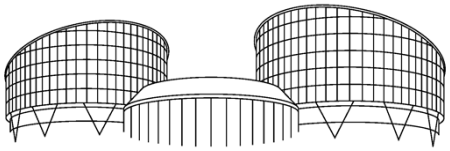

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no. 77575/11
László MARKOVICS against Hungary

Application no. 19828/13
László BÉRES against Hungary

Application no. 19829/13
Gábor AUGUSZTIN against Hungary

The European Court of Human Rights (Second Section), sitting on 24 June 2014 as a Chamber composed of:
Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Nebojša Vučinić,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to the above applications lodged on 12 December 2011 and 21 March 2012, respectively,

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

1. The first applicant, Mr László Markovics, is a Hungarian national, who was born in 1968 and lives in Budapest. He was represented before the Court by Mr D. Karsai, a lawyer practising in Budapest.

The second applicant, Mr László Béres, is a Hungarian national, who was born in 1957 and lives in Budapest. He was represented before the Court by Mr P. Bárándy, a lawyer practising in Budapest.

The third applicant, Mr Gábor Augusztin, is a Hungarian national, who was born in 1956 and lives in Budapest. He was represented before the Court by Mr P. Bárándy, a lawyer practising in Budapest.

2. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

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

4. Between 1 April 1990 and 20 December 2007 Mr Markovics served as a police officer. On the latter date he was placed in early retirement on account of his deteriorated health and became entitled to a "service pension" (*szolgálati nyugdíj*).

5. On 4 October 2010 the National Police Department informed Mr Béres, a colonel in the police, that his appointment as a senior police commander would be terminated. He was offered the choice between accepting a lower-ranking position and retiring on service pension. Mr Béres chose the latter option and retired by 30 December 2010.

6. Between 20 November 1974 and 1 November 2005 Mr Augusztin served as an army doctor. On the latter date he was placed in early retirement on account of his deteriorated health and became entitled to service pension.

7. On 28 November 2011 Parliament enacted Act no. CLXVII, which entered into force on 1 January 2012. According to its paragraph 5(1), service pensions like that of the applicants – provided that the person concerned was born in or after 1955 – were transformed into a "service allowance" (*szolgálati járandóság*), subject to personal income tax (at the material time, 16% flat rate). Should the tax rate change, the allowance will be taxed accordingly.

8. This legislation, which concerned all ex-members of the law enforcement agencies, fire brigades and defence forces, entails that beneficiaries of the service pension are no longer "pensioners" for the purposes of the law but become entitled to receive the service allowance, that is, a certain social allowance subject to personal income tax, unlike pensions. Moreover, the disbursement of the allowance would be interrupted if the applicant was convicted or prosecuted for an offence which had been committed during the service period. Furthermore, it appears that should the beneficiary acquire income other than the allowance, the entitlement may be suspended or even discontinued in certain circumstances. Lastly, as opposed to old-age pensioners, the recipients of the allowance are no longer entitled to various miscellaneous benefits in kind, the availability of which is dependent on the status of pensioner.

9. Following the entry into force of the legislation on 1 January 2012, Mr Markovics received a service allowance in the amount of 137,620 Hungarian forints (HUF) (approximately 460 euros (EUR)), instead of his former service pension, the amount of which would have been HUF 163,833 (EUR 550) at that time (decrease of 16%).

Mr Béres received HUF 283,035 (EUR 940) in service allowance instead of HUF 321,745 (EUR 1,070) in service pension (decrease of 12%).

The amount of the service allowance disbursed to Mr Augusztin was HUF 219,590 (EUR 730) instead of a service pension of HUF 249,625 (EUR 830) (decrease of 12%).

10. Under the relevant rules of Act no. XLIII of 1996 (sections 44/A and 52, as in force as of 1 January 2012), the upper age-limit for service in the armed forces is the same as that of the general old-age pension age-limit (in relevant cases, 62 years). Previously, it was five years lower than that. As of 1 January 2012, servicemen may ask for "*mise à disposition*" (*rendelkezési állományba helyezés*) five years before reaching the general age-limit for old-age pension, that is, at 57 years of age.

