

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

GRAND CHAMBER

# CASE OF BEELER v. SWITZERLAND

*(Application no. 78630/12)*

JUDGMENT

Art 14 (+ Art 8) • Discriminatory treatment of widower, taking care of children full-time, through termination of his survivor's pension when youngest child reached adulthood, while widows continued to receive one • Family life • Clarification of criteria specifying or circumscribing which welfare benefits fall within ambit of Art 8 • Approach adopted in *Konstantin Markin v. Russia* [GC] to be followed • Benefit in issue seeking to promote family life and necessarily affecting way in which applicant's family life was organised, and therefore within ambit of Art 8 • Domestic rules governing survivor's pension based on outdated considerations and assumptions • Return to labour market equally difficult for both sexes at applicant's age and after several years of not working • No indication that termination of pension of less impact on applicant than on widow in comparable situation • Narrow margin of appreciation • Absence of "very strong" or "particularly weighty and convincing reasons" justifying difference in treatment on grounds of sex

STRASBOURG

11 October 2022

*This judgment is final but it may be subject to editorial revision.*



**In the case of Beeler v. Switzerland,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano,
Jon Fridrik Kjølbro,
Síofra O'Leary,
Marko Bošnjak,
Gabriele Kucsko-Stadlmayer,
Yonko Grozev,
Stéphanie Mourou-Vikström,
Pere Pastor Vilanova,
Pauliine Koskelo,
Jovan Ilievski,
Péter Paczolay,
Arnfinn Bårdsen,
Saadet Yüksel,
Anja Seibert-Fohr,
Peeter Roosma,
Ioannis Ktistakis,
Andreas Zünd, *judges*,
and Søren Prebensen, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 16 June 2021 and on 12 January and 15 June 2022,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case originated in an application (no. 78630/12) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Max Beeler ("the applicant"), on 19 November 2012. The President of the Section to which the case had been assigned acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court). The President of the Grand Chamber subsequently acceded to the applicant's request for the lifting of his anonymity following the hearing before the Grand Chamber.

2. The applicant was represented by Mr J. Luginbühl, a lawyer practising in Zürich. The Swiss Government ("the Government") were represented by their Agent, Mr A. Chablais, of the Federal Office of Justice.

3. In his application the applicant submitted that as a widower who had been bringing his children up alone since his wife's death, he had suffered discrimination as compared with widows looking after their children alone, given that he had lost his entitlement to a widower's pension when his

younger daughter had reached the age of majority, while the corresponding pension remained payable to widows with children of the same age.

4. On 22 November 2016 notice of the application was given to the Government.

5. The application was allocated to the Third Section of the Court (Rule 52 § 1). On 20 October 2020 a Chamber of that Section, composed of Paul Lemmens, President, Georgios A. Serghides, Helen Keller, Alena Poláčková, María Elósegui, Gilberto Felici and Lorraine Schembri Orland, judges, and Milan Blaško, Section Registrar, gave judgment. The Chamber unanimously declared the application admissible and found a violation of Article 14 of the Convention read in conjunction with Article 8. The concurring opinion of Judge Keller was annexed to the judgment.

6. On 19 January 2021 the Government requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention. On 8 March 2021 the panel of the Grand Chamber granted that request.

7. The composition of the Grand Chamber was subsequently determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 June 2021.

There appeared before the Court:

(a) *for the Government*
MR A. CHABLAIS, *Agent*,
MS C. MASCETTA,
MS V. RUFFIEUX,
MS D. STEIGER LEUBA,
MS S. HEEGAARD-SCHROETER,
MR R. BAUMANN, *Advisers*;

(b) *for the applicant*
MR J. LUGINBÜHL,
MS F. DE WECK, *Counsel.*

The Court heard addresses by Mr Chablais, Mr Luginbühl, Ms de Weck and Ms Mascetta.

# THE FACTS

# THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1953 and lives in Schwellbrunn.

10. He is the father of two children. Having lost his wife in an accident in August 1994, he decided to leave his job at an insurance company and to

devote himself full-time to bringing up his daughters, who at the time were 21 months old and four years old.

11. In 1997, when the survivor's pension was extended to widowers (see paragraph 22 below), the applicant was granted a widower's pension at a monthly rate of approximately 920 Swiss francs (CHF), together with supplementary benefits. His daughters were granted orphans' pensions amounting to CHF 459 per month, and later received education allowances up to the age of 25.

12. On 9 September 2010, having noted that the applicant's younger daughter was about to reach the age of majority, the Compensation Office (*Ausgleichskasse*) of the Canton of Appenzell Outer Rhodes terminated the payment of the applicant's widower's pension. The applicant lodged an objection, relying on the principle of gender equality enshrined in the Swiss Constitution.

13. In a rejection decision dated 20 October 2010, the Compensation Office noted that the Swiss legal system did not provide for a review of constitutionality, but that the authorities had to interpret federal laws in accordance with the Constitution in cases where they had any discretion. However, the Compensation Office considered itself bound by the terms of section 24(2) of the Federal Law on old-age and survivors' insurance (see paragraph 20 below), which was, in its view, a clear provision that was not open to interpretation.

14. The applicant subsequently appealed to the Cantonal Court, arguing that there were no grounds for treating him less favourably than a widow with children above the age of 18, who remained eligible for a widow's pension. He submitted that he was 57 years old and had raised his two children alone.

15. On 22 June 2011 the Cantonal Court dismissed the applicant's appeal. It noted that the conditions for entitlement to a pension that were applicable to widows and widowers respectively under sections 23 and 24 of the Federal Law on old-age and survivors' insurance were indeed different, a situation that on the face of it was incompatible with the requirements of Article 8 of the Constitution. Nevertheless, it pointed out that during the tenth revision of the old-age and survivors' insurance ("OASI") system in 1997 (see paragraph 22 below), the legislature had been aware of the difference in treatment between widowers and widows but had taken the view that since there were still relatively few house-husbands, they could be expected to return to employment once their child-raising duties had ended. The Cantonal Court held that only the legislature could change that state of affairs, and that at all events the courts could not refuse to apply the clear letter of the law.

16. The applicant lodged an appeal with the Federal Supreme Court, alleging a violation of Article 14 of the Convention read in conjunction with Article 8.

17. In a judgment of 4 May 2012 (9C_617/2011), the Federal Supreme Court dismissed the appeal. It pointed out that under Article 8 § 3 of the

Constitution, distinctions on grounds of sex could only be justified where the biological or functional differences between men and women rendered equal treatment quite simply impossible. It further noted that Switzerland had not ratified Protocol No. 1 to the Convention and was therefore not bound by that instrument and the related case-law. As regards the complaint under Article 14 in conjunction with Article 8 of the Convention, the Federal Supreme Court found that it could not be inferred from the case-law of the European Court that Article 8 of the Convention required States to provide specific social security benefits.

As to the legal provisions concerning the right to a widower's pension, the Federal Supreme Court held that they were based on the idea that it was the husband who provided for his wife's needs, particularly if there were children, and that gender-neutral regulations would not be based on sex but on whether a particular individual (male or female) had lost the person who provided for him or her. The Federal Supreme Court noted that, during the tenth revision of the OASI system, the Federal Council had proposed the recognition of a limited right to a widower's pension and that the legislature had opted for the regulations in issue, which were still in force, while being aware that they established an unacceptable distinction on grounds of sex, contrary to Article 4 § 2 (since 1 January 2000, Article 8 § 3) of the Constitution. It added that by applying different conditions for entitlement to the pension according to whether the person concerned was a widow or a widower, the legislature had made a distinction on the basis of sex which was not necessary for either biological or functional reasons. Lastly, the Federal Supreme Court pointed out that in its message on the eleventh revision (which had ultimately been rejected) of the OASI system, the Federal Council had made it clear that the rule that widowers were entitled to a pension only if they had children under the age of 18 was contrary to the principle of gender equality and should therefore be adjusted in line with an approach linked to loss of support. The Federal Supreme Court noted that, following the failure of the eleventh revision of the OASI system, the impugned provisions remained in force and that Article 190 of the Constitution required it – like all other authorities – to apply them.

# LEGAL FRAMEWORK

## I. RELEVANT DOMESTIC LAW AND PRACTICE

18. The relevant provisions of the Swiss Federal Constitution read as follows:

**Article 8 – Equality before the law**

"1. Every person is equal before the law.

2. No person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological or political convictions, or because of a physical, mental or psychological disability.

3. Men and women have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education and in the workplace. Men and women have the right to equal pay for work of equal value.

4. The law shall provide for the elimination of inequalities that affect persons with disabilities."

19. According to the Federal Supreme Court's case-law, Article 8 § 3 of the Constitution excludes sex as a valid criterion for making a distinction in law (ATF (Judgments of the Federal Supreme Court) 134 V 131), and a difference in treatment between men and women is permissible only if biological or functional differences preclude any equality of treatment (ATF 108 Ia 22). In the judgment adopted in the applicant's case, the Federal Supreme Court added that this reservation allowing for functional differences did not mean, in particular, that the traditional division of roles, assuming that it still corresponded to present-day reality, could be of any legal relevance in the future.

20. The relevant provisions of the Federal Law of 20 December 1946 on old-age and survivors' insurance are worded as follows:

**Section 23 – Widows' and widowers' pensions**

"1. Widows and widowers shall be entitled to a pension if they have one or more children at the time of their spouse's death.

2. The following shall be treated as the children of widows or widowers:

(a) children of the deceased spouse who, at the time of the latter's death, had been living together with the widow or widower and have been taken in by the surviving spouse as foster children within the meaning of section 25(3);

(b) foster children within the meaning of section 25(3) who, at the time of the death in question, had been living together with the widow or widower and have been adopted by the surviving spouse.

3. Entitlement to a widow's or widower's pension shall begin on the first day of the month following the spouse's death and, where a foster child has been adopted in accordance with subsection 2 (b) above, on the first day of the month following the adoption.

4. Entitlement shall end:

(a) on remarriage;

(b) on the widow's or widower's death.

5. Entitlement shall resume in the event of annulment of marriage or divorce. The Federal Council shall regulate the details."

**Section 24 – Special provisions**

"1. Widows shall be entitled to a pension if, on their husband's death, they have no children or foster children within the meaning of section 23, but have reached the age of 45 and have been married for at least five years. If a widow has been married more than once, the calculation shall take into account the overall length of the marriages in question.

2. In addition to the causes of termination mentioned in section 23(4), entitlement to a widower's pension shall end when the youngest child reaches the age of 18."

**Section 25 – Orphans' pensions**

"1. Children whose father or mother has died shall be entitled to an orphan's pension. In the event of the death of both parents, they shall be entitled to two orphans' pensions.

2. Foundlings shall be entitled to an orphan's pension.

3. The Federal Council shall regulate the entitlement of foster children to orphans' pensions.

4. Entitlement to an orphan's pension shall begin on the first day of the month following the death of the father or mother. It shall end on the 18th birthday or the death of the orphan.

5. In the case of children pursuing training or studies, entitlement to the pension shall continue until the end of the course, but not beyond the age of 25. The Federal Council may define what is meant by 'training or studies'."

## II. PREPARATORY WORK ON THE FEDERAL LAW ON OLD-AGE AND SURVIVORS' INSURANCE CONCERNING WIDOWS' AND WIDOWERS' PENSIONS, AND ATTEMPTED REFORMS

21. Widows' pensions were introduced in Switzerland in 1948, at the same time as the OASI system. At the time, married women found themselves excluded from the labour market at the time of starting a family, so mothers were especially affected. The main question in defining the conditions for entitlement to the pension was therefore whether widows could reasonably be expected to begin or, less frequently, to resume gainful employment on the death of their husband (report of 16 March 1945 by the Federal Commission of Experts on the introduction of the OASI system, pp. 64 et seq., and message of 24 May 1946 from the Federal Council on the Bill on old-age and survivors' insurance, Federal Gazette (*Feuille fédérale* – "FF") 1946 II 353).

22. Widowers' pensions were introduced in 1997 at the time of the tenth revision of the OASI system. The government set out the following considerations during the presentation of the Bill in Parliament (message of 5 March 1990 from the Federal Council concerning the tenth revision of the OASI system, FF 1990 II 1, pp. 37-38):

"Current legislation only provides for widows' pensions, and not widowers' pensions. Yet nowadays, wives are increasingly often in gainful employment, whether on a full-time or part-time basis.

> In cases where the husband devotes himself to household chores and bringing up children, he is not eligible for any OASI benefits in the event of his wife's death.
>
> We therefore propose introducing the principle of a widower's pension. However, entitlement to such a pension should only arise if the widower has dependent children under the age of 18.
>
> We realise that this restriction means that widows and widowers will not enjoy equal treatment; nevertheless, we consider that the envisaged difference in treatment is still justified for the time being.
>
> Granting widowers' pensions under the same conditions as for widows would go beyond the financial framework set for the present revision.
>
> A possible alternative might be to set out more restrictive conditions for the award of a widow's pension, along the lines of the proposal which we submitted in April 1988. That alternative was, quite rightly, criticised because of the difficulties inherent in the idea of older widows returning to employment. Indeed, it cannot be denied that the image of family support traditionally conveyed by marriage is still widespread. The OASI system cannot overlook the fact that women who left employment many years ago would be likely to face serious financial problems after their husband's death if the conditions for entitlement to a widow's pension became stricter.
>
> Marriages involving a 'house-husband' are still fairly rare. In our view, however, even in such cases, the husband can be expected to resume gainful employment after having brought up his children. Accordingly, we consider that the inequality of treatment being proposed between widows and widowers is still defensible today."

