



Prisoner's non-affiliation to pension system for work performed in prison did not violate the Convention

In today's Grand Chamber judgment in the case **Stummer v. Austria** (application no. 37452/02), which is final¹, the European Court of Human Rights held, by a majority, that there had been:

No violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights in conjunction with Article 1 of Protocol No. 1 (protection of property) and no violation of Article 4 (prohibition of slavery and forced labour).

The case concerned a former prisoner's complaint of his non-affiliation to the old-age pension system for work performed in prison and his consequent inability to receive pension benefits under that scheme.

Principal facts

The applicant, Ernst Stummer, is an Austrian national who was born in 1938 and lives in Vienna. He spent many years of his life in prison, during which he worked for lengthy periods in the prison kitchen or the prison bakery. As a working prisoner, he was not affiliated to the old-age pension system under the General Social Security Act.

Mr Stummer's application for an early retirement pension was dismissed by the Workers' Pension Insurance Office (*Pensionsversicherungsanstalt der Arbeiter*) in March 1999, noting that he had failed to accumulate the minimum of 240 insurance months required for pension eligibility under domestic social law. He subsequently brought an action against the Pension Insurance Office, submitting that he had been working in prison for 28 years and that the number of months worked during that time should be counted as insurance months for the purpose of assessing his pension rights. In April 2001, the Vienna Labour and Social Court dismissed the claim. The Vienna Court of Appeal dismissed his appeal in October 2001. According to the court, the fact that prisoners were affiliated to the unemployment insurance scheme since an amendment of the Execution of Sentences Act in 1993 was not conclusive as regards the question of their affiliation to the old-age pension system, as Mr Stummer had argued. It further held in particular that it was not for the courts but for the legislator to decide whether or not to change the provisions relating to the social insurance of prisoners. In February 2002, the Supreme Court (*Oberster Gerichtshof*) dismissed Mr Stummer's appeal.

After his release from prison in January 2004, Mr Stummer received unemployment benefits for a few months and has since then received emergency relief payments under the Unemployment Insurance Act. According to his counsel's submissions at the hearing before the European Court of Human Rights in November 2010, Mr Stummer received some 720 euros (EUR) per month, composed of EUR 15.77 per day plus EUR 167 per

¹ Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

month in emergency relief payments and EUR 87 as an allowance towards his rent expenses.

Complaints, procedure and composition of the Court

Mr Stummer complained that the exemption of prison work from affiliation to the old-age pension system was discriminatory and deprived him of receiving pension benefits. He relied in substance on Article 14 (prohibition of discrimination) of the European Convention on Human Rights in conjunction with Article 1 of Protocol No. 1 to the Convention (protection of property). He further relied on Article 4 (prohibition of slavery and forced labour).

The application was lodged with the European Court of Human Rights on 14 October 2002 and declared admissible on 11 October 2007. On 18 March 2010 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber, and on 3 November 2010 a public hearing was held in the Human Rights building in Strasbourg ([webcast available](#)).

Judgment was given by the Grand Chamber of 17, composed as follows:

Jean-Paul **Costa** (France), *President*,
Nicolas **Bratza** (the United Kingdom),
Peer **Lorenzen** (Denmark),
Françoise **Tulkens** (Belgium),
Josep **Casadevall** (Andorra),
Corneliu **Bîrsan** (Romania),
Anatoly **Kovler** (Russia),
Elisabeth **Steiner** (Austria),
Alvina **Gyulumyan** (Armenia),
Dean **Spielmann** (Luxembourg),
Sverre Erik **Jebens** (Norway),
Dragoljub **Popović** (Serbia),
Giorgio **Malinverni** (Switzerland),
George **Nicolaou** (Cyprus),
Ann **Power** (Ireland),
Kristina **Pardalos** (San Marino),
Vincent A. **de Gaetano** (Malta), *Judges*,

and also Vincent **Berger**, *Jurisconsult*.

Decision of the Court

[Article 14 in conjunction with Article 1 of Protocol No. 1](#)

While the Court agreed with the Austrian Government that prison work differed from the work performed by regular employees, notably in that it served the primary aim of rehabilitation and resocialisation and that it was obligatory under Austrian law, the Court did not find that factor decisive. What mattered in Mr Stummer's case was the need to provide for old age. The Court found that in that respect Mr Stummer was in a relevantly similar situation to ordinary employees, yet he was treated differently in that he was not affiliated to the old-age pension system under the General Social Security Act.

