



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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 35771/97
by Einar Thorkelsson and Friðthjófur Thorkelsson
against Iceland

The European Court of Human Rights (First Section), sitting on 12 April 2001 as a Chamber composed of

Mrs W. THOMASSEN, *President*,

Mr L. FERRARI BRAVO,

Mr GAUKUR JÖRUNDSSON,

Mr R. TÜRMEŒ,

Mr B. ZUPANČIČ,

Mr T. PANŦIRU,

Mr R. MARUSTE, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 11 March 1997 and registered on 25 April 1997,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants are Icelandic nationals, born in 1937 and 1932, and reside in Mosfellsbær, Iceland. Before the Court they are represented by Mrs Erla S. Árndóttir, a lawyer practising in Reykjavík.

A. The circumstances of the case

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

The applicants are master house builders. In 1985 they established the limited liability company *Trésmiðjan K 14 hf.* together with three other persons. The applicants and one of the other persons formed the company's Board of Directors. They were on the company's payroll and worked there on carpentry. The first applicant is a member of the Association of Master Carpenters in Reykjavík. None of the applicants has been a member of the Reykjavík Carpenters' Union or other trade union during the period under reference. The applicants paid premiums to the Construction Workers' Pension Fund until the end of 1989. As of that time they commenced paying premiums to the Free Pension Fund. In April 1991 the Construction Workers' Pension Fund filed a request to *Trésmiðjan* to pay the company's part of the premiums with respect to the applicants. The company rejected payment as the applicants had shifted to the Free Pension Fund and thereby done their legally prescribed duty of payment to a pension fund.

In October of 1993 the United Pension Fund, which had then taken over the rights and duties of the Construction Workers' Pension Fund, instituted proceedings against *Trésmiðjan* before the Reykjavík District Court, claiming payment of premiums in respect of the period from November 1989 until December 1992. The company disputed the claim, arguing, *inter alia*, that an interpretation of the provisions of the Act on Employment Terms of Wage Earners and Obligatory Pension Insurance 1980 (Act No. 55/1980, hereinafter referred to as "the 1980 Act") to the effect that there was an obligation to participate in the United Pension Fund, would be incompatible with the right to freedom of association and the right to property as protected by the Icelandic Constitution, the Convention and Protocol No. 1 thereto.

By a judgment of 3 March 1995 the District Court ordered *Trésmiðjan* to pay to the United Pension Fund the premiums claimed by it.

The company appealed against the above judgment to the Supreme Court, which, by 3 votes to 2, upheld the District Court's judgment on 26 September 1996. The minority voting for acquitting the company of the pension claim relied, *inter alia*, on Article 11 of the Convention.

The majority's reasoning included the following observations:

“... from the above follows that the 1980 Act contains an unequivocal legal duty for the entire population to belong to a pension fund. The aim of this legislation is to promote public welfare and, *inter alia*, to base the right to life insurance on the most possibly equal conditions. Such general limitations under the law are not in conflict with the human rights provisions of the Icelandic Constitution Being employers the appellants were according to ... section 2 of the 1980 Act required to pay their employees' premiums and are therefore rightly considered as parties to the present case. It has been shown that the appellants engage in business operations falling within the plaintiffs' field of work. They have not referred to the Ministry of Finance any dispute about payments being made to the plaintiffs. The fact that the plaintiffs have not done so does not weaken their case.

The appellants plead that, in addition to the fact that their employees have been paying a premium to the Free Pension Fund, they have met the duty for pension guarantee in accordance with the 1980 Act. They consider that according to Article 73 of the Constitution, which applied to the freedom of association at the time when the case was before the District Court, and Article 11 of the Convention, cf. Act No. 62/1994 incorporating the Convention, they could at least have discharged their duty towards any pension fund had the Ministry of Finance ratified its Regulations. The plaintiffs maintain, with reference to section 3 of the 1980 Act, that the appellants' wage-earners cannot select a fund for themselves as they work in the field to which participation of plaintiffs extend and are thus naturally parties thereto.