23. Since 2000 the government has made several unsuccessful attempts to reform the widows' and widowers' pensions system, particularly with a view to gradually bringing widows' entitlement to the pension into line with that of widowers.

24. Thus, in 2000 the government presented a proposal for the eleventh revision of the OASI system. Finding that the rule that widowers were not entitled to a pension unless they had children under the age of 18 was contrary to the principle of gender equality and should therefore be adjusted, the Federal Council proposed gradually limiting widows' entitlement to the pension in order to bring it into line with that of widowers after a transitional phase, while relaxing the conditions for entitlement to a widower's pension (FF 2000 1771 1862 s.). Those proposals would have helped improve the situation of widowers. However, they were mainly aimed at tightening up the conditions applicable to widows, since the Federal Council had not envisaged bringing the situation of widowers into line with that of widows with children by extending benefits. In any event, that reform was rejected by referendum in 2004.

25. In 2005 the government presented a new version of its proposal for the eleventh revision of the OASI system, although the conditions for entitlement to a surviving spouse's pension remained unchanged. The new proposal was rejected by a final vote in Parliament in 2010.

26. In response to a motion submitted to the Council of States on 26 March 2007 by the Social Security and Public Health Commission

(motion 07.3276), asking the Federal Council to draft a bill bringing the status of widowers with children into line with that of widows, the Federal Council expressed its opposition to the motion for a number of reasons, including the extra cost of such an adjustment, an estimated CHF 200 million, while accepting that the rules in force at the time led to inequalities between widows and widowers with children. In view of the foreseeable trend in the funds required for the OASI system, the Federal Council refused such an increase in costs.

27. In 2014 the government presented a proposed reform under the heading "Old-Age Pensions 2020" (*Prévoyance vieillesse 2020* – "the 2020 reform"), which proposed, *inter alia*, adapting survivors' benefits to the situation applicable to widows at that time, albeit without placing widowers and widows on an equal footing. The government considered that the system operating at the time was no longer suited to the contemporary context, but that social realities did not allow complete standardisation of the conditions for entitlement to a widow's pension and a widower's pension under the Federal Law on old-age and survivors' insurance. In drawing up its proposals the government relied on objective data from a survey of the financial situation of widows and widowers, which had shown that Switzerland had an effective mechanism for covering the loss of income consequent upon bereavement and that widowhood could entail a change of behaviour on the employment market. The survey showed that widowers were usually in a sounder financial position than widows, for reasons mainly linked to the employment market and continuing inequalities between women and men in that sphere. In view of the increasing number of women in gainful employment and the changes in the distribution of roles in the family and at work, the government considered that the bereavement risk ought to be covered in a more targeted manner. The 2020 reform consequently envisaged abolishing widows' pensions for childless women after a long transitional period, but only very slightly modified the conditions for entitlement to a widower's pension, payment of which was to end – as was already the case at the time – on the youngest child's eighteenth birthday.

28. The 2020 reform was approved by Parliament on 17 March 2017. After deliberating on the matter, both houses decided not to amend the existing system for widows' and widowers' pensions. Following a referendum held on 24 September 2017, the "Old-Age Pensions 2020" proposal was rejected.

## III. WORK BY THE COUNCIL OF EUROPE

### Recommendation no. R (85) 2 of 5 February 1985 on legal protection against sex discrimination

29. In this Recommendation, the Committee of Ministers, signalling its awareness of ongoing inequalities between men and women in spite of the extensive work carried out by member States, called upon the latter to take or reinforce, as the case might be, any measures they considered appropriate with a view to securing gender equality. Concerning legislative measures, the Recommendation states (principle I. 2.) that in the field of social security and pensions, men and women should be treated in an equal way with regard to access to official social security and pension systems or to any other similar systems set up under public law and with regard to the benefits paid by such systems.

## IV. RELEVANT INTERNATIONAL INSTRUMENTS

30. The relevant part of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was ratified by Switzerland in 1997, reads:

**Article 2**

"States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women."

# THE LAW

31. The applicant submitted that unlike a widow in a similar situation, he had ceased to be entitled to a widower's pension since his younger daughter had reached the age of majority, and alleged that he had been discriminated against on that account. He relied on Article 14 of the Convention read in conjunction with Article 8, the relevant parts of which provide:

**Article 14**

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex ..."

**Article 8**

"1. Everyone has the right to respect for his ... family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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."

## I. THE GOVERNMENT'S PRELIMINARY OBJECTION

### A. The parties' submissions

#### *1. The Government*

32. The Government reiterated the objection which they had raised before the Chamber (see paragraphs 23-28 of the Chamber judgment) and urged the Court to declare the complaint under Article 14 read in conjunction with Article 8 inadmissible as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 § 3 (a) of the Convention.

33. The Government stated that it was clear from the case-law of the Court (particularly that of the Grand Chamber) that social welfare benefits such as the one in issue in the present case generated pecuniary rights, which ordinarily fell within the scope of Article 1 of Protocol No. 1. They observed that disputes specifically relating to unequal treatment of widows and widowers as regards the payment of a survivor's pension had been examined by the Court under Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 (they cited, in particular, *Willis v. the United Kingdom*, no. 36042/97, ECHR 2002-IV; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, 10 May 2007; and *Şerife Yiğit v. Turkey* [GC], no. 3976/05, 2 November 2010). The few cases which the Court had considered under Article 14 of the Convention in conjunction with Article 8, including *Petrovic v. Austria* (27 March 1998, *Reports of Judgments and*

*Decisions* 1998-II), *Dhahbi v. Italy* (no. 17120/09, 8 April 2014), *Weller v. Hungary* (no. 44399/05, 31 March 2009) and *Konstantin Markin v. Russia* ([GC], no. 30078/06, ECHR 2012), had concerned "family" welfare benefits of a very different kind from the one in issue in the present case. Furthermore, those cases had been characterised by the existence of a direct and especially close link between the provision of the welfare benefit and family life, stemming in particular from the aim of the allowance in question, inasmuch as the latter had been directly intended to facilitate or promote family life.

34. The Government observed that that approach had been applied in a clear, consistent and foreseeable manner until the departure from previous case-law in *Di Trizio v. Switzerland* (no. 7186/09, 2 February 2016) and *Belli and Arquier-Martinez v. Switzerland* (no. 65550/13, 11 December 2018). In those cases, which appeared to constitute a special body of case-law tailored to Switzerland as a State that had not ratified Protocol No. 1, the Court had simply relied on a tenuous, indeed highly indirect, link between the benefit in question and the enjoyment of family life, on the grounds that the issues arising were bound up with the organisation of family life. In the Government's view, the Court's findings in those Swiss cases amounted to holding that any decision on whether or not to grant a pension fell automatically within the scope of Article 8, thus expanding that scope, given that a social welfare benefit was always liable to affect an individual's family life in one way or another. Such an approach also risked weakening the requirement that Article 14 of the Convention should be accessory in nature.

35. The Government stated that they were convinced that the Court should consider under Article 8 only such cases as presented a close and direct link between the provision of the social welfare benefit in question and the enjoyment of family life, adding that such a link should be examined objectively in the light of the nature and aim of the benefit as determined by the law and practice of the State concerned.

36. However, in the present case, in which a very close link of this kind was clearly absent, the Chamber had failed to explain why it had considered it legitimate to depart from the approach of systematically considering such complaints under Article 1 of Protocol No. 1. The Government reaffirmed in that connection that the sole aim of the widow's and widower's pension was to prevent any financial difficulties that might arise as a result of the spouse's death, by meeting the surviving spouse's basic needs. Unlike a parental-leave allowance or large-family allowance, and contrary to the Chamber's conclusion in paragraph 43 of its judgment, the pension in question was not aimed at promoting the family and had no effect on the organisation of family life either. This was demonstrated by the fact that the widow's pension could, subject to certain conditions, also be paid to widows without any children. The Government further explained that costs relating to the maintenance of the deceased's children were covered by their orphans' pensions. Moreover,

given that the presence of children over the age of 15 was no obstacle to their parents' engaging in an occupation, the widower's pension was no longer necessary when the children reached the age of majority, at the very latest, and did not affect family life outside of working or school hours. This meant, in addition, that the survivor's pension provided for in Swiss law was clearly different from the social welfare benefits found by the Court to fall within the scope of Article 8, which was narrower than that of Article 1 of Protocol No. 1.

37. The Government took the view that in the present case it had not been shown how, in practical terms, the termination of the applicant's widower's pension when his younger daughter had come of age had affected his family life. They further contended that the termination of the pension had been foreseeable for the applicant and that he had not established that he could not have resumed paid employment once both his daughters had reached the age of majority. In fact, it was more likely that the payment of the pension had dictated the way in which the applicant's family life was organised, that is, his choice to stay at home, rather than vice versa; the Government pointed out that the widower's pension had not existed when the applicant had lost his wife in 1994. That being so, neither the grant of the widower's pension to the applicant in 1997 nor, *a fortiori*, its termination in 2010 had been family-related or had any real impact on the organisation of his family life. If the termination of the pension had had any financial impact, it could only have affected the applicant's personal sphere.

38. The Government further argued that when Switzerland had acceded to the Convention, it had been clear that Article 8 did not cover entitlement to welfare benefits, and that was still the case today. In their view, it was under Article 1 of Protocol No. 1 that the Court had extended the scope of its protection to cover welfare benefits. Moreover, sources including a recent Federal Council report indicated that the reasons why Switzerland had not ratified Protocol No. 1 related to its desire to comply with international law and to the fact that its domestic law did not cover all the requirements deriving from that Protocol, particularly in the sphere of social security benefits. Since a treaty was valid only among the parties to it, the right of property deriving from Article 1 of Protocol No. 1 could not be relied on against the Swiss State on the basis of an extensive interpretation of Article 8, as that would be liable to frustrate that State's sovereign will and impose obligations on it to which it had not voluntarily subscribed. Furthermore, in accordance with Article 31 § 1 of the Vienna Convention of 1969 on the Law of Treaties, an extensive interpretation could not be used to confer on a term an effect which a State had precisely wished to avoid by not ratifying a different treaty. It followed that if the facts of the present case, by reason of their pecuniary dimension, were found to fall within the ambit of Article 1 of Protocol No. 1 rather than Article 8 of the Convention, the applicant's complaint should be excluded

from the scope of the latter Article and declared inadmissible as incompatible *ratione materiae* with the Convention.

39. The Government submitted that the adoption by the parties to a treaty of a protocol covering certain specific subjects was a clear sign of the parties' shared intention that the subjects in question should not be governed by the original treaty. As regards Protocol No. 1, they contended that the parties' intentions were clear from the Preamble thereto and from Article 5 thereof, and that it followed that Protocol No. 1 could only supplement the Convention. Although the Convention was a living instrument that was intended to guarantee rights that were practical and effective, the Court could not derive rights from the Convention which had been deliberately omitted from it at the outset, as was the case for social rights (which were set forth in the European Social Charter). Accordingly, the Court could not disregard the protection afforded by an additional protocol and extend the scope of Article 8 of the Convention, or indeed circumvent its usual meaning, in such a way as to encompass the obligations deriving from Article 1 of Protocol No. 1, and if it did so, the latter provision would in a sense be superfluous. In the Government's submission, while it was not entirely inconceivable to consider, as the Court's case-law did, that within the same protocol certain provisions were subsumed within a right set forth in a Convention Article while others were not, that nonetheless required an interpretation in keeping with the methods referred to in the Vienna Convention.

*2. The applicant*

40. The applicant began by explaining that he had worked as a textile technician until 1992, and subsequently for an insurance company. After his wife's death in August 1994 he had ceased working and brought up his daughters alone, until they had completed their education and graduated from university. His widower's pension, once granted from 1997 onwards, and supplementary benefits had allowed him to devote himself entirely to looking after, bringing up and caring for his daughters. The termination of his pension when he was 57 years old had caused him serious family and financial problems, because he had been unable to find a job on account of his age, the computerisation of his occupation and his long absence from the labour market. At the same time, his daughters had nevertheless remained dependent on him because they had not completed their education. He had therefore on several occasions had to apply for welfare assistance in order to meet their needs. Moreover, between the termination of his widower's pension and the first instalments of his old-age pension his family life had been significantly restricted, ruling out the usual family activities for lack of money. Financial difficulties had prevented him from inviting his daughters to family occasions, giving them birthday or Christmas presents, or going on holiday with them.

41. The applicant accordingly submitted that the present case struck at the very concept of family life, which was protected by Article 8 of the Convention. The case did not concern the payment of a pension as such – the only issue which would fall within the scope of Article 1 of Protocol No. 1 – but rather a difference in the treatment of identical, specific family relationships, resulting in unequal amounts of pension. The facts of the case therefore clearly fell within the ambit of Article 8, and this was unaffected by the fact that such discrimination could also have pecuniary consequences or involve material interests. Any attempt to examine the present case under Article 14 read in conjunction with Article 1 of Protocol No. 1, arbitrarily excluding any reference to the applicant's family situation, would mean calling the Court's case-law into question. Moreover, for the protection secured under Article 8 of the Convention to be applicable in conjunction with Article 14, there was no need for there to be a close link between the payment of the pension and the applicant's enjoyment of his family life, let alone for there to be a violation of Article 8.