The Court accepted that the aims of that difference in treatment relied on by the Austrian Government were legitimate ones. Namely, the Government argued that working prisoners often did not have the financial means to pay social security contributions and it would thus undermine the economic efficiency of the old-age pension

system if periods for which no meaningful contributions had been made were counted as insurance periods, giving rise to pension entitlements. They further argued that the overall consistency of the old-age pension system had to be preserved. Therefore, periods of work in prison could not be counted as substitute periods compensating for times during which no contributions had been made, as Austrian social security law provided for that possibility only in a limited number of socially-accepted situations, such as child-raising, unemployment or military service.

As regards the question whether the difference in treatment was proportionate to the legitimate aims pursued, the Court observed that the issue of working prisoners' affiliation to the old-age pension system was closely linked to the State's general choice of economic and social policy. In that area, States enjoyed a wide margin of appreciation, being better placed to decide what was in the public interest, and the Court generally respected the legislature's policy choice unless it was without reasonable foundation. There was further no European consensus on social security for prisoners. While an absolute majority of Council of Europe member States provided prisoners with some kind of social security, only a small majority affiliated prisoners to their old-age pension system and some of them, like Austria, did so only by giving them the possibility of making voluntary contributions.²

The Court attached weight to the fact that at the time Mr Stummer worked as a prisoner without being affiliated to the old-age pension system, that is, between the 1960s and the 1990s, there had been no common ground regarding the affiliation of working prisoners to domestic social security systems. Only gradually were societies moving towards affiliation of prisoners to their social security systems in general and to their old-age pension systems in particular. While the 1987 European Prison Rules – a set of recommendations of the Committee of Ministers to member States of the Council of Europe as to the minimum standards to be applied in prisons – did not contain any provision in this regard, the 2006 Rules recommended to include prisoners who work as far as possible in national social security systems, without, however, referring specifically to old-age pension systems. Austrian law reflected that trend in that all prisoners were to be provided with health and accident care and in that working prisoners had been affiliated to the unemployment insurance scheme since January 1994.

It was further significant that Mr Stummer, while not entitled to an old-age pension, was not left without social cover. His current income, composed of emergency relief payments and social assistance in the form of a housing allowance, amounted to EUR 720, almost reaching the level of a minimum pension, currently fixed at approximately EUR 780 for a single person.

While Austria was required to keep the issue raised by Mr Stummer's case under review, the Court found that by not having affiliated working prisoners to the old-age pension system to date, it had not exceeded the margin of appreciation afforded to it in that matter. There had accordingly been no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

² From the information available to the Court, including a survey on comparative law taking into account the national laws of 40 out of the 47 member States of the Council of Europe, it would appear that: 22 member States give prisoners access to the old-age pension system, namely Albania, Andorra, Azerbaijan, Croatia, Cyprus, Czech Republic, Finland, France, Ireland, Italy, Latvia, Lithuania, Norway, Portugal, Russia, Slovakia, Slovenia, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom. In 12 member States prisoners are not covered by an old-age pension scheme, namely Belgium, Bosnia and Herzegovina, Bulgaria, Estonia, Georgia, Greece, Hungary, Malta, Montenegro, the Netherlands, Romania and Serbia. In a third group of member States, affiliation to the social security system (including old-age pension) depends on the type of work performed, mainly on whether it is work for outside employers / remunerated work or not. This is the case in Germany, Luxembourg, Poland, Spain and Sweden.

Article 4

Mr Stummer essentially argued that European standards had changed to such an extent that prison work without affiliation to the old-age pension system could no longer be regarded as “work required to be done in the ordinary course of detention”, which was exempt from the term “slavery and forced labour” prohibited under Article 4. However, having regard to the lack of a European consensus on the issue of the affiliation of working prisoners to the old-age pension system, as noted above, the practice of the Council of Europe member States did not provide a basis for such an interpretation. There had accordingly been no violation of Article 4.

Separate opinions

Judge De Gaetano expressed a concurring opinion. Judges Tulkens, Spielmann, Kovler, Gyulumyan, Popovic, Malinverni and Pardalos expressed a joint partly dissenting opinion; Judge Tulkens expressed a further partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.