COMPLAINTS

11. The applicants complain under Article 1 of Protocol No. 1, read alone and in conjunction with Articles 13 and 14 of the Convention that the abolition of the service pensions – the suddenness of which made it impossible to make the necessary personal adjustments – amounts to an unjustified and discriminatory interference with the peaceful enjoyment of possessions, not susceptible to an effective domestic remedy.

THE LAW

12. Given that the applications raise the same issue in essence, the Court considers that they should be joined under Rule 42 § 1 of the Rules of Court.

13. The applicants complained that the removal of their service pensions and their replacement with an allowance represented an unjustified and discriminatory interference with their property rights which could not be challenged effectively before any domestic authority. They relied on Article 1 of Protocol No. 1, read alone or in conjunction with Articles 13 and 14 of the Convention.

14. Article 1 of Protocol No. 1 provides:

> "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."

15. Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

16. Article 14 of the Convention provides:

"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."

17. The Government submitted that the applicants had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. According to section 5(2) of Act no. CLXVII of 2011, the amount of service allowance was to be subjected to personal income tax except for the cases prescribed in section 5(3) of the same Act and in particular if the person's service relationship was terminated on account of mental or physical unfitness or unfitness due to ill-health. Since the service relationships of Mr Markovics and Mr Augusztin had been terminated on account of their deteriorated health, they should have relied on this tax exemption in dedicated administrative proceedings. Moreover, all the applicants could have filed a constitutional complaint against the impugned law under section 26 (2) of the Act on the Constitutional Court, a remedy available and effective for such complaints. In the same context, thirty-six complaints had been filed by others and examined on the merits by the Constitutional Court.

18. As to the applicants' complaint related to the potential suspension of the disbursement of their service allowance on account of conviction for an offence committed during the service relationship or on account of revenue acquired from a work relationship, it was inadmissible for lack of victim status, since these rules were not applicable to their cases.

19. As regards the applicants' complaint concerning the loss of in-kind benefits and bonuses previously enjoyed by pensioners, including those in receipt of service pensions, the Government maintained that these complaints should be declared inadmissible as incompatible *ratione materiae* with the provisions of the Convention. Those benefits were not governed by the Pensions Act, but were dependent upon various social policy considerations, thus they did not fall within the scope of Article 1 of Protocol No. 1.

20. Concerning the merits, the Government submitted that the only interference with the applicants' right to possession under Article 1 of Protocol No. 1 had been the introduction of a 16% tax-like deduction. The change in title (that is, from pension to allowance) did not affect the applicants' entitlement but merely indicated the fact that the allowance was now funded from the central budget instead of pension contributions. In this regard the Government pointed out that whereas old-age pension was financed by the pension fund, the former service pension scheme (currently service allowance), awarded under preferential rules, was funded from the central State budget. Thus the applicants had no acquired right or legitimate expectation constituting a "possession" in the sense that benefits granted under the social security pension scheme would be granted to recipients of the service allowance.

21. The Government moreover submitted that the purpose of the impugned measure was to realise a fairer sharing of the public burden, taking into account Hungary's unfavourable economic situation, debts and unsustainable budget deficit on the one hand and certain unjustified privileges involving very high pension amounts on the other hand.

22. They also pointed out that in matters related to tax issues and questions of social policy States enjoy a wide margin of appreciation; and, in the present cases, a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights. The measure, introduced with a reasonable adjustment period, was proportionate to the aims sought to be realised and the applicants did not have to bear an excessive individual burden, since they remained entitled to social security old-age pension once they have reached the requisite age. Moreover, the reduction in the amount of the allowance was a minor one and did not have a detrimental effect on the applicants' subsistence. The applicants continued to receive social security benefits, such as health care, as well as certain non-social-security services granted to retired servicemen, entitlements they had previously enjoyed as service pensioners. Concerning the rule under which a beneficiary may lose the newly introduced allowance if he takes up employment, the Government noted that the entitlement would only be removed if the beneficiary earned additional revenues in the private sector in an amount at least 1.5 times the minimum wage. However, below that threshold this restriction was not relevant. Moreover, since 1 July 2013, the payment of service allowance was to be suspended, irrespective of the amount of the additional revenue, only if this revenue originated in an employment with an organ funded from the State budget. In any event, the applicants had never suffered any prejudice in application of this restriction.