42. The applicant submitted that the Government's argument that there had to be a close link between entitlement to the pension and the enjoyment of family life was not supported by the Court's case-law. He argued that even if such a link were necessary, it would not be lacking in the instant case, because in accordance with the relevant legislation, the survivor's pension was aimed at protecting married couples, particularly families with children, in the event of the death of one of the spouses and parents. In the applicant's view, therefore, it could not be maintained that that benefit was not aimed at facilitating or contributing to family life. It was also clear that his daughters and he had been specifically and individually affected, not only when the payment of the pension had ended. Indeed, the law had penalised the applicant for having looked after his daughters during their childhood and for not having organised his family life in line with what he saw as the false assumption underpinning the survivor's pension system to the effect that the man's role was that of the breadwinner.

43. The applicant considered it obvious that the guarantees provided in additional protocols added new rights to those set out in the Convention, but could neither restrict nor extend the Convention rights. Moreover, it was well established in the case-law that a given situation could fall under both Article 8 of the Convention and Article 1 of Protocol No. 1, whereas the latter did not constitute a *lex specialis* in relation to Article 8. Even where the Court had considered a complaint under Article 1 of Protocol No. 1, it had not ruled out the possibility that the same complaint could be examined under Article 8 of the Convention, as was illustrated, for example, by *Şerife Yiğit* (cited above), *Sawden v. the United Kingdom* ((dec.), no. 38550/97, 8 June 1999) and *Aldeguer Tomás v. Spain* (no. 35214/09, 14 June 2016). Indeed, it would be dangerous to claim otherwise, because that would mean that an additional protocol restricted the rights secured under the Convention. The applicant

emphasised that this did not, however, imply that Article 1 of Protocol No. 1 had no independent existence, since there were many cases concerning property rights and the fields of social security and taxation which had nothing to do with Article 8.

The applicant further observed that widows' and widowers' pensions were aimed, in principle, at exempting surviving spouses from having to engage in paid work and at providing them with social welfare protection, so that they had time to look after their children. Just as a widow's pension paid after the children had reached the age of majority enabled a widow to continue to look after her family, a widower's pension paid after the children reached the age of majority would enable a father to continue to care for his family. If such a mode of provision for the family was no longer considered necessary once the children had come of age, the pension should be discontinued for parents of both sexes, although that would amount to ignoring the fact that by that time in their lives, widows and widowers had often reached an age at which it was *de facto* impossible to resume employment.

### B. The Chamber judgment

44. The Chamber first of all observed that the concept of "family life" not only included social, moral or cultural relations but also comprised interests of a material kind (see *Merger and Cros v. France*, no. 68864/01, § 46, 22 December 2004). It further pointed out that measures enabling one of the parents to stay at home to look after the children promoted family life and thus affected the way in which it was organised, and that such measures fell within the scope of Article 8 (see, among other authorities, *Petrovic*, *Konstantin Markin* and, to similar effect, *Weller* and *Dhahbi*, all cited above).

45. In the light of the principles established in the above-mentioned case-law and with reference to the judgments in two previous Swiss cases, *Di Trizio* and *Belli and Arquier-Martinez* (both cited above), the Chamber considered that the applicant's complaint fell within the ambit of Article 8 of the Convention. It held that widows' and widowers' pensions were aimed at exempting surviving spouses from having to engage in paid work so that they had time to look after their children, and that the benefit in question was therefore clearly "family-related" since it had a real impact on the organisation of the applicant's family life.

46. As regards the practical consequences of the widower's pension for the applicant, the Chamber pointed out that since his wife's death in an accident, when the couple's children had been 21 months old and four years old, the applicant, who up to that point had been in employment, had devoted himself exclusively to his children's upbringing and had been unable to pursue his occupation. When payment of the pension had ceased, he had been 57 years old and had not been in gainful employment for over sixteen years. By the time of the Federal Supreme Court's judgment, the applicant had

already reached the age of 59, making it difficult to envisage a return to the labour market. In those circumstances, the Chamber took the view that the widower's pension, which had been paid to the applicant since his wife's death and had been terminated when his younger child had reached the age of majority, had affected the way in which he had organised and managed his family life.

## C. The Court's assessment

### *1. Preliminary remarks*

47. According to the consistent case-law of the Court, Article 14 of the Convention only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among many other authorities, *Sahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII, and *Fábián v. Hungary* [GC], no. 78117/13, § 112, 5 September 2017).

48. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary, but it is also sufficient, for the facts of the case to fall within the ambit of one or more of the Convention Articles. Moreover, the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the ambit of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see, among many other authorities, *Konstantin Markin*, cited above, § 124; *Petrovic*, cited above, § 22; *Yocheva and Ganeva v. Bulgaria*, nos. 18592/15 and 43863/15, § 71, 11 May 2021; and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 39, ECHR 2005-X).

49. Having regard to the non-autonomous nature of Article 14 of the Convention, and also to the request for referral and the parties' observations, the Court observes that it must first determine whether the applicant's interests that were adversely affected by the survivor's pension system fell within the ambit of Article 8 of the Convention (see, *mutatis mutandis*, *Stec and Others*, cited above, § 41). Indeed, the answer to that question is decisive in establishing whether the Court has jurisdiction to deal with the merits of the case, as regards the alleged violation of Article 14 read in conjunction with Article 8 of the Convention.

*2. Development and current state of case-law on social welfare benefits*

50. The Court observes that the Convention, as adopted in 1950, reflected the idea of a separation between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. The catalogue of rights guaranteed by the Convention and by Protocol No. 1, adopted in 1952, was clearly based on civil and political rights, to which the 1961 European Social Charter (opened for signature on 18 October 1961, came into force on 26 February 1965, ETS 35) added economic and social rights. Moreover, the *travaux préparatoires* of the Social Charter indicate that that instrument was intended to form a "pendant" to the Convention in the social sphere.

51. Nevertheless, as the Court itself has noted, "[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature"; furthermore, an interpretation of the Convention may extend into the sphere of social and economic rights, since "there is no watertight division separating that sphere from the field covered by the Convention" (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32, and *Stec and Others*, cited above, § 52).

52. The Court subsequently built on this approach as regards Article 1 of Protocol No. 1, notably in the social security sphere, finding that its approach should reflect the reality of the way in which welfare protection was currently organised within the member States of the Council of Europe, as deriving in particular from the provisions of the Social Charter (see *Stec and Others*, cited above, §§ 50 and 52).

53. In this connection, it should be noted at the outset that Switzerland has ratified neither the Social Charter nor, above all, Protocol No. 1, and the reasons for that particular policy choice have been explained by the Government (see paragraph 38 above). Protocol No. 1 cannot therefore be relied on against Switzerland (see, *mutatis mutandis*, *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 57, 60 and 149, ECHR 2008).

54. In the context of the present case, it should be emphasised that in the vast majority of cases where the Court has ruled on alleged discrimination in the sphere of entitlement to social welfare benefits, it has concentrated its analysis on Article 1 of Protocol No. 1, and not on Article 8 of the Convention. First of all, it held that paying contributions into a pension fund or a social security scheme could, under certain circumstances, give rise to property rights for the purposes of Article 1 of Protocol No. 1 (see *Bellet, Huertas and Vialatte v. France* (dec.), nos. 40832/98 and 2 others, 27 April 1999; *Skórkiewicz v. Poland* (dec.), no. 39860/98, 1 June 1999; *Gaygusuz v. Austria*, 16 September 1996, §§ 39 and 41, *Reports* 1996-IV; and *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 39, ECHR 2004-IX).

55. Subsequently, in its decision in *Stec and Others* (cited above), the Court held that, for the purposes of the applicability of Article 1 of Protocol No. 1, there was no longer any justification for drawing a distinction between contributory and non-contributory benefits (ibid., §§ 52-53). It also

emphasised that the principles which applied generally in cases under Article 1 of Protocol No. 1 were equally relevant as regards welfare benefits. There can thus be no doubt that that Article 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 amount of benefits to provide under any such scheme. However, if a Contracting State has in force legislation providing for the payment as of right of a welfare benefit or a pension, that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (ibid., § 54), and it must be compatible with Article 14 of the Convention (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 53, ECHR 2006-VI).

56. Many cases examined to date by the Court (including *Willis*, cited above; *Muñoz Díaz v. Spain*, no. 49151/07, ECHR 2009; *Moskal v. Poland*, no. 10373/05, 15 September 2009; *Si Amer v. France*, no. 29137/06, 29 October 2009; *Santos Hansen v. Denmark* (dec.), no. 17949/07, 9 March 2010; *Hasani v. Croatia* (dec.), no. 20844/09, 30 September 2010; *Šulcs and Others v. Latvia* (dec.), nos. 42923/10 and 22 others, 6 December 2011; *Guberina v. Croatia*, no. 23682/13, 22 March 2016; and *Béláné Nagy v. Hungary* [GC], no. 53080/13, 13 December 2016) show that in the sphere of social welfare benefits, the Court regularly carries out its analysis primarily under Article 1 of Protocol No. 1, or else under Article 14 read in conjunction with Article 1 of Protocol No. 1 where the applicant complains that he or she was deprived of a benefit on discriminatory grounds. In particular, in *Moskal* and *Béláné Nagy* (both cited above), the Court chose to examine the complaints concerning welfare benefits under Article 1 of Protocol No. 1 in the first place, and subsequently did not consider it necessary to pursue its examination under Article 8 of the Convention.

57. On the basis of all the above considerations, the Court observes that its case-law has now taken on sufficient maturity and stability for it to give a clear definition of the threshold required for the applicability of Article 1 of Protocol No. 1, including in the sphere of social welfare benefits. It should be reiterated in this connection that that Article does not create a right to acquire property or to receive a pension of a particular amount. Its protection applies only to existing possessions and, under certain circumstances, to the "legitimate expectation" of obtaining an asset; for the recognition of a possession consisting of a legitimate expectation, the applicant must have an assertable right which may not fall short of a sufficiently established, substantive proprietary interest under the national law (see *Béláné Nagy*, cited above, §§ 74-79).

58. Thus, where the applicant does not satisfy, or ceases to satisfy, the legal conditions laid down in domestic law for entitlement to any particular form of benefits or pension, there is no interference with the rights under Article 1 of Protocol No. 1 if the conditions had changed before the applicant

became eligible for the benefit in question. Where the suspension or diminution of a pension was not due to any changes in the applicant's own circumstances, but to changes in the law or its implementation, this may result in an interference with the rights under Article 1 of Protocol No. 1. Accordingly, where the domestic legal conditions for entitlement to any particular form of benefits or pension have changed and where, as a result, the person concerned no longer fully satisfies them, a careful consideration of the individual circumstances of the case – in particular, the nature of the change in the conditions – may be warranted in order to verify the existence of a sufficiently established, substantive proprietary interest under the national law (ibid., §§ 86-89).

59. The situation has been less clear as regards the scope of Article 8 of the Convention in this sphere. While it is not in doubt that the concept of "family life" within the meaning of Article 8 also covers, in addition to social, moral and cultural relations, certain material interests which have necessary pecuniary consequences, that interpretation has been chiefly adopted in cases concerning a failure to recognise parent-child relationships in law and the consequences of such failure for the transfer of property between private individuals (see, among other authorities, *Marckx v. Belgium*, 13 June 1979, Series A no. 31; *Camp and Bourimi v. the Netherlands*, no. 28369/95, ECHR 2000-X; *Pla and Puncernau v. Andorra*, no. 69498/01, ECHR 2004-VIII; *Merger and Cros*, cited above; *Schaefer v. Germany* (dec.), no. 14379/03, 4 September 2007; and *Brauer v. Germany*, no. 3545/04, 28 May 2009).

Thus, in *Şerife Yiğit* (cited above), the failure to recognise the applicant's religious marriage and the consequences of that failure in terms of inheritance rights were examined by the Court under Article 8 of the Convention, whereas the financial aspect of the applicant's complaint, concerning the State's refusal to award her a survivor's pension and social security benefits, was considered under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1.

60. There have been fewer cases in which complaints concerning social welfare benefits – that is to say, payments from public funds, including social insurance funds – have been examined by the Court under Article 8 read alone (see, for example, *La Parola and Others v. Italy* (dec.), no. 39712/98, 30 November 2000; *McDonald v. the United Kingdom*, no. 4241/12, 20 May 2014; and *Belli and Arquier-Martinez*, cited above). The Court does not infer from those cases that Article 8 read alone can be interpreted as imposing any positive obligations on the State in the social security sphere.

61. However, certain guidelines for the identification of the factors capable of bringing the facts of a case of this kind within the ambit of Article 8 can be gleaned from the more numerous cases in which the Court has examined complaints concerning welfare benefits under Article 14 read in conjunction with Article 8 of the Convention. While Article 8 does not guarantee the right to a social welfare benefit, where a State decides to go

beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – it cannot, in the application of that right, take discriminatory measures within the meaning of Article 14 (see, *mutatis mutandis*, the judgment in *Stec and Others*, § 53; *Konstantin Markin*, § 130; and *Aldeguer Tomás*, § 76, all cited above).

