 19.2 %; 1997: 20.3 %; 1999 19.5 %, 2000: 19.3 %, 2001: 19.1 %; 2003 – 2005: 19.5 % of the gross income.

The contributions have to be paid in equal shares by the employed person and by the employer (section 168 (1) no. 1 SGB VI).

(b) The Federal State contributes to the expenses by tax-financed subsidies (section 213 SGB VI). On 1 April 1998 the legislator introduced an additional state subsidy which was aimed at financing those expenses

under the insurance scheme, which were not covered by contributions (see no. 2 above). These additional payments amounted in 1998 to DEM 9.6 billion. In 2001, the overall subsidies covered 23.2 % and in 2003 25.6 % of the overall spending.

COMPLAINTS

1. The applicants complained under Article 1 of Protocol No. 1, in conjunction with Article 14 of the Convention, that they were subjected to discrimination on grounds of sex, professional status, social origins and age. They further invoked Articles 17 and 18 of the Convention.

2. The applicants also complained under Article 1 of Protocol No. 1 to the Convention taken on its own about their obligation to contribute to the old-age insurance scheme.

3. The applicants further complained under Article 11 on its own and in conjunction with Articles 14, 17 and 18 of the Convention that the obligatory adherence to the old-age insurance scheme violated their right to freedom of association.

THE LAW

1. The applicants complained under Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention that the obligation to contribute to the statutory old-age insurance amounted to discrimination on ground of their sex, their age, their birth and their professional and social status as employees. They further invoked Articles 17 and 18 of the Convention.

Article 1 of Protocol No. 1 provides 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 of the Convention provides 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."

The applicants complained, in particular, about discrimination when compared to the group of self-employed persons and of civil servants with comparable income, which were not subject to the obligatory pension scheme. They claimed that the obligatory insurance imposed on them the burden to finance so-called "extrinsic benefits", which constituted general state obligations and should be borne by society as a whole. The applicants further complained about being burdened with the costs of social compensation and the costs incurred by the negative growth of population and the additional benefits granted to women because of earlier retirement and higher life expectancy. Moreover, they complained about disadvantages due to the fact that they could not profit from taxation privileges which were granted to private pension schemes and investments for old age. They finally complained about discrimination due to their age, alleging that they were likely to receive a considerably lower pension when reaching retirement age than earlier generations did. The first applicant, who was unmarried, also complained about being discriminated when compared to married men.

The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV; and *Merger and Cros v. France*, no. 68864/01, § 38, 22 December 2004).

It has thus to be established whether the obligation to contribute to the pension system falls within the ambit of Article 1 of Protocol No. 1. According to the Court's consistent case-law, compulsory contributions to state benefit schemes constitute "contributions" within the meaning of § 2 of that Article (see *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports of Judgments and Decisions* 1997-I, §§ 34, 35; *Roshka v. Russia* (dec.), no. 63343/00, 6 November 2003; *Frátrik v. Slovakia* (dec.), no. 51224/99, 25 May 2004). Accordingly, the applicants' complaints fall within the ambit of Article 1 of Protocol No. 1.

According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it "has no objective and reasonable justification", that is, 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 States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons

would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention (see, among other authorities, *Van Raalte*, cited above, § 39; and *Willis v. United Kingdom*, no. 36042/97, § 39, ECHR 2002-IV).

The Court notes, first, that the applicants have not established that they had to pay higher contributions to the insurance scheme than women or married men of the same professional situation. Moreover, in 1992 the domestic legislator has equalised women's and men's pension age. Finally, the Court cannot find any indication of discrimination based on women's statistically higher life expectancy, as every insured person receives a life-long pension.

Insofar as the applicants further complained about discrimination on ground of age, alleging that earlier generations of pensioners received considerably higher pensions than they themselves would on reaching pension age, the Court notes that the applicants have not established that their own situation is comparable to that of earlier pensioners. In this respect, it has to be taken into account that the State must be in a position to adapt the pension system to the change of socio-economic circumstances. Accordingly, the applicant cannot claim equal treatment "in time".

It follows that the applicants have not established that they have been discriminated against with respect to their sex, age or birth.

The applicants finally complained about discrimination on the basis of their status as employees. They pointed out that the group of self-employed and civil servants were not obliged to adhere to the insurance scheme.

The Court reiterates that the Convention grants the contracting states a wider margin of appreciation in decisions which involve the appreciation of political, economic and social questions (see, *mutatis mutandis*, *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 46; *Frátrik*, cited above; and *Allesch v. Austria*, no. 18168/91, Commission decision of 1 December 1993). Furthermore, the Convention organs have recognized on several occasions the basic difference between the legal situation of civil servants and that of self-employed persons and private employees which can justify, under Article 14 of the Convention, that the system adopted by the legislator for retirement pensions of civil servants is not based on the same principles as the social insurance schemes for employees (see *Hesse-Anger and Anger v. Germany* (dec.), no. 45835/99, ECHR 2001-VI; *Matheis v. Germany* (dec.), no. 73711/01, 1 February 2005; *K. v. Germany*, no. 11203/84, Commission decision of 5 May 1986; and *X. v. Austria*, no. 7624/76, Commission decision of 6 July 1977, Decisions and Reports (DR) 19, p. 105).