The plaintiffs are a pension fund functioning in accordance with the 1980 Act. The appellants' employees were parties of The Construction Workers' Pension Fund being one of the funds merged with the plaintiffs. It has not been shown that the plaintiffs are unable to secure the appellants' wage earners the annuity rights provided for under the 1980 Act. Thus, their compulsory participation in a pension fund does not prevent them from purchasing additional rights from other instances. It follows from the above that pension funds like that of the plaintiffs are established under the law for the benefit of the funds' participants and in order to achieve a social aim, but this is a question of joint insurance funds. The legislators have considered that, if one were to be able to join and leave the funds at will, there would be a risk that this social aim would risk not be achieved and that the interests of other holders of rights in the fund would be set aside. Under the present circumstances, it is considered that the appellants have not shown that the restrictions on the employees' choice of pension fund, ... is inconsistent with the former provisions of the Constitution on the freedom of association, cf. the current provisions of paragraph 2 of Article 74 of the Constitution. ...

In the light of the above the conclusion in the present case is that the appellants shall pay on behalf of their wage-earners the annuity contribution claimed by the plaintiffs...”

On 21 February 1997 the District Court placed *Trésmiðjan* under bankruptcy administration, at a request made by the United Pension Fund on account of the Supreme Court's order that the company pay its arrears in pension contributions.

B. Relevant domestic law

The 1980 Act (Act No. 55/1980 on the Employment Terms of Wage Earners and Obligatory Pension Insurance) contained in its section 2 the following provision:

“All wage earners and self-employed persons have the right and duty of membership of the pension fund of the members of the relevant profession or occupation, which shall function in accordance with laws enacted on that particular fund or a regulation approved by the Ministry of Finance. Any employer is obliged to withhold his employees' pension fund contributions from their wages and to return them to the fund with his own obligatory contribution, in accordance with the rules on contribution payments laid down in the regulation on the relevant fund or in law. The Ministry of Finance, having obtained the opinion of the Icelandic Confederation of Employers, the Icelandic Federation of Labour and/or other concerned parties, shall decide on any dispute as to what fund the contributions shall be paid.”

Section 3 provided:

“The duty of pension insurance shall be performed by participation in the pension funds provided for in Section 2 to the extent possible, and in accordance with the rules of the individual funds relating to membership. A person not automatically entitled to membership of a fund provided for in section 2 shall select a pension fund that is permitted under the rules of the individual funds. If this duty is not performed in this manner, it shall be performed by contributions to the pension fund indicated by the deciding authority under section 2, and by an agreement concluded with the pension fund in question.”

On 1 July 1998 the 1980 Act was replaced by the Act on Mandatory Insurance of Pension rights and on the Activities of Pension Funds 1997 (Act no. 1929/1997, hereinafter referred to as “the 1997 Act”), containing comprehensive provisions on the general framework for compulsory pension insurance. One objective of the new legislation was to increase the freedom of choice of pension funds for persons who were not subjected to collective agreements. Following the changes brought about by its section 2, persons who, like the applicants, do not receive wages under a collective agreement, may chose not to contribute to the United Pension Fund but may instead select another pension fund.

COMPLAINTS

The applicants complain that the Supreme Court's judgment of 26 September 1996 requiring the payment of arrears in pension contributions to the United Pension Fund violated Article 11 of the Convention and Article 1 of Protocol No. 1 to the Convention.

THE LAW

1. In the Government's submissions, by virtue of the entry into force on 1 July 1998 of the new 1997 Act allowing pension subscribers to exercise a choice in pension funds, the applicants had obtained adequate redress and could no longer claim to be victims within the meaning of Article 34 of the Convention.

The Court, however, notes that the applicants' complaints under the Convention relate to the Supreme Court's judgment of 26 September 1996 requiring the payment of arrears in pension contributions to the United Pension Fund with respect to the period from November 1989 to December 1992. The 1997 Act, which entered into force in July 1998, did not affect the Supreme Court's order that the arrears should be paid. The Court agrees with the applicants that those legislative changes cannot be viewed as depriving them of their victim status under the Convention.

2. The applicants complained that their compulsory participation in the United Pension Fund entailed an unjustifiable interference with their right to negative freedom of association as guaranteed by Article 11 of the Convention. In as far as is relevant, this Article reads:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others ...”

Even assuming that there has been an interference with the applicants' right to freedom of association within the meaning of paragraph 1 of Article 11, the Court is satisfied that the interference fulfilled the conditions set out in its paragraph 2.