62. Consequently, the scope of Article 14 read in conjunction with Article 8 may be more extensive than that of Article 8 read alone. In finding that complaints concerning social welfare benefits fall within the ambit of Article 8, thus bringing Article 14 into play, the Court has had regard to a number of different factors over time.

63. Mention should first of all be made of the cases concerning parental leave and related allowances, namely *Petrovic* (cited above), *Konstantin Markin* (cited above) and *Topčić-Rosenberg v. Croatia* (no. 19391/11, 14 November 2013). In those cases, which saw the emergence of the concept of "organisation of family life", the applicability of Article 14 read in conjunction with Article 8 stemmed from a combination of circumstances involving the granting of leave and an allowance, which in the applicants' specific situation had *necessarily affected* the way in which their family life was organised.

64. Another approach, which the Court adopted in cases including *Di Trizio* and *Belli and Arquier-Martinez* (both cited above), and which guided the Chamber in its judgment in the present case, is based instead on the hypothesis that the fact of granting or refusing the benefit is *liable to affect* the way in which family life is organised.

65. Lastly, in other judgments, most of them predating that delivered by the Grand Chamber in *Konstantin Markin* (cited above), the Court had recourse to a legal presumption to the effect that in providing the benefit in question the State was *displaying its support and respect for family life*. The Court has adopted such an approach in cases concerning, for example, a maternity benefit (see *Weller*, cited above), a large-family allowance (see *Fawsie v. Greece*, no. 40080/07, 28 October 2010, and *Dhahbi*, cited above), child benefits (see *Okpisz v. Germany*, no. 59140/00, 25 October 2005, and *Niedzwiecki v. Germany*, no. 58453/00, 25 October 2005) and a family allowance in respect of children with only one living parent (see *Yocheva and Ganeva*, cited above).

### *3. Approach to be followed henceforth*

66. An analysis of the case-law summarised above indicates that the Court has not always been entirely consistent in defining the factors leading it to find that complaints concerning social welfare benefits fell within the ambit of Article 8 of the Convention.

67. The Court notes at the outset that all financial benefits generally have a certain effect on the way in which the family life of the person concerned is managed, although that fact alone is not sufficient to bring them within the

ambit of Article 8. Otherwise, all welfare benefits would fall within the ambit of that Article, an approach which would be excessive.

68. It is therefore necessary for the Court to clarify the relevant criteria in order to specify, or indeed to circumscribe, what falls within the ambit of Article 8 in the sphere of welfare benefits.

69. It can also be seen from the case-law summarised above that in the field of social welfare benefits, the sphere of protection of Article 1 of Protocol No. 1 and that of Article 8 of the Convention intersect and overlap, although the interests secured under those Articles are different. In determining which complaints fall within the ambit of Article 8, the Court must redress the inconsistencies noted under Article 8, particularly when read in conjunction with Article 14 of the Convention (see paragraphs 64-65 above).

It follows that the Court can no longer simply accept either a legal presumption to the effect that in providing the benefit in question, the State is displaying its support and respect for family life (see the case-law cited in paragraph 65 above), or a hypothetical causal link whereby it ascertains whether the grant of a particular benefit is "liable to affect the way in which family life is organised" (see the case-law cited in paragraph 64 above).

70. In the Court's view, the Grand Chamber judgment in *Konstantin Markin* (cited above) should be taken as the main reference point here:

> "*(i) On whether Article 14 taken in conjunction with Article 8 is applicable*
>
> 129. The Court must determine at the outset whether the facts of the case fall within the scope of Article 8 and hence of Article 14 of the Convention. It has repeatedly held that Article 14 of the Convention is pertinent if 'the subject matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed ...', or if the contested measures are 'linked to the exercise of a right guaranteed ...'. For Article 14 to be applicable, it is enough for the facts of the case to fall within the ambit of one or more of the provisions of the Convention (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV; *E.B. v. France* [[GC], no. 43546/02], §§ 47-48 [, 22 January 2008]; and *Fretté v. France*, no. 36515/97, § 31, ECHR 2002-I, with further references).
>
> 130. It is true that Article 8 does not include a right to parental leave or impose any positive obligation on States to provide parental-leave allowances. At the same time, by enabling one of the parents to stay at home to look after the children, parental *leave* and related *allowances* promote family life and *necessarily affect the way in which it is organised* [emphasis added]. Parental leave and parental allowances therefore come within the scope of Article 8 of the Convention. It follows that Article 14, taken together with Article 8, is applicable. Accordingly, if a State does decide to create a parental-leave scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see *Petrovic*, cited above, §§ 26-29)."

71. In the context of *Konstantin Markin*, the applicability of Article 14 of the Convention read in conjunction with Article 8 stemmed from the fact that the parental leave and the corresponding allowance had "*necessarily affect[ed] the way in which [family life was] organised*" (compare and contrast the approach followed in the cases referred to in paragraphs 64

and 65 above), both measures having been aimed at enabling one of the parents to remain at home to look after the children (in that case, infants). Thus, a close link between the allowance associated with parental leave and the enjoyment of family life was considered necessary.

72. Accordingly, for Article 14 of the Convention to be applicable in this specific context, the subject matter of the alleged disadvantage must constitute one of the modalities of exercising the right to respect for family life as guaranteed by Article 8 of the Convention, in the sense that the measures seek to promote family life and necessarily affect the way in which it is organised. The Court considers that a range of factors are relevant for determining the nature of the benefit in question and that they should be examined as a whole. These will include, in particular: the aim of the benefit, as determined by the Court in the light of the legislation concerned; the criteria for awarding, calculating and terminating the benefit, as set forth in the relevant statutory provisions; the effects on the way in which family life is organised, as envisaged by the legislation; and the practical repercussions of the benefit, given the applicant's individual circumstances and family life throughout the period during which the benefit is paid.

*4. Application to the present case*

73. In accordance with the approach set out above, with a view to determining whether Article 8 and, consequently, Article 14 of the Convention come into play in the present case, the Court is called upon to consider the relevant factors as a whole and to take into account the entire period from 1997 to 2010, during which the applicant received the widower's pension.

74. The Court considers firstly that in this particular case it must assess the aim of the survivor's pension. To that end, regard should be had to the wording of the relevant statutory provisions, that is to say, sections 23 and 24 of the Federal Law on old-age and survivors' insurance (see paragraph 20 above), and the conditions for entitlement to the pension. It observes that section 23 of the Federal Law lays down conditions to the effect that in order to be eligible for this benefit, the surviving parent must have one or more children at the time of the spouse's death. The same section also refers to the requirement for the surviving spouse to be living together with the deceased spouse's children (subsection 2) and to the marital status of the pension beneficiary (subsections 4 and 5). However, with the exception of widows satisfying the criteria in section 24(1) of the Federal Law, surviving spouses are not entitled to the pension if the family have no children.

75. By virtue of that legislation, the applicant, who had lost his wife in 1994, was accordingly entitled to the widower's pension on its introduction in 1997 solely because he was the father of dependent children. The material before the Court indicates, moreover, that his wife had previously had primary responsibility for looking after the children, whereas the applicant

had been in employment, first as a textile technician and then in an insurance company.

76. Next, it should be noted that the termination of the widower's pension was also the consequence of the applicant's family circumstances, specifically the age of his children, since his entitlement to the pension lapsed when his younger daughter reached the age of 18.

77. The Court is mindful of the Government's assertion that the sole aim of the widow's and widower's pension is to prevent any financial difficulties that might arise as a result of the spouse's death, by meeting the surviving spouse's basic needs (see paragraph 36 above). However, irrespective of the intended effect of the legislation as argued by the Government, the Court concludes from the above observations that the pension in question in fact seeks to promote family life for the surviving spouse by enabling the latter to look after his or her children full-time if that was previously the role of the deceased parent, or, in any event, to devote more time to them without having to face financial difficulties that would force him or her to engage in an occupation.

78. The Court must also ascertain, in the light of all the specific circumstances of the present case, how the fact that the applicant received the benefit between 1997 and 2010 before being deprived of it when his younger daughter reached the age of majority affected the way in which his family life was organised during that period.

79. In this connection, the Court observes that at the time of the applicant's wife's death in 1994, their daughters were one year and nine months old and four years old. In that situation, which made it necessary to take difficult decisions with a crucial impact on the organisation of his family life, the applicant left his job in order to devote himself full-time to his family, in particular by looking after and bringing up his daughters. The Court has no doubt that the receipt of the widower's pension necessarily affected the way in which his family life was organised throughout the period concerned.

80. It follows that from the point at which the applicant was granted the widower's pension in 1997 until it was terminated in November 2010, he and his family organised the key aspects of their daily life, at least partially, on the basis of the existence of the pension.

81. The Court notes, lastly, that the delicate financial situation in which the applicant found himself at the age of 57 – in view of the loss of the survivor's pension and his difficulties in returning to an employment market from which he had been absent for sixteen years – was the consequence of the decision he had made years earlier in the interests of his family, supported from 1997 onwards by the receipt of the widower's pension.

82. The above considerations lead the Court to conclude that the facts of the case fall within the ambit of Article 8 of the Convention. This is sufficient to render Article 14 applicable.

83. The Government's preliminary objection should therefore be dismissed.

## II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 8

84. The applicant submitted that unlike a widow in a similar situation, he had ceased to be entitled to a survivor's pension since his younger daughter had reached the age of majority, and that on that account he had suffered discrimination on grounds of sex.

### A. The parties' submissions

#### *1. The applicant*

85. The applicant submitted firstly that, having given up his job following his wife's death in August 1994, he had then looked after his daughters on his own until they had completed their education, and that during that period he had received a widower's pension and supplementary benefits. The termination of the pension in November 2010 when he was 57 years old had caused him serious family and financial problems, because he had no longer been able to find a job. He had therefore had to apply on several occasions for welfare assistance in order to meet his daughters' needs. Thus, the effect on him had not been any different from what would have been the case for a widow. Moreover, between the termination of his widower's pension and the first payments of his old-age pension in April 2018, his family life had been significantly restricted, ruling out the usual family activities for lack of money.

86. The applicant further observed that widows' and widowers' pensions were aimed, in principle, at exempting surviving spouses from having to engage in paid work and at providing them with social welfare protection, so that they would have time to look after their children. Just as a widow's pension paid after the children reached the age of majority enabled a widow to continue to look after her family, a widower's pension paid after the children reached the age of majority would enable a father to continue to care for his family. If such a mode of provision for the family was no longer considered necessary once the children had come of age, the pension should be discontinued for both parents, although that would amount to hindering family life and ignoring the fact that by that time in their lives, widows and widowers had often reached an age at which it was *de facto* impossible to resume employment.

87. Next, the applicant maintained that there was no objective reason to put widowers in a less favourable situation than widows as regards the receipt of pensions, especially as regulations of this kind were in his submission unique in Europe. He argued that the existence of discrimination against

women, that is to say, their unconstitutional inequality of treatment on the labour market, particularly in terms of salaries, should not be used as justification for perpetuating discrimination against men. The issue here was not positive discrimination aimed at helping women, since, on the contrary, the existing regime reinforced outdated and discriminatory role models and approaches to the division of tasks. Since traditions or social attitudes and behaviours were insufficient, it could not be concluded in the present case that there were very strong arguments that could, in themselves, justify gender inequality. The requirements of Article 14 read in conjunction with Article 8 of the Convention would therefore only be satisfied if the same conditions applied to widowers and widows as regards the termination of their entitlement to a pension.

88. In that connection, the applicant submitted that the Government's argument based on the obsolete "breadwinner model" of marriage, whereby widows in Switzerland still required special protection as compared with widowers on account of their greater financial dependence, was invalid. It was extremely rare to find families in which the man was exclusively responsible for the financial maintenance of the family and the woman for the house and home. Moreover, in finding that there had been manifest discrimination against him, the Federal Supreme Court had already rejected both functional and biological differences between the sexes, as well as the traditional expectations in terms of roles. The justification for the difference in treatment between widows and widowers was therefore based solely on democratic considerations (the will of the people), which were deemed more important than fundamental rights, and on financial concerns. Indeed, when the relevant legislation had been revised, Parliament had observed that ensuring equality of treatment of spouses after their children reached the age of majority entailed an excessive cost. The applicant argued, however, that in view of the central importance of gender equality, it was disproportionate and unacceptable to rely on such grounds.

*2. The Government*

89. While reiterating that States enjoyed a wide margin of appreciation in adopting general measures of economic or social strategy (and referring in particular to *Andrle v. the Czech Republic*, no. 6268/08, §§ 55-59, 17 February 2011), the Government did not dispute the need to readjust the conditions for entitlement to survivors' pensions to take into account the changes in society in recent decades. Nevertheless, they maintained that despite the progress observed in the position of women in the labour market (pointing out that an update of a 2012 survey on the financial situation of widows and widowers had been launched in March 2021 and was ongoing), the need for a slightly higher level of protection for widows had not entirely disappeared. That being so, the resulting difference in treatment could still be

justified on objective and reasonable grounds, pending a more comprehensive reform of the system in accordance with political and democratic processes.