23. As to the exhaustion of domestic remedies, Mr Markovics and Mr Augusztin contended that their health problems did not originate in factors related to their profession, hence the inapplicability of section 5 (3)

of the Act to their situations. Therefore, they could not challenge the reduction of their service allowance in administrative proceedings. With regard to the effectiveness of a constitutional complaint, the applicants submitted that the impugned statutory regulation was based on constitutional-level regulation (notably, on section 70/E (3) of the former Constitution), which expressly envisaged transformation of non-old-age pensions into allowances, as well as their reduction and discontinuance in certain cases. In view of this, any constitutional complaint against the statutory regulation would have been futile.

24. Moreover, they were of the view that in-kind benefits and bonuses had been inextricably linked to pensioner status as such, and the rules on potential suspension of disbursements were an inherent part of the current regulations. Accordingly, the transformation of their status should be examined in its entirety.

25. As to the merits of the case, the applicants argued that the impugned measure interfered with their rights guaranteed by Article 1 of Protocol No. 1. They contended that in 1996 the respondent State had decided to enact legislation providing for the payment, as of right, of a service pension and related welfare benefits, which had generated on their side a proprietary interest falling within the ambit of this provision. The reform of this system resulted in the impairment of the essence of their right to receive a pension. In their view, the disbursement of their pension from the central budget instead of the pension scheme was only an accounting detail (all the more so because the pension scheme is also a part of the State budget) and had no bearing on the fact that they had been entitled to a special pension which represented consideration for their risky profession – chosen, at least partly, because of the benefits linked thereto. The source of the financing was thus immaterial, all the more so since the link in the Hungarian system between pension contributions and the subsequent pension was indirect at best.

26. As regards the justification for that interference, the applicants stressed that it had not met the requirements of "lawfulness", as it is understood for the purposes of Article 1 of Protocol No. 1. Notably, the legal basis of the reform lacked foreseeability, the relevant legislation being adopted only three weeks before its entry into force. Moreover, it had a retrospective effect in that it interfered with already acquired rights and disbursed benefits.

27. Furthermore, although the aim of balancing the pension system might be accepted as serving the public interest, the means employed manifestly lacked reasonable foundation and imposed a disproportionately heavy burden on those entitled to a service pension. The applicants pointed out that the reform affected the balance of the pension scheme only by 0.003%, whereas the transformation of the applicants' pension into an uncertain and significantly less protected legal form, the reduction of the amount of their entitlement (which might become even worse should the

rate of personal income tax be raised) and the deprivation of the benefits linked to pensioner status affected them radically and excessively. In doing away with their welfare benefits – matters of vital importance to them – the respondent State had failed in its duty to act with the utmost care. Referring to the hazards inherent in their profession, they also stressed that there was nothing in the Government's submissions which corroborated that the impugned measures had eliminated unjustified or anomalous privileges. Moreover, even assuming that the system had been tainted by inherent social injustice, they did not bear responsibility for it, the mistake (if at all) having been caused by the authorities themselves, without any fault on their side. The applicants also argued that, contrary to the Government's opinion, pensioners who enjoy their well-deserved retirement years should no longer be required to share the public burden, which they had done during their active years.

28. The applicants further submitted that their situation was relevantly similar to those entitled to old-age pension or to service pensioners born before 1955, in that they all had a statutory pension entitlement based on a compulsory pension scheme and the payment of contributions, backed by State guarantee. However, they were subject to differential treatment solely on the ground of their age: had they reached the age limit for old-age pension before 31 December 2011, their entitlement would not have been removed. Although the burden of proof lay on the Government once the applicants had shown a difference in treatment, in their view the Government had failed to provide an objective and reasonable justification for this differential treatment.

The applicants also submitted that a reduction of pension amounts could be acceptable in the light of the financial crisis if such a reduction were to apply to every kind of pension entitlement over a certain amount (that is, not only to service pensions) and to keep intact the classification (that is, constitutionally protected pension and not discretionary allowance) of the entitlement itself.

29. With regard to their complaint under Article 13 of the Convention, the applicants reiterated that they had not had an effective remedy against the measure imposed on them.