In the first place, the Court sees no reason to doubt that the impugned obligation to participate in the United Pension Fund was “prescribed by law”, namely section 2 of the 1980 Act.

Moreover, it is clear that the contested interference pursued a legitimate aim, namely the protection of the rights and freedoms of others.

As regards the further question, whether the interference was necessary in a democratic society, the applicants submitted that their wish had been to purchase annuity rights with a pension fund subject to separate property arrangements, not to participate in a fund with joint property rights. Under the latter type of arrangement the fund members accumulated assets by means of premium payments throughout their working lives, without the assets being earmarked for individual fund members. Instead they would as from a certain age be entitled to monthly annuity payments, the amounts of

which were to be determined in the light of the total premium payments made by each fund member.

The applicants further maintained that, since pension fund members would not always agree with the funds' investment policies, members should have a free choice as to which fund to join. If they were to continue participating in the United Pension Fund, they could not expect to obtain a pension from the fund which was commensurate with the premium paid. During the past years, the fund's financial situation had given the applicants reason to believe that the fund would be unable to honour its obligations when time comes for payment of pension. According to a 1992 report of the Bank Inspectorate of the Central Bank of Iceland, in 1991 the United Pension Fund was short of 260% assets to be able to meet its total obligations.

The Court notes that the applicants' objections to participation in the United Pension Fund, as opposed to the Free Pension Fund, were essentially of an economic nature and did not appear to involve considerations of personal conviction or opinion (cf. the *Sigurður A. Sigurjónsson v. Iceland* judgment of 30 June 1993, Series A no. 264, pp. 17–18, §§ 37 and 41). The rationale for the impugned compulsion was, as explained by the Government, to make members of particular occupational groups join a specific fund in order better to meet the particular needs and concerns of that group. It was to ensure that each participant, on the basis of the same principles, bear the costs of establishing their pension rights, not only for the benefit of their own individual interests but also those of the nation at large. The distribution of risk among the participants was an inherent feature of such a system, where a participant's benefits could be smaller than his or her contributions but could also be greater.

In the view of the Court, the applicants' compulsory participation in the United Pension Fund was thus based on relevant and sufficient reasons and clearly fell within the wide margin of appreciation that States must enjoy in the area under consideration.

It is further to be noted that, as stated by the Icelandic Supreme Court, the applicants had not shown that the United Pension Fund was unable to honour their pension rights as guaranteed under national law. Moreover, the legal compulsion to contribute to the pension fund in question had not prevented them from contributing to other funds such as the Free Pension Fund. The Court finds that there is nothing to indicate that the compulsion at issue affected the applicants' right to freedom of association in a manner which was disproportionate for the purpose of the necessity test under Article 11 § 2 of the Convention.

The above considerations are not diminished by the fact that the legislature in the respondent State later deemed it desirable to afford employees a freedom of choice with respect to pension funds. On the

contrary, the entry into force of the 1997 Act seems to have removed the legal situation of which the applicants complained under the Convention.

Against this background, the facts of the present case disclose no appearance of a violation of Article 11 of the Convention. This part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicants further complained that their compulsory participation in the United Pension Fund amounted to a violation of Article 1 of Protocol No. 1 to the Convention, which reads:

“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.”

The applicants maintained that fact that they had been obliged to disburse 10% of their income to United Pension Fund constituted an unjustified interference of their right to peaceful enjoyment of their possessions as guaranteed by the first paragraph of Article 1.

The Government disputed that there had been a violation of the applicants' right to peaceful enjoyment of their possessions. In their submissions, the compulsory pension participation at issue constituted a control of the use of their possessions, which was justified under the second paragraph of Article 1.

The Court shares the Government's view that the impugned measure falls to be considered under the rule enshrined in Article 1 § 2. The crux of the matter is whether the compulsory participation in the United Pension Fund was proportionate to the legitimate aim pursued. In this regard the Court notes that the parties rely essentially on the same arguments as those mentioned above in the context of the Article 11 § 2 of the Convention. Having regard to its reasoning and conclusions on this point, the Court sees no reason to call into question the compatibility of the measure at issue with the respondent State's obligations under Article 1 of Protocol No. 1.

This part of the application must also be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Wilhelmina THOMASSEN
President