90. As regards the legitimate aim of the difference in treatment, the Government submitted that the widow's pension, which had been introduced in 1948, had been based on the assumption that the husband provided for his wife's maintenance, particularly where she had children. Although the Swiss government had made a number of subsequent attempts to reform the widows' and widowers' pension system with a view to gradual harmonisation, their plans had not come to fruition.

91. Concerning proportionality, the Government observed that the situation of surviving spouses was among the changes in society that had to be taken into account and that such changes could not be reflected immediately since they took place gradually over a very lengthy period. Moreover, the margin of appreciation afforded to States also meant that they were free to choose the means they considered the most appropriate to lessen or eliminate any inequalities as they emerged. Thus, when the widower's pension had been introduced in 1997, equality in the distribution of roles between men and women had not yet been fully achieved. For that reason, the legislature had taken the view that a widower should only be entitled to the pension if he had dependent children under the age of 18. Since then, the legislature had made several attempts to "level down" the conditions for entitlement to a widow's pension, but it had abandoned those plans on the grounds that strict equality was not yet appropriate in the light of social realities. The Government maintained in that connection that equality between men and women had not yet been entirely achieved in practice as regards involvement in paid employment and the distribution of roles within the couple. In the present case, the difference in treatment was therefore based not on gender stereotyping but on social reality. Indeed, according to statistics available from 2020, some 87% of men with children under the age of 15 were working full-time, as compared with only 21% of women with children in the same age group. Of the other 79% of women in that category who worked part-time, some 42% were working less than 50% of the time. The situation of fathers on the labour market was therefore objectively still different from that of mothers, and it appeared to be easier for fathers to return to paid employment. When a man lost his wife, he was losing the person who in practice was still mainly responsible for looking after the children, whereas a woman who lost her husband was losing the person who still predominantly provided for the family in financial terms. Therefore, it could still reasonably be considered that widowers' needs in terms of support decreased and then disappeared as the children grew up and became more independent, whereas the need to provide widows with a more favourable system did not lapse completely when the youngest child reached the age of majority. It was therefore a question of compensating for the less favourable situation of women on the labour market and the persisting unequal distribution of

household tasks. However, in the Government's submission, strict formal equality of the conditions for entitlement to widowers' and widows' pensions would be difficult to reconcile with Article 14 of the Convention.

92. As regards the applicant's situation in the present case, the Government observed that he had worked up until his wife's death, that is, until the age of 40. In subsequently choosing to devote himself entirely to looking after his young children, he must have known that payment of his widower's pension would be terminated when his younger daughter reached the age of majority. It had not been unreasonable to expect him to take steps to return to employment, even on a part-time basis, once his children became more independent. However, the applicant had not indicated any specific steps he had taken to that end or any practical difficulties he might have encountered. The Government further emphasised that the applicant had reached the age of 65 in April 2018, which was the standard retirement age for men in Switzerland, so that he was now eligible for an old-age pension.

## B. The Court's assessment

### *1. General principles*

93. The Court reiterates that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and the Protocols thereto. According to the Court's settled case-law, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or relevantly similar situations. Such a difference of treatment is 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 (see, among many other authorities, *Biao v. Denmark* [GC], no. 38590/10, § 90, 24 May 2016, and *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 64, 24 January 2017). In other words, the notion of discrimination generally includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013).

94. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that the difference was justified (see *Biao*, § 92, and *Khamtokhu and Aksenchik*, § 65, both cited above).

95. The advancement of gender equality is today a major goal in the member States of the Council of Europe (see *Konstantin Markin*, cited above, § 127, and *Ünal Tekeli v. Turkey*, no. 29865/96, § 59, ECHR 2004-X). The

Court has repeatedly held that differences based exclusively on sex require "very weighty reasons", "particularly serious reasons" or, as it is sometimes said, "particularly weighty and convincing reasons" by way of justification (see the judgment in *Stec and Others*, § 52; *Vallianatos and Others*, § 77; and *Konstantin Markin*, § 127, all cited above). In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex (see *Konstantin Markin*, cited above, §§ 126-27; *X and Others v. Austria* [GC], no. 19010/07, § 99, ECHR 2013; and *Khamtokhu and Aksenchik*, cited above, §§ 77-78). For example, States cannot impose traditions deriving from the idea that the man plays a predominant role and the woman a secondary role in the family (see *Ünal Tekeli*, cited above, § 63).

96. It follows that although the Contracting States must be afforded a margin of appreciation in deciding on the timing of the introduction of legislative changes and in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment, where a difference in treatment is based on sex the State's margin of appreciation is narrow (see *X and Others v. Austria*, § 99, and *Vallianatos and Others*, § 77, both cited above).

97. Furthermore, while the Convention places no restrictions on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme, if 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 the judgment in *Stec and Others*, § 53, and *Konstantin Markin*, § 130, both cited above).

*2. Application of those principles in the present case*

**(a) Whether there was a ground of discrimination prohibited by Article 14**

98. The applicant submitted that he had suffered discrimination as compared with widows on account of the termination of his widower's pension when his younger daughter had reached the age of majority. He argued in that connection that a widow in the same situation would not have lost her pension entitlement. In view of the foregoing considerations, the applicant can indeed claim to have been the victim of discrimination on grounds of "sex" within the meaning of Article 14 of the Convention.

**(b) Whether there was a difference in the treatment of persons in analogous or relevantly similar situations**

99. The Court observes that when he became a widower in August 1994, the applicant stopped working in order to look after his children. Having received a widower's pension since its introduction in 1997, he lost his entitlement to that benefit when his younger daughter reached the age of 18.

At that time the applicant was 57 years old; he was thus not yet eligible for an old-age pension and, in his submission, was no longer able to find a job.

100. The Court notes that the termination of the applicant's entitlement to a widower's pension was based on section 24(2) of the Federal Law on old-age and survivors' insurance, which, in the case of widowers alone, ends that entitlement at the time when the youngest child reaches the age of majority. Widows, meanwhile, retain their entitlement to a survivor's pension even after their youngest child has reached the age of majority.

101. As a result, the applicant stopped receiving the widower's pension simply because he was a man. In other respects he was in an analogous situation to a woman, and it has not been argued that he did not satisfy any other statutory condition for entitlement to the benefit in question.

102. Although he was in an analogous situation in terms of his subsistence needs, the applicant was not treated in the same way as a woman/widow. He was therefore subjected to unequal treatment on account of the termination of his widower's pension.

103. It remains to be determined whether this difference in the treatment of widows and widowers had an objective and reasonable justification for the purposes of Article 14 of the Convention.

#### (c) Whether the difference in treatment was objectively and reasonably justified

104. The Court is mindful of the fact that the present case concerns the field of social welfare, which constitutes a complex system in which a balance must be preserved, and that, accordingly, a wide margin is usually allowed to the State when it comes to general measures of economic or social strategy (see the judgment in *Stec and Others*, cited above, § 52). In this context, the Court has already accepted that any adjustments of pension schemes must be carried out in a gradual, cautious and measured manner, since any other approach could endanger social peace, the foreseeability of the pension system and legal certainty (see *Andrle*, cited above, § 51).

105. It reiterates, however, that very weighty reasons would have to be put forward before it could regard a difference in treatment based on the ground of sex as compatible with the Convention, and that the margin of appreciation afforded to States in justifying such a difference is narrow (see paragraphs 95-96 above).

106. In the present case, the Court notes that in justifying the difference in the treatment of women and men regarding entitlement to a survivor's pension, the Government argued that gender equality had not yet been entirely achieved in practice as far as involvement in paid employment and the distribution of roles within the couple were concerned. They contended that it was still justifiable to rely on the presumption that the husband provided for the financial maintenance of the wife, particularly where she had children, and thus to afford a higher level of protection to widows than to

widowers. The difference in treatment in issue was therefore based not on gender stereotyping but on social reality (see paragraph 91 above).

107. For their part, while the Government have provided statistics relating to the percentage of men and women – with children under the age of 15 – working full-time and part-time, no information has been provided on the percentage of widows or widowers who have successfully returned to the employment market after many years of absence once their children have reached that age or the age of majority. The absence of relevant information is noticeable given repeated attempts to reform the system of widows' and widowers' pensions from 2000 onwards and the findings of the Federal Supreme Court in a judgment dating from 2012 in the applicant's case (see also paragraphs 111-113 below).

108. In this connection, the Court observes that in *Petrovic* (cited above, § 40), and subsequently in *Konstantin Markin* (cited above, § 140), it noted that contemporary European societies had moved towards a more equal distribution of responsibility between men and women for the upbringing of their children and that there was increasing recognition of the role of men in caring for young children. It concluded from this that a general and automatic restriction applied to a group of people on the basis of their sex, irrespective of their personal situation, fell outside any "acceptable margin of appreciation, however wide that margin might be", and was therefore "incompatible with Article 14" (ibid., § 148).

109. It should also be emphasised that the advancement of gender equality remains a major goal in the member States of the Council of Europe (see paragraph 95 above). This is reflected in instruments such as Recommendation R (85) 2 of 5 February 1985 on legal protection against sex discrimination, adopted by the Committee of Ministers on 5 February 1985, which calls for men and women to be guaranteed equal treatment with regard to access to official social security and pension systems and with regard to the benefits paid by such systems (see paragraph 29 above).

110. The Court accordingly reaffirms that references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex, whether in favour of women or men. It follows that the Government cannot rely on the presumption that the husband supports the wife financially (the "male breadwinner" concept) in order to justify a difference in treatment that puts widowers at a disadvantage in relation to widows.

111. Moreover, while accepting that the field of social welfare is among those in which States must be afforded a margin of appreciation in deciding on the timing of the introduction of legislative changes, the Court observes that the Swiss government acknowledged in 1997 that women were increasingly often in gainful employment and that protection was necessary for men who devoted themselves to carrying out household tasks and bringing up children. It appears, however, that complete harmonisation of the

eligibility conditions for widows' and widowers' pensions was thwarted at the time by financial constraints and by criticism stressing the difficulties faced by "older" widows in returning to employment (see paragraph 22 above). Other attempts by the government to reform the system of survivors' pensions from 2000 onwards, driven by the view that the existing system was no longer suited to the contemporary context and was at variance with the principle of gender equality, were unsuccessful (see paragraphs 23-28 above).

112. In this connection, the Court attaches fundamental importance to the considerations set out in the present case by the Federal Supreme Court (see paragraph 17 above). In its judgment of 4 May 2012, the court in question observed that the legislature had been aware, at the time the widower's pension had been introduced, that the relevant rules established an unacceptable distinction on grounds of sex, which was contrary to the Constitution. By applying different conditions for entitlement to the pension according to whether the person concerned was a widow or a widower, the legislature had made a distinction on the basis of sex which was not necessary for either biological or functional reasons. The Federal Supreme Court also drew attention to the message issued by the Federal Council to Parliament at the time of the eleventh revision of the OASI system in 2000 (see paragraph 15 above), in which it had emphasised that the rule that widowers were entitled to a pension only if they had children under the age of 18 was contrary to the principle of gender equality and should therefore be adjusted.

113. In the Court's view, the above-mentioned attempted reforms and the assessment of the impugned legislation by the country's highest court, the Federal Supreme Court, show that the old "factual inequalities" between men and women have become less marked in Swiss society. Accordingly, the considerations and assumptions on which the rules governing survivors' pensions had been based over the previous decades are no longer capable of justifying differences on grounds of sex. The Federal Supreme Court's judgment even indicates that the rules in question are in breach of the principle of gender equality enshrined in Article 8 § 3 of the Swiss Constitution. The Court would add that in its view, the relevant legislation contributes rather to perpetuating prejudices and stereotypes regarding the nature or role of women in society and is disadvantageous both to women's careers and to men's family life (see *Konstantin Markin*, cited above, § 141). In this connection, it should be reiterated that Article 2 of the CEDAW (see paragraph 30 above) requires the States Parties, among other things, to ensure, through law and other appropriate means, the practical realisation of the principle of the equality of men and women and to establish legal protection of the rights of women on an equal basis with men.

114. Turning again to the present case, the Court observes that after his wife's death, the applicant devoted himself entirely to looking after, bringing up and caring for his daughters and gave up his job. He was 57 years old when

payment of the pension ceased, and had not been in gainful employment for over sixteen years. In this regard, the Grand Chamber shares the Chamber's view (see paragraph 75 of the Chamber judgment) that there is no reason to believe that the applicant, at that age and following a lengthy absence from the labour market, would have had less difficulty in returning to employment than a woman in a similar situation, or that the termination of the pension would have had less impact on him than on a widow in comparable circumstances.

115. Having regard to the foregoing, and to the narrow margin of appreciation enjoyed by the respondent State in the present case, the Court considers that the Government have not shown that there were very strong reasons or "particularly weighty and convincing reasons" justifying the difference in treatment on grounds of sex complained of by the applicant. It accordingly finds that the unequal treatment to which the applicant was subjected cannot be said to have been reasonably and objectively justified.

116. The Court therefore concludes that there has been a violation of Article 14 of the Convention read in conjunction with Article 8.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

117. 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."

### A. Damage

#### *1. Pecuniary damage*

118. The applicant claimed the sum of 189,355 Swiss francs (CHF) in respect of the pecuniary damage he had sustained as a result of the termination of the widower's pension and supplementary benefits.