30. The Court considers at the outset that it is not necessary to examine the Government's arguments concerning the exhaustion of remedies, since the application is in any event inadmissible for the following reasons.

31. The Court notes that it is not in dispute between the parties that the imposition of a 16% deduction on the allowance in question represents an interference with the applicants' rights under Article 1 of Protocol No. 1, and it sees no reason to hold otherwise. The Court does not consider that the abolition of the service pensions and their conversion into service allowances amounted to a "deprivation of possessions" within the meaning of the second sentence of the paragraph of Article 1 of Protocol No. 1. It is

rather to be regarded as an interference with the applicants' right to the peaceful enjoyment of their possessions, within the meaning of the first sentence of the first paragraph (see *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 40, ECHR 2004-IX). The Court will therefore examine the issue under the first paragraph of Article 1 of Protocol No. 1, subject to the specific rule concerning the payment of taxes contained in Article 1 *in fine* (see *N.K.M. v. Hungary*, no. 66529/11, § 45, 14 May 2013).

32. With regard to the loss of ancillary benefits dependent on the status of pensioners, the Court accepts that these elements, not influenced directly by the impugned legislation, cannot be regarded as a "legitimate expectation", let alone existing possessions, for the purposes of Article 1 of Protocol No. 1. Without further investigating the exact nature of these benefits, apparently of an in-kind nature, the Court observes that the applicants have not substantiated that had their status as pensioners been maintained, those benefits wou1d always have been available to them, irrespective of future changes of law or policy of the providers of those benefits. In other words, it has not been argued that these benefits were under a constitutional protection similar to that of the pensions themselves.

33. Therefore, the Court considers that the core issue of the present applications is the conversion of the service pensions into an allowance and their subjection to a deduction corresponding to the general personal income tax rate. At this juncture, the Court notes the applicants' contention about the potential change in that tax rate; however, it is of the view that its task is to examine the compliance with the Convention of the specific consequences of the legislation on the applicants as it stands and it cannot speculate about potential changes of the law in the future.

34. The question remains as to whether an interference of the kind complained of can be seen as justified under Article 1 of Protocol No. 1.

As to the legitimate aim pursued by the measure, the Court notes that it has not been disputed by the applicants that in principle it can be taken as having aimed at serving the general interest of economic and social policies. The Court shares this view.

The Court further finds that the interference was prescribed by law and considers that the applicants' observations about the hasty adoption of legislation with allegedly retroactive effect should be taken into consideration in the context of proportionality, examined below.

35. According to the Court's case-law, the margin of appreciation available to the legislature in implementing policies concerning pensions or welfare benefits, since they involve economic and social issues, should be a wide one (see *Valkov and Others v. Bulgaria*, nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, § 91, 25 October 2011).

36. Nonetheless, the interference must strike a fair balance between demands of the general interest of the community and the requirements of

the protection of the individual's fundamental rights. That balance will be lacking where the person concerned has to bear an individual and excessive burden (see *Wieczorek v. Poland*, no. 18176/05, §§ 59-60, 8 December 2009). In that regard, it would also be important to verify whether the applicants' right to derive benefits from the social security scheme in question has been infringed in a manner resulting in the impairment of the essence of their pension rights (see *Kjartan Ásmundsson,* cited above, § 39).

37. Article 1 of Protocol No. 1 does not restrict a State's freedom to choose the type or amount of benefits that it provides under a social security scheme (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 53, ECHR 2006-VI), and Article 1 of Protocol No. 1 does not guarantee, as such, any right to a pension of a particular amount (see *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, § 55, 31 May 2011). Furthermore, the Court has in a number of cases accepted the possibility of reductions in social security entitlements (see *Kuznetsova v. Russia*, no. 67579/01, § 51, 7 June 2007; *Kjartan Ásmundsson,* cited above, § 45, and *Wieczorek,* cited above, § 67).

38. The Court first notes that according to the applicants, the means employed did not provide an adequate response to Hungary's unfavourable economic situation since the reform affected the balance of the pension scheme only by 0.003 per cent.