Turning to the present case, the Court recalls the assessment of the domestic courts, according to which the group of employees is typically more in need of social protection, because they depend on their own labour

force to earn their living. The Court further notes that the domestic law has applied similar principles when defining the group of self-employed persons who were also included in the statutory pension scheme (see section 2 of SGB VI). The Court accepts that the domestic courts' reasons provide objective and reasonable justification for the different treatment of employees on one hand and civil servants and certain groups of self-employed persons on the other.

The Court further finds that the obligation to adhere to the old-age insurance system pursued a legitimate aim, namely to secure the financing of a functioning old-age pension scheme based on the ideas of solidarity and social compensation.

With respect to the payments granted under the pension scheme, the Court notes that the financing of pensions is organised in a revolving system under which payments made under a certain year are financed from contributions received in that same year. Payments effected by the statutory old-age insurance fund include certain pension claims which are not based on an insured person's own contributions – and which have also been referred to as "extrinsic benefits" – such as pensions granted for times devoted to the raising of children, pensions compensating the effects of war and injustice and payments relating to the conversion of pensions following the German reunification. While these payments have been partly covered by tax-financed State subsidies, the Court assumes that they have, at least to a certain degree, also been financed by the monthly payments of the present contributors, including the applicants.

The Court notes that the so-called "extrinsic benefits" mainly constitute pension payments which are aimed at compensating certain historical or social inequities. Accordingly, these payments cannot be regarded as being totally foreign to the pension scheme – as the term "extrinsic" might imply – but are related to pension claims.

The Court further notes that these additional payments have been, at least partly, covered by tax-financed state subsidies, which have been further increased since 1998.

Taking into account these aspects, considering, in particular, the principle of solidarity between contributors and beneficiaries which is inherent in the pension scheme, the Court concludes that the domestic authorities have not overstepped their margin of appreciation and thus did not violate the applicants' right to equal treatment.

The Court does not find that the applicants' complaint raises an issue under Articles 17 and 18 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

2. The applicants further complained under Article 1 of Protocol No. 1 taken on its own that the obligation to adhere to the old-age pension scheme

amounted to a violation of their property rights. They alleged, in particular, that their contributions would have yielded considerably higher returns if they had been in a position to invest into a private insurance scheme of their own choice.

The Court reiterates that the second paragraph of Article 1 of Protocol No. 1 provides that States may levy taxes or other contributions. A financial liability arising out of the raising of taxes may adversely affect the guarantee secured under Article 1 of Protocol No. 1 only if it places an excessive burden on the person concerned or if it fundamentally interferes with his financial position (see *Frátrik* and *Allesch*, both cited above).

The Court notes that the applicants have not contested that the obligatory contributions to the pension scheme had been prescribed by law.

The Court finds that the applicants' liability to contribute to the pension scheme was based on considerations of social policy. The Court further notes that, during the relevant period of time, the contributions fluctuated between 17.5 % and 20.3 % of the gross income, amounting to 19.5 % from 2003 onwards. These contributions had to be paid in equal shares by the applicants and their employers.

The Court does not find that these contributions imposed an excessive burden on the applicants. Accordingly, this complaint is also manifestly ill-founded within the meaning of Article 35 § 3 and has to be rejected pursuant to Article 35 § 4.

3. The applicants further complained that their obligatory affiliation to the pension scheme amounted to a violation of their right to freedom of association under Article 11 of the Convention taken on its own and in conjunction with Articles 14, 17 and 18 of the Convention.

The Court reiterates that institutions of a public-law character do not constitute associations within the meaning of Article 11 (see *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, § 64; and *Sigurður A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, Series A no. 264, § 30). The term "association" has an autonomous meaning, the classification in national law has only relative value and constitutes no more than a starting point (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 101, ECHR 1999-III).

The Court notes that the old-age pension scheme has been introduced by the legislature as a public law institution. It pursues an aim which is in the general interest, namely to provide for employees' old age. Under these circumstances, the Court finds that the old-age pension scheme cannot be considered as an association within the meaning of Article 11.

It follows that Article 14 is not applicable with respect to this complaint.

Furthermore, the Court does not find that the complaint raises an issue under Articles 17 and 18.

Accordingly, also this complaint is manifestly ill-founded within the meaning of Article 35 § 3 and has to be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President