119. The Government submitted that, should the need arise, the domestic courts would be in a better position than the Court to make a precise assessment of the pecuniary damage sustained by the applicant. They pointed out, in particular, that he could bring a claim for compensation in the context of an application for review of the Federal Supreme Court's judgment of 4 May 2012.

120. The Court considers that there is a direct causal link between the violation found and the pecuniary damage resulting from the non-payment of the widower's pension to the applicant as of 1 December 2010. It agrees with the Government that the domestic courts are in a better position than the Court to make a precise assessment of the damage in question, bearing in mind in particular that the amount of a pension may vary from one year to the next

(see, *mutatis mutandis*, in relation to a disability benefit, *Di Trizio*, cited above, § 120). In addition, regard should be had to the subsidiary nature of the mechanism under Article 41, which provides that the Court is to afford just satisfaction to the injured party if the internal law of the respondent State allows only partial reparation to be made for the consequences of a violation of the Convention.

121. That said, although the respondent State generally remains free to choose, subject to monitoring by the Committee of Ministers, the means by which it will discharge its obligations under Article 46 § 1 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 88, ECHR 2009), the Court has nevertheless stated on many occasions that a retrial or the reopening of the case, if requested by the applicant, represents in principle an appropriate way of redressing the violation (see, among other authorities, *Di Trizio*, cited above, § 120; *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; and *Claes and Others v. Belgium*, nos. 46825/99 and 6 others, § 53, 2 June 2005).

122. In the present case, the Court shares the Government's view that there is nothing to prevent the applicant from submitting a claim for compensation in the context of an application for review of the Federal Supreme Court judgment which he has challenged before the Court. Since such a possibility is explicitly provided for in section 122 of the Federal Supreme Court Act of 17 June 2005 and there is no indication that that remedy is illusory, the Court considers that there is no need to make any award in respect of pecuniary damage.

*2. Non-pecuniary damage*

123. In addition, the applicant claimed the sum of CHF 18,935.50 in respect of the non-pecuniary damage sustained as a result of his lack of contact with his daughters following the termination of his widower's pension, and the need for him to have recourse to welfare assistance.

124. The Government submitted that there was no causal link between any discrimination on grounds of sex and the non-pecuniary damage alleged. Consequently, they urged the Court to reject the applicant's claims under that head and to conclude that the finding of a violation would in itself constitute sufficient satisfaction.

125. The Court considers that the applicant sustained non-pecuniary damage owing to the authorities' refusal to grant him a widower's pension as of 1 December 2010. Making its assessment on an equitable basis as required by Article 41, it finds it appropriate to award the applicant the sum of 5,000 euros (EUR) under this head.

## B. Costs and expenses

126. The applicant firstly claimed CHF 3,300 in respect of court fees incurred at domestic level, CHF 350 for the lodging of the application with the Court, and CHF 7,216.45 in respect of the observations submitted by his lawyer before the Chamber.

With regard to the proceedings before the Grand Chamber, the applicant claimed a total sum of CHF 26,182.20 to cover legal representation, translation costs and other expenses. In support of his claim, he submitted an invoice issued on 8 June 2021 by his lawyer Ms de Weck, setting out the details of thirty-seven hours and twenty minutes' legal work at a reduced hourly rate of CHF 250 (amounting to CHF 9,300 in total), plus six hours for a return trip to Strasbourg billed at CHF 1,200, and CHF 255 for the cost of the journey, making an overall total of CHF 11,583.15 for Ms de Weck, inclusive of value-added tax. The expenses for his principal lawyer, Mr Luginbühl, amounted to CHF 14,598.05, although no invoices or documents were submitted in support of that claim.

In respect of his own travel expenses to attend the Grand Chamber hearing, the applicant claimed CHF 448.40, without providing any supporting documents.

127. The Government stated that they were prepared to accept the applicant's claims in respect of the costs incurred before the domestic courts and those associated with lodging the application, and also the sum of EUR 3,000 awarded by the Chamber for the observations submitted to it.

However, with regard to the costs and expenses incurred before the Grand Chamber, the Government submitted that the costs and legal fees in respect of the applicant's two representatives were manifestly excessive (relying on *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 160, ECHR 2010). They noted in addition that the fees for his principal representative had not been substantiated by supporting documents as required by Rule 60 § 2 of the Rules of Court. The Government therefore submitted that an award of CHF 9,000 would be appropriate to cover all costs and expenses incurred before the Grand Chamber.

128. The Court reiterates that under Article 41 of the Convention, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In accordance with Rule 60 § 2, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part (see, for example, *A, B and C v. Ireland* [GC], no. 25579/05, § 281, ECHR 2010, and *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 234, 10 September 2019).

In the present case, having regard to the documents in its possession and to its case-law, the Court considers it reasonable to award the applicant the sum of EUR 6,500 in respect of the costs incurred before the domestic courts,

the lodging of the application and the observations submitted before the Chamber.

With regard to the proceedings before the Grand Chamber, the Court notes that the applicant did not produce any documents showing that he had paid or was under an obligation to pay all the fees he claimed to have incurred in respect of legal representation, translation and other matters. In the absence of such documents, the Court finds no basis on which to accept that certain costs and expenses claimed by the applicant have actually been incurred. Having regard to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant only part of the sums claimed in respect of lawyers' fees before the Grand Chamber, namely EUR 10,000.

The Court therefore awards the applicant the total sum of EUR 16,500 in respect of costs and expenses.

### C. Default interest

129. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT

1. *Dismisses*, by twelve votes to five, the Government's preliminary objection that the applicant's complaint does not fall within the ambit of Article 8 of the Convention;

2. *Holds*, by twelve votes to five, that there has been a violation of Article 14 read in conjunction with Article 8 of the Convention;

3. *Holds*, by twelve votes to five,
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 16,500 (sixteen thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Søren Prebensen | Robert Spano |
| Deputy to the Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Seibert-Fohr;
(b) concurring opinion of Judge Zünd;
(c) joint dissenting opinion of Judges Kjølbro, Kucsko-Stadlmayer, Mourou-Vikström, Koskelo and Roosma.

R.S.
S.C.P.

# CONCURRING OPINION OF JUDGE SEIBERT-FOHR

## I. Introduction: Non-discrimination in the field of social security

1. I fully agree with the majority's finding of a violation of Article 14 of the Convention read in conjunction with Article 8. I write separately to further clarify the reasons leading to this conclusion and to refute arguments which may be raised against that finding. For this purpose, I will clarify the elements which are relevant for delimiting the ambit of Article 8 in the field of social security and further elaborate on the lack of objective and reasonable justification for the difference in treatment in the present case.

## II. The relevant elements for delimiting the ambit of Article 8

### *A. The notion of ambit*

2. According to the Court's settled case-law, the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 63, ECHR 2010). It extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee, applying also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide. It is therefore sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 39, ECHR 2005-X, and *Andrejeva v. Latvia* [GC], no. 55707/00, § 74, ECHR 2009). Article 14 of the Convention is pertinent if "the subject matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed ...", or if the contested measures are "linked to the exercise of a right guaranteed ..." (see *Konstantin Markin v. Russia* ([GC], no. 30078/06, § 129, ECHR 2012).

### *B. No presumed or hypothetical link to family life*

3. When it comes to establishing this link, I fully agree with the majority in rejecting a legal presumption to the effect that in providing a socio-economic benefit, such as in the present case, a State is displaying its support and respect for family life (see paragraph 69 of the present judgment). Nor should a hypothetical causal link be accepted if a benefit is "liable to affect the way in which family life is organised" (ibid.). If any effect, however tenuous, of a social welfare benefit on private or family life were to suffice, there would be hardly any financial benefit left that would not fall within the ambit of Article 8 (see paragraph 67 of the present judgment).

### *C. The need for a close link*

4. What is needed for the facts of the case to fall within the ambit of Article 8 is a close link between the provision of the welfare benefit and the enjoyment of family life (see paragraph 71 of the present judgment), "close" meaning substantively close and close in terms of direct effect. Such a close link can be established if a financial benefit enables the beneficiary to exercise the right to family life (see *Konstantin Markin*, cited above, § 130). Whereas States are free to decide how to promote family life, they are prevented from excluding individuals on discriminatory grounds once they provide financial aid to families (compare *Fábián v. Hungary* [GC], no. 78117/13, § 112, 5 September 2017; *Biao v. Denmark* [GC], no. 38590/10, § 88, 24 May 2016; *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, § 158, 26 April 2016; *Carson and Others*, cited above, § 63; *E.B. v. France* [GC], no. 43546/02, § 48, 22 January 2008; *X and Others v. Austria* [GC], no. 19010/07, § 135, ECHR 2013; *Genovese v. Malta*, no. 53124/09, § 32, 11 October 2011; and *Beeckman and Others v. Belgium* (dec.), no. 34952/07, § 19, 18 September 2018).

#### 1. Legislative intent is not decisive

5. Whereas a legislative intent to facilitate or improve family life would be a significant indicator for a close link to the organisation of family life, the latter can also be established by other relevant factors which demonstrate that a financial benefit *necessarily affects the way in which family life is organised* (for this notion see *Konstantin Markin*, cited above, § 130). Thus, the aim of the benefit is one amongst several elements to be examined as a whole, which also include the criteria for awarding, calculating and terminating the benefit as set forth in the relevant statutory provisions; the effects on the way in which family life is organised, as envisaged by the legislation; and the practical repercussions of the benefit (see paragraph 72 of the present judgment). To limit the applicability of Article 14 only to those welfare benefits which reflect a State's intention to facilitate or improve family life would be prone to inviting legislators to provide reasons for social benefits that were unrelated to any of the rights protected under the Convention in an effort to dispense with the applicability of Article 14. Moreover, it is not the Court's role to second-guess legislative intent.

6. This is also evidenced by the Court's judgment in *Konstantin Markin* (cited above), where the issue of intent was not taken into account when the Court determined the applicability of Article 14 read in conjunction with Article 8 (ibid.; compare §§ 129-30 in respect of applicability with § 132, which relates to the merits). The judgment in the present case, which affirms the standard set out in *Konstantin Markin* (see paragraph 70 of the present judgment with reference to *Konstantin Markin*, cited above, §§ 129-30), is thus not to be read as providing for a cumulative test which requires

legislative intent *plus* a necessary effect. Paragraph 72 clarifies that the aim of the benefit is but one of the elements to be considered in assessing whether the facts of the case fall within the ambit of Article 8 (see also paragraph 73 of the present judgment). What is crucial are the nature and the direct effect of the benefit paid.

**2. The nature and effect of the welfare benefit**

*(a) Substantively closely related to and with a direct effect on family life*

7. What is decisive for the determination of whether an allowance necessarily affects the way in which family life is organised is the question of whether an allowance is substantively closely related to (for example, in terms of the conditions for entitlement to the allowance) and has a direct, that is, a close causal, effect on family life. This is a factual question which is not limited to legislative intent (see paragraphs 74-76 of the present judgment). For this purpose, more is needed than indirect factual effects (but see *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016, and *Belli and Arquier-Martinez v. Switzerland*, no. 65550/13, 11 December 2018, which had proceeded from the tenuous notion of "liable to affect" which the Court overrules in paragraph 69 of the present judgment). A regulatory effect which is evidence of the close substantive connection between the welfare benefit and family life can be established on the basis of the statutory criteria for awarding, calculating and terminating the benefit, which are indicative of whether a benefit objectively serves to facilitate family life (see paragraphs 74-77 of the present judgment), whereas a direct effect is to be determined on the basis of the effects on the organisation of family life, including those envisaged by the legislation and the practical repercussions of the benefit, given the applicant's individual circumstances and family life throughout the period during which the benefit is paid (see paragraphs 72 and 78-81 of the present judgment).

*(b) Application to the present case*

8. In the present case, the applicant decided to stay at home in order to raise his minor children full-time after his wife had died in an accident in 1994. By doing so, he exercised his right to family life. The pension which he started to receive in 1997 allowed him to continue staying at home while taking the risk of not being able to return to his occupation after a period of sixteen years. The risk materialised as a direct consequence of his decision to stay with his children when his youngest daughter turned 18 years old. While widows in the same position continued to benefit from the widow's pension, he was debarred from the benefit pursuant to section 24(2) of the Federal Law on old-age and survivors' insurance, a provision which explicitly relates only to widowers (see paragraph 20 of the present judgment).

9. This welfare benefit was closely linked to the right to enjoy family life, for the following reasons. The pension was paid only to surviving spouses with children, indicating that its objective was to facilitate family life. The financial support offered a direct incentive and enabled the applicant to stay with his minor children for an extended period of time in order to raise them full-time without the financial need to return to his employment (a comparable situation to that examined in *Konstantin Markin*, cited above, § 130, where the Court found that the provision of a parental leave allowance *enabled* one of the parents to stay at home to look after the children and thus promoted family life and necessarily affected the way in which it was organised). Thus, key aspects of his family life were at least partially organised on the basis of the receipt of the pension (see paragraph 80 of the present judgment). The survivor's pension, therefore, was substantively closely related to family life and helped directly to sustain family life and thus fell within the ambit of Article 8.