39. Regarding this argument, the Court notes that, provided that the legislature chose a method that could be regarded as reasonable and suited to achieving the legitimate aim being pursued, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way (see *James and Others v. the United Kingdom*, 21 February 1986, § 51, Series A no. 98). It is to be observed that the contested measure was part of a whole range of measures implemented with the aim of reducing public spending (see *Association of General Practitioners v. Denmark* (dec.), no. 12947/87, 12 July 1989).

40. The Court further notes that the law complained of was adopted on 28 November 2011 and entered into force on 1 January 2012. The present case is thus to be distinguished from previous judgments where a retrospective action deprived the applicants of a substantial portion of their claim or of an existing asset which they previously possessed, without a satisfactory alternative, leaving them in considerable uncertainty (compare and contrast *Maurice v. France* [GC], no. 11810/03, §§ 90-91, ECHR 2005-IX). Nonetheless, as the Court has previously acknowledged, the legislature is not in principle precluded in civil matters from intervening to alter the current legal position through a statute which is immediately applicable (see *Maurice*, cited above, § 89, ECHR 2005-IX).

In the present case, the applicants continued to receive a service allowance reasonably related to the value of their previous service pension.

Thus, in the Court's view, the circumstances of the present case did not require a transitional period for the applicants to adjust themselves to the new scheme. Although the Government have not submitted any elements about a similar pension revision implemented in other Member States of the Council of Europe, the Court is nevertheless satisfied that the applicability of legislation to already existing pension entitlements did not upset the requisite fair balance.

41. Moreover, Act no. CLXVII provided that the applicants' service pensions were transformed into a service allowance subject to personal income tax. As a consequence, according to the first applicant, he received on 1 January 2012 a monthly allowance of HUF 137,620 instead of HUF 163,833, the amount he would have obtained had the law not been adopted. The second applicant continued to receive an allowance of HUF 283,035 instead of HUF 321,745 and the third applicant HUF 219,590 instead of HUF 249,625. On the basis of these calculations, the Court observes that the applicants lost respectively 16%, 12% and 12% of the amounts of their pensions (see paragraph 9 above).

42. Thus, the Court considers that the applicants were obliged to endure a reasonable and commensurate reduction of their social scheme benefit, in the form of a tax resulting in a decrease of income of 16%, 12% and 12% respectively, rather than a total loss of their entitlements. Although there has been an actual decrease in the nominal amount of the monthly disbursements, the measure did not totally divest the applicants of their only means of subsistence nor did it place them at risk of having insufficient means to live on. They cannot therefore be regarded as being made to bear an excessive and disproportionate burden, or as having suffered an impairment of the essence of their social security benefits. Nor can the very conversion, as such, of their pension into an allowance be regarded as upsetting the requisite fair balance. At this juncture the Court would note that it is not uncommon to extend certain privileged pension benefits to former members of armed forces and the like, in view of their often demanding service. It does not share the Government's related contention about these privileges being unjustifiable as such (see paragraph 20 above). However, in the present case the curtailing of those benefits has not been found to impose an excessive individual burden on the applicants.

43. Furthermore, concerning the applicants' complaints under Article 14 of the Convention, the Court considers that to bring the applicants' situation – that is, their being beneficiaries of service pensions – closer to that of other citizens in the same age group – and in particular to that of other servicemen (see paragraph 10 above) – cannot amount to a difference in treatment so as to attract the applicability of Article 14. Indeed, the measure complained of aimed at eliminating a privileged situation which the domestic authorities found was no longer warranted or viable. However, even assuming that the legislation complained of resulted in a difference in

treatment, as argued by the applicants, the Court is satisfied that it can be seen as respecting a reasonable relation of proportionality between the aim pursued (that is, rationalisation of the pension system) and the means employed (a commensurate reduction of benefits).

44. Lastly, as to the applicants' complaint that there was no effective remedy available to them against the legislation in question, in breach of Article 13 of the Convention, the Court reiterates that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see, among other authorities, *Vallianatos*, cited above, § 94; *Roche v. the United Kingdom* [GC], no. 32555/96, § 137, ECHR 2005-X; *Paksas v. Lithuania* [GC], no. 34932/04, § 114, ECHR 2011). In the instant case, the applicants' complaint under Article 13 is at odds with this principle.

45. Having regard to the above, the Court finds that the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Stanley Naismith
Registrar

Guido Raimondi
President