10. The fact that the survivor's pension was paid to surviving spouses with children irrespective of whether they stopped working or continued to work after their spouse's death and that the surviving spouses were not asked to give up their occupation and remain at home in order to bring up their children cannot be decisive for determining whether the applicant, who decided to exercise his right to family life, suffered from discrimination. Since the allowance was substantively closely related to and had a direct effect on family life, the applicant was protected against discrimination once he decided to stay at home with his minor children. To disregard the fact that he did so in order to look after his daughters full-time only because he was not required to do so by the law would not only fail to give recognition to an autonomous decision that is protected under Article 8 but would also fail to understand the difficult situation that the family experienced after the death of the mother. The fact that the applicant took the risk of not being able to return to the job market of his own motion when his children were small can thus hardly be decisive for the applicability of Article 14.

## III. Article 14: No objective and reasonable justification

11. Given the applicability of Article 14 in the present case, the distinction made on grounds of sex in section 24(2) of the Federal Law on old-age and survivors' insurance is clearly not justifiable on objective and reasonable grounds. This was most aptly explained by the Federal Supreme Court (see paragraph 17 of the present judgment). According to its judgment of 4 May 2012, the provisions concerning the right to a widower's pension were based on the idea that it was the husband who provided for his wife's needs, particularly if there were children. The court recognised that gender-neutral regulations would not be based on sex but on whether a particular individual had lost the person who provided for him or her (ibid.). However, during the

tenth revision of the old-age and survivors' insurance system the legislature had opted for the regulations in issue, while being aware that they established an unacceptable distinction on grounds of sex (ibid.). The distinction was neither necessary for either biological or functional reasons.

12. The Government's argument that gender equality had not yet been entirely achieved in practice as far as involvement in paid employment was concerned (see paragraph 91 of the present judgment) cannot serve as a justification for a blanket *de jure* distinction between widowers and widows with respect to survivor's pensions without taking into account their needs, namely their ability to return to the job market. If such factual disparities within the population at large and presumptions of this kind could justify distinctions between survivors with children based on their sex irrespective of real factual needs, this would be tantamount to reinforcing inequalities and stereotypes in contravention of Article 2 (a) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in accordance with which States Parties undertake to embody the principle of equality of men and women in their legislation and to ensure through law the practical realisation of this principle (see paragraph 30 of the present judgment). The United Nations Human Rights Committee found as long ago as 1987 that a regulation based on the breadwinner concept, placing one sex at a disadvantage compared to the other, was not reasonable und thus not justified (see *Zwaan de Vries v. the Netherlands*, UN Doc. CCPR/C/29/D/182/1984, § 14). The same applies to the widower's pension which was introduced ten years later in the respondent State.

13. It is for these reasons that I fully agree with the majority's finding of a violation of Article 14 of the Convention read in conjunction with Article 8 in the present case.

# CONCURRING OPINION OF JUDGE ZÜND

*(Translation)*

1. I agree with the present judgment, which confirms and refines the verdict reached by the Chamber. The Court rightly finds that the applicant's complaint of discrimination falls within the ambit of Article 8 of the Convention and that Article 14 read in conjunction with Article 8 has been breached in the present case. I am writing separately because I consider it appropriate to clarify certain points in the light of Swiss law.

2. Switzerland is, besides the Principality of Monaco, the only member State of the Council of Europe not to have ratified Additional Protocol No. 1 to the Convention. Why is this? Switzerland ratified the Convention in 1974. It opted not to ratify the Additional Protocol on that occasion. The Federal Council (that is, the government) justified its decision by arguing that there were (still) too many divergences between Swiss law as applicable at the time and the Protocol. Such divergences related to the question of the right to free elections by secret ballot (voting rights for women had yet to be introduced in all cantons, and the elections held by a show of hands in some cantons raised issues as to voting secrecy), and the right to education (*Feuille fédérale* 1972 I p. 998, 1974 I p. 1021). At that time, nevertheless, the right to protection of property for the purposes of Article 1 of the Protocol did not constitute an obstacle to accession to the Protocol. It was only from 2003 onwards that the Federal Council, in its reports to Parliament on Switzerland and the Council of Europe conventions, found that accession to Protocol No. 1 was hindered by the scope that the Court had conferred on the protection of property "by extending" (as the Federal Council put it) that protection to social welfare benefits.

3. The Court observes that in the vast majority of cases in which it has ruled on alleged discrimination in the sphere of entitlement to social welfare benefits, it has concentrated its analysis on Article 1 of Protocol No. 1 (see paragraphs 54-56 of the judgment), which admittedly would appear on the face of it to be the most "natural" safeguard in relation to such benefits. While Article 8 does not guarantee the right to a social welfare benefit, a State may decide to go further in accordance with Article 53 of the Convention, but in that case it is bound by Article 14 and cannot take discriminatory measures within the meaning of that Article (see paragraph 61 of the judgment). For Switzerland, which has not ratified Protocol No. 1, it is extremely important to ascertain whether a case falls within the ambit of the protection of property alone or whether it also comes under Article 8. That said, it must be noted that in the field of social welfare benefits, the sphere of protection of the right to protection of property and that of the right to respect for private and family life intersect and overlap (see paragraph 69 of the judgment). In other words, the fact that Switzerland has not ratified Protocol No. 1 does not give rise

either to a broader interpretation of Article 8, or to a narrower interpretation of the protection of family life. Nevertheless, it remains crucial for Switzerland to determine whether or not a welfare benefit falls within the ambit of Article 8. This issue must, however, be assessed independently, and irrespectively, of whether such a benefit would also fall within the ambit of Article 1 of Protocol No. 1. The principle of *lex specialis*, even if it were applicable to those two provisions (which I strongly doubt), is immaterial here, seeing that only one of the provisions in question applies to Switzerland.

4. It is true that all financial benefits may generally have certain repercussions on family life, although – of course – that fact alone is not sufficient for a case to fall within the ambit of Article 8. What is decisive, as the Court notes, is whether a measure seeks to promote family life and necessarily affects the way in which it is organised. In examining whether that is the case, the Court will adopt a holistic approach by taking a number of aspects into account, such as the aim of the benefit, as determined by the Court in the light of the legislation; the criteria for awarding, calculating and terminating the benefit; its effects on the way in which family life is organised, as envisaged by the legislation; and its practical repercussions, given the circumstances of the person concerned (see paragraph 72 of the judgment).

5. In view of those aspects, it seems very clear to me that a pension paid to the surviving member of a married couple with minor children falls within the ambit of the right to protection of family life. The aim of such a benefit is to alleviate the surviving partner's situation, and its impact on the way in which family life is organised is linked precisely to the fact that it offers the surviving partner greater room for manoeuvre in organising family life (see paragraph 77 of the judgment). That being so, in order to avoid any discrimination, a widower's pension should be awarded under the same conditions as a widow's pension. Yet entitlement to the widower's pension ends when the youngest child reaches the age of majority, whereas the widow's pension continues to be paid.

6. In order to execute the present judgment (Articles 1 and 46 of the Convention) and remedy the situation by removing any inequalities in treatment, Switzerland has a number of solutions available, all of which are compatible with the Convention. Firstly, it could consider abolishing the limit applicable to a widower's pension linked to the children reaching the age of majority, and thus bring widowers' pensions into line with widows' pensions. It could also decide to discontinue the widow's pension once the children have reached the age of majority, which would amount to bringing widows' pensions into line with widowers' pensions. An intermediate solution could be to continue awarding the survivor's pension – to men and women alike – after the children have reached the age of majority, until they have completed their studies.

7. It should also be noted that Swiss legislation provides for payment of a widow's pension in another scenario that is very different from the one with which the present case is concerned. The pension in question is paid to widows, even without children, if at the time of their husband's death they had been married for at least five years and were at least 45 years old (see section 24(1) of the Federal Law of 20 December 1946 on old-age and survivors' insurance, quoted in paragraph 20 of the judgment); there is no equivalent provision for widowers. In my view, according to the criteria adopted by the Court in the present case, Article 8 would not be applicable to this benefit since it does not seek to facilitate the organisation of family life, which, moreover, does not depend on the pension.

8. Lastly, mention should be made of the fact that Swiss law entails another significant difference between men and women in the field of old-age pensions. The retirement age is currently 65 years for men, but 64 for women. I consider that this difference does not come under Article 8 either, and that it probably only falls within the ambit of Article 1 of Protocol No. 1. On 25 September 2022 the Swiss people will be asked to decide in a referendum whether the retirement age for women should be brought into line with that for men[1]. Irrespective of the result of the vote, the Swiss legislation remains compatible with the Convention since, firstly, the pension in question does not fall within the ambit of Article 8 and, secondly, Protocol No. 1 is not applicable to Switzerland, and nor, indeed, is Article 1 of Protocol No. 12 – which provides for a general prohibition of discrimination – as Switzerland has likewise decided not to ratify that Protocol.

[1] The Swiss people accepted the proposed amendment by a narrow majority. The text of this opinion was written before the referendum of 25 September.

# JOINT DISSENTING OPINION OF JUDGES KJØLBRO, KUCSKO-STADLMAYER, MOUROU-VIKSTRÖM, KOSKELO AND ROOSMA

1. We have regrettably not been able to agree with the majority in this case. The core issue concerns the applicability of Article 14 in conjunction with Article 8 to the facts of the case, more specifically the question of the "ambit" of Article 8 in matters relating to social welfare benefits.

2. The applicant's complaint arises from the fact that the survivor's pension granted to him was discontinued when his children reached the age of majority whereas, in otherwise similar circumstances, a widow would have remained entitled to such a pension. As a matter of policy, such a difference in treatment based on sex may indeed be considered outdated. It is, however, an entirely separate question whether, as a matter of Convention law, such a matter of social welfare policy should be considered to fall within the Court's supervision under Article 14 in conjunction with Article 8. This crucial issue is one with wide-ranging implications, and the apparently facile conclusion on the specific point of policy at hand should not blur the underlying issue that goes to the scope of the Court's powers of supervision. In this regard, we think that several reasons would have called for judicial restraint on the part of this Court.

3. The line taken by the majority significantly expands the applicability of Article 8 – at least when invoked together with Article 14 – in the field of social welfare benefits. This is the main aspect, and our primary concern, in the case.

4. It is well known that the Court has previously adopted a very wide interpretation of the notion of "possessions" in the context of Article 1 of Protocol No. 1. This has been extended to also cover various claims under domestic law relating to social welfare benefits. Indeed, the issue in the present case has arisen because Switzerland has not ratified Protocol No. 1 and is therefore not bound by it. From the Government's submissions it transpires that the decision not to ratify Protocol No. 1 was taken essentially with a view to *avoiding* the application of the Convention in the field of social welfare claims. The decision taken by a member State of the Council of Europe not to accede to Protocol No. 1 to the Convention is a sovereign political decision which might be aimed at preserving national regulations and ensuring an overall balance in the granting of certain benefits and advantages of various kinds. To the extent that Article 8 is extended to cover matters relating to pecuniary entitlements which would normally fall within the protection guaranteed under Article 1 of Protocol No. 1, such an expansion of the ambit of Article 8 could be perceived as a way of circumventing the will of a State not to be bound by a specific international obligation and could thereby harm confidence in the Convention system. Paradoxically, however, the above situation has now prompted the Court to

proceed to expand the applicability of Article 8 in matters of social welfare – with an effect on all Contracting States. We find such a course of action dubious in principle.

5. As a result, the ensuing legal implications and novel uncertainties will from now on affect the entire Convention system throughout all the jurisdictions within its geographical sphere. For instance, it is to be noted that the starting-points under Article 1 of Protocol No. 1 and Article 8 are different. Whereas the former comprehensively protects the right to property, including acquired entitlements, *per se* – or, in conjunction with Article 14, the obligation to provide such entitlements without discrimination – Article 8 protects the right to respect for family life, which will place the focus on the manner in which various benefits affect that aspect of an individual's life. The methodologies of application in terms of general principles under the two provisions are distinct. A parallel application of both provisions in the field of social welfare benefits, whether taken alone or in conjunction with Article 14, thus becomes a source of many legal questions and uncertainties.

6. In this case, the Grand Chamber had the opportunity to clarify matters in a limitative sense, but the majority have instead chosen to broaden the applicability of Article 8 in this context. While the judgment purports to rely on, and to maintain, criteria already found in previous case-law, the real impact of the evolution in the detailed reasoning and the conclusion reached is not to contain but to expand the reach of Article 8 in the field of social welfare benefits. This is revealed by several aspects in the reasoning.

7. Firstly, the majority build upon the distinction made between the "scope" of Article 8 when taken alone and its "ambit", which is wider, when taken in conjunction with Article 14 (see paragraph 62 of the judgment). It is indeed well established that the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention requires each State to guarantee. Article 14 also applies to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide (see, *inter alia*, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 40, ECHR 2005-X, and *E.B. v. France* [GC], no. 43546/02, § 48, 22 January 2008). Thus, while there is no positive obligation arising under a substantive Convention provision, such as Article 1 of Protocol No. 1 or Article 8, imposing a duty on the Contracting States to provide social welfare benefits, and while the discontinuation of such a benefit in accordance with its original terms and conditions – as in the present case – would entail no interference with the rights protected under those provisions, the prohibition of discrimination may nonetheless be applicable in the context of such benefits if the right in question may be considered to fall "within the general scope" of a Convention Article.

8. Even if the distinction between the notions of "scope" and "ambit" is no novelty in the case-law, this distinction does not in itself mandate, or justify, any expansion of either aspect of Article 8 to matters concerning social welfare benefits. On the contrary, the inherently multifarious nature of notions such as private or family life should not be taken by the Court as a licence to occupy any subject matter that might somehow be subsumed thereunder but rather as a call for reflection as to the appropriate tasks of an international court of human rights.

9. Secondly, the judgment defines the ambit of the right to respect for family life in a problematic way. According to the majority, for Article 14 to be applicable in the present context, that is to say, for the facts of the case to fall within the "ambit" of Article 8, "the subject matter of the alleged disadvantage must constitute one of the modalities of exercising the right to respect for family life as guaranteed by Article 8" (see paragraph 72 of the judgment). It is difficult to grasp the meaning of this phrase. The "subject matter of the disadvantage" suffered by the applicant was not an inability to receive a survivor's pension when his children were still minors, something he was entitled to under domestic law, but the inability to receive a survivor's pension once his children had reached adulthood. In general, the Court has held that there is no "family life" within the meaning of Article 8 between parents and adult children unless additional elements of dependence exist (see *Slivenko v. Latvia* [GC], no. 48321/99, § 97, ECHR 2003-X; *A.W. Khan v. the United Kingdom*, no. 47486/06, § 32, 12 January 2010; *Narjis v. Italy*, no. 57433/15, § 37, 14 February 2019; and *Khan v. Denmark*, no. 26957/19, §§ 58 and 80, 12 January 2021). No such elements of dependence have been submitted in the present case. The applicant has complained that he could no longer afford to spend on leisure or gifts for his adult children, but such circumstances can hardly be characterised as elements of dependence in the sense of the Court's case-law. It is therefore not readily understandable in what sense the "subject matter of the disadvantage" could "constitute one of the modalities" of the "exercise of family life" as protected under Article 8, unless the idea really is to convert into a legal criterion the obvious fact that the level of available income has a bearing on how an individual may lead his or her life, including within the family circle. In any event, the formulation cited above provides no real guidance on what might be considered to fall within the "ambit" and what might remain outside.

10. Moreover, that obscure phrase appears to stand in contradiction with the set of criteria mentioned subsequently (see paragraph 72 of the judgment). According to these, the "ambit" encompasses "measures [which] seek to promote family life and necessarily affect the way in which it is organised". Here, focus is shifted from the point of the "disadvantage" complained of to the general nature of the welfare benefit in question.

11. This criterion, however, also remains very vague. The reference to the aim of "promoting family life" excludes various subsidies which are not

payable to families but is otherwise quite broad and indefinite. The criterion of "necessarily affecting" the organisation of family life, too, is potentially very wide-ranging, as it can easily be argued that the availability of financial support, or its withdrawal, will always "necessarily" affect the manner in which family life may be conducted. If "necessarily" is to be understood as "inevitably", an alternative argument can also be made: for a well-off family a relatively modest financial benefit would have hardly any, let alone a "necessary", effect on the organisation of the family life.

12. It is important to note that while the test of "necessarily affecting the manner in which family life is organised" was relied on in the case of *Konstantin Markin v. Russia* ([GC], no. 30078/06, § 130, ECHR 2012), the context there was different from that of the present case. In *Konstantin Markin*, the necessary impact arose from the very conditions of the benefit at issue, namely the right to parental leave and a financial allowance, tied to absence from service during the period of primary care for an infant. By contrast, in the present case the majority *expressly disconnect* the notion of "necessary impact" from the terms and conditions of the benefit in question, broadening that criterion to encompass circumstances where the "necessity" of the impact does not stem from the terms and conditions to which the benefit is made subject under domestic law but results from the individual's specific factual situation, including the choices made in the organisation of his life. Thus, although the test is formulated in similar terms, it entails a clear and radical departure from its original version. The substance of the criterion is now very different, and much wider than in the context of *Konstantin Markin*.

13. This expansion of circumstances which may be found to satisfy the test of "necessary impact" is made explicit in paragraph 72 of the judgment, according to which "a range of factors" will be relevant for determining the "nature of the benefit". These will include, in particular, the "aim of the benefit" – notably not as set out by the domestic legislature but as determined by the Court; the "criteria for awarding, calculating and terminating" the benefit; the "effects on the way in which family life is organised, as envisaged by the legislation"; and, perhaps most remarkably, the "practical repercussions" on the individual's specific circumstances and family life throughout the period during which the benefit is paid.

14. We will return below to the highly problematic features among this "range of factors" set out by the majority. At this stage, we would reiterate in general terms that the novel version of the test originally set out in *Konstantin Markin* has now become, in substance, essentially quite different and much broader.

15. Thirdly, with a view to the expansion of the "ambit" of Article 8, the present case as such is only concerned with "family life" and the question of when matters concerning social benefits may come within the "ambit" of the "family life" aspect of that provision in conjunction with Article 14. There is, however, no convincingly identifiable reason why the expansive

interpretation of the notion of "ambit" in the field of social benefits should remain limited to the "family life" aspect of Article 8 and halt at the boundary to "private life" – a boundary which itself is not always clear-cut. It appears difficult to see on what basis a watershed could be maintained between the two. On the contrary, one may predict that sooner or later the expansive thrust will spill over to assessments directed at the manner in which various social benefits, or their withdrawal, "necessarily affect" the private lives of the individuals concerned.

16. Fourthly, as regards the overall extent of the Court's supervisory powers in the field of social welfare policies and benefits, the interpretation of the "ambit" of Article 8 is not the only factor to consider. The other key factor relates to the scope of Article 14 itself, in particular the interpretation of the grounds for differences in treatment which may engage the application of that provision, whether in conjunction with Article 8 or with another substantive provision such as Article 1 of Protocol No. 1. Although the present case concerns a difference in treatment based on sex, which is one of the protected grounds expressly enumerated in Article 14, it is worth noting the broader repercussions that may follow from the manner in which the reach of that provision is construed. The more the notion of "other status" under Article 14 is extended to cover not only certain fundamental personal or legal characteristics but also various factual circumstances relating to the individual's situation, the wider the combined repercussions will be on the extent of the Court's supervisory role. Whereas some differences in treatment are inherently illicit or dubious depending on the ground relied on, other criteria for making distinctions may be essential elements and key determinants in the definition of various areas of policy, be they economic, fiscal, social, environmental or other. In the field of social welfare policies, for instance, the award of benefits is regularly tied to, and limited by reference to; criteria such as income level, number and age of family members or the like. A transformation of Article 14 from a prohibition of discrimination on certain specific grounds into a general equal treatment clause, capable of being invoked on the grounds of any difference in treatment regardless of the nature of the criterion on which it is made, would produce wide-ranging consequences for the Court's powers of review.

17. Thus, the nebulous interpretation of the questions of "ambit" together with an expansive interpretation of the scope of protection under Article 14 might entail the consequence that the exercise of supervisory powers by the Court would not be subject to any distinct limits whatsoever. We submit that the Court, with the processes and capacities under which it functions, would be institutionally ill-suited for such "all-encompassing" tasks of judicial review relating to domestic policies.

18. In this context, it should be noted that the present judgment addresses the question of the "ambit" of Article 8 in conjunction with Article 14, whereas the question of whether and how measures in the field of social

welfare benefits might engage the application of Article 8 taken alone (the issue of "scope") remains outside the subject matter of this case. In the context of Article 1 of Protocol No. 1, the Court has consistently held that that provision, standing alone, entails no "positive obligations" requiring the Contracting States to make provision for welfare benefits. Where such benefits are awarded, it follows from Article 14 taken in conjunction with Article 1 of Protocol No. 1 that such entitlements must be provided in compliance with Article 14. Even on the assumption that a similar line of interpretation would prevail in the context of Article 8, the extent of the grounds on which Article 14 may be invoked will also have an impact on the extent to which positive obligations relating to social welfare benefits would in effect be capable of arising from the application of that provision.

19. In our view, these are matters of serious concern, not least in the light of the current realities which have already rendered the Court unable to fulfil some of its basic functions in the international enforcement of core human rights. The risk of creating an increasingly dysfunctional Court through the pursuit of overreaching ambitions of substantive omnipotence should not be underestimated.

20. Last but not least, it is inevitable that matters of social welfare policies are at the heart of political and democratic processes at the domestic level. The forms and levels of benefits, the setting of priorities in the face of competing needs and scarcity of resources, as well as the funding arrangements necessary to meet the costs of policies, vary and depend heavily on the prevailing economic capacities and social conditions. These may not only differ greatly between States but may also change over time within a given State. As social welfare benefits consist of claims against the public purse, or other funds raised from the collective of contributors, there is a necessary and tight link between social, economic and fiscal policies. There are complex choices to be made, and they may often be both hard and controversial. It is obvious that the basic battlefields and corrective mechanisms in such matters must remain at the domestic levels of political democracy. Such functions cannot be shifted to the courts. In particular, an international human rights court cannot legitimately place itself at the forefront of disputes relating to social welfare entitlements or turn itself into a final arbiter in the complex matters of income distribution and social rights. Furthermore, many practical difficulties for the Court's assessment will stem from the fact that financial benefits are only one tool used in the complex system of social policies, which may include, among other elements, a range of free or subsidised services and tax benefits. The Court was never intended to function as a standard-setter for these types of policies, nor should it aspire to assume such a role.

21. Against this background, it is particularly striking to note that the respondent State in the present case is one with a prominent tradition of not only representative but also direct democracy. It seems somewhat paradoxical, therefore, that this case should nonetheless become a landmark in the Court's case-law in terms of expanding and enhancing the international judicial supervision of social welfare policies.

22. As a final remark, the manner in which the majority define the parameters for engaging the Court's supervisory power gives rise to some particular concerns. We have noted above that the majority expressly underline that the nature of a given welfare benefit for the purposes of determining whether it comes within the ambit of Article 8 will not be decided on the basis of its aims as set out by the domestic legislature but will depend on the Court's own assessment (see paragraph 72 of the judgment). In the same context, it is made clear that the assessment of the nature of the benefit will not depend on its underlying terms and conditions as set out in domestic law but also on the "practical repercussions" which the enjoyment of the benefit has had on the specific circumstances of the individual and his life. Such an approach is problematic especially with a view to benefits which are not, as a matter of principle, granted according to an assessment of specific individual needs (as in the case of benefits in the form of "last resort" assistance) but which form part of systems of social insurance, such as pensions. In order to achieve uniform treatment of beneficiaries and to ensure the sustainability of the funding of such systems, it is essential that the entitlements are based on predetermined criteria and do not depend on the manner in which an individual may choose to organise his life in reliance on the income derived from the system. It would be quite anomalous to allow beneficiaries to generate, through the intervention of this Court, entitlements based on self-created dependencies on benefits received, contrary to the intentions and conditions as set out in the governing domestic legislation. Moreover, the majority's new, "case-specific" definition of the "ambit" of Article 8 will make it difficult for domestic legislators to determine how to formulate social law in a Convention-compliant manner.

23. The observations above indicate our general concerns with regard to the line taken by the majority and the potential wider implications. The judgment entails a further expansion of the "ambit" of Article 8, going well beyond the position in *Konstantin Markin*. We are not able to endorse such a development towards a further shift in the direction of bringing social rights under the Convention and the jurisdiction of this Court.

24. In the present case, the applicant had been the beneficiary of a survivor's pension. His entitlement to that pension was conditional on his position as the surviving parent of minor children. Neither the receipt of the pension nor its amount were tied to the applicant becoming a full-time career of those children. The decision to quit his job and to fully devote himself to the parenting role during the entire period until the children reached

adulthood was his own. He would have received the survivor's pension regardless of the manner in which the care of the children was organised. The circumstances of this case are therefore decisively different from those in *Konstantin Markin*, where, unlike in the present case, it was accurate to consider that the nature of the measure at issue was such as to "necessarily affect" the manner in which family life was organised.

25. Furthermore, in the present case the applicant knew from the very beginning that the duration of the pension was limited in time and would not continue beyond the point at which both his children had reached the age of majority. We note that the majority place their focus on the constraints under which the applicant took his decisions to leave his job and to remain without employment throughout the period until his children became adults, and the ensuing difficulties he faced (see paragraphs 79 and 81 of the judgment). Implicitly, such an approach suggests that the individual is entitled to rely on the collective of contributors to the welfare system to assume the predictable consequences of his life arrangements, even contrary to the principles on which the system is based. While that may be a respectable ideological position to take, we would not agree that an international judicial body such as the Court may legitimately impose such an ideological approach on the domestic, democratically based institutions whose task it is to set up, maintain and finance the systems of social protection.

26. For the reasons explained above, we consider, contrary to the majority, that the circumstances of the present case should not have been found to fall within the ambit of Article 8. We have voted accordingly.

27. As in our view Article 14 in conjunction with Article 8 is not applicable, we have also voted against the finding of a violation of those provisions. This does not mean that we would endorse the impugned difference in treatment as a matter of policy. It is simply a consequence of our legal view according to which this is not a matter that should fall within this Court's powers of adjudication.