

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

FOURTH SECTION

CASE OF MAREK v. POLAND

(Application no. 54148/09)

JUDGMENT

STRASBOURG

28 January 2014

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



In the case of Marek v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

Ledi Bianku, *President,*
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 7 January 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 54148/09) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Ms Stanisława Marek ("the applicant"), on 24 August 2005.

2. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz, succeeded by Ms J. Chrzanowska, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the ex officio reopening of the social security proceedings concerning her right to an early-retirement pension, which resulted in the quashing of the final decision granting her a right to a pension, was in breach of Article 1 of Protocol No. 1 to the Convention.

4. On 20 May 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1951 and lives in Łańcut.

6. Prior to her early retirement she had been employed for 23 years and had paid her social security contributions to the State. Between October 1992 and November 1997 she received a disability pension.

A. Proceedings concerning the grant and the revocation of an EWK pension

7. On 6 March 2000 the applicant filed an application with the Rzeszów Social Security Board (Zakład Ubezpieczeń Społecznych) to be granted the right to an early-retirement pension for persons raising children who, due to the seriousness of their health condition, required constant care, the so-called "EWK" pension.

8. Along with her application for a pension, the applicant submitted, among other documents concerning her son's health condition, a medical certificate issued by a specialist doctor. The certificate stated that the child (born in 1985) suffered from chronic asthma and that he was in need of his parent's constant care.

9. On 19 April 2000 the Rzeszów Social Security Board issued a decision granting the applicant the right to an early-retirement pension with effect of 1 March 2000.

10. Due to the applicant's employment the Social Security Board initially suspended the payment of the pension until the end of April 2000. The payment started on 1 May 2000.

11. The EWK pension granted to the applicant amounted to 773.89 Polish zlotys (PLN) (approximately EUR 193).

12. The applicant was issued with a pensioner's identity card marked "valid indefinitely" and she continued to receive her pension without interruption until the date of the revocation of the right.

13. On an unspecified date the Rzeszów Social Security Board asked the Main Social Security Board's doctor *(Główny Lekarz Orzecznik)* to inform it whether the applicant's son required the permanent care of a parent. The doctor stated that, on the basis of the medical documents, the child could not be considered as ever having required such care.

14. On 25 April 2003 the Rzeszów Social Security Board issued simultaneously two decisions in respect of the applicant.

15. By virtue of one decision, the payment of the applicant's pension was discontinued with immediate effect. By virtue of the other decision, the Social Security Board revoked the initial decision granting a pension and eventually refused to grant the applicant the right to an early-retirement pension under the scheme provided for by the 1989 Ordinance.

16. The applicant appealed against the respective decisions divesting her of the right to an early-retirement pension. She submitted that she should receive the benefit because her child required constant care, as confirmed by the medical certificate attached to the original application for a pension. Moreover, the applicant alleged that the revocation of her retirement pension was contrary to the principle of vested rights.

17. On 12 May 2004 the Rzeszów Regional Court (*Sąd Okręgowy)* dismissed the applicant's appeal.

18. The applicant appealed against the first-instance judgment.

19. On 6 October 2004 the Rzeszów Court of Appeal dismissed the applicant's further appeal. The domestic court held that the applicant had been rightfully divested of her right to a pension under the scheme provided by the 1989 Ordinance as she had not satisfied the requirement of necessary permanent care.

20. On 24 February 2004 the Supreme Court refused to examine the applicant's cassation appeal. The Supreme Court's decision was served on the applicant's lawyer on 15 March 2005.

B. The applicant's financial situation

21. Following the social security proceedings the applicant was not ordered to return her early-retirement benefits paid by the Social Security Board, despite the revocation of her right to an early-retirement pension.

22. Throughout the whole period of receiving the EWK pension the applicant did not work.

23. On 1 May 2003 the applicant registered her business activity which she continued until 8 November 2005. Between 22 June and 1 August 2005 the activity was suspended.

24. Between 1 February and 31 October 2006 the applicant was employed.

25. The Government submitted that the applicant's gross annual income in 2006 amounted to PLN 8,293 (approx. EUR 262) which constituted 27.90% of the average salary in Poland at the relevant time.

26. On 1 November 2006 the applicant turned 55 and she was granted a right to early retirement. Between 2006 and 2010 the early retirement amounted to PLN 1,150-1,300 (approx. EUR 290-325) which constituted approx. 40% of the average net salary at the relevant time.

27. The Government submitted that "between 2003 and 2005 the applicant was making profits of her business activity", however, they were unable to submit information as regards the amount of the profits.

28. The applicant submitted that her business activity was a small shop in a modest wooden pavilion. She was forced to undertake this activity because of her economic situation after the revocation of her EWK pension. The profits were irregular and very modest. Sometimes she could not afford to pay the taxes and social insurance premiums and had to borrow money to do so. She produced her tax declarations for the years 2003-2009 from which it emerges that from her business activity she earned PLN 3,237.09 (approx. EUR 737) in 2003, PLN 1,404.49 (approx. EUR 312) in 2004 and PLN 912.90 (approx. EUR 234) in 2006. In 2005 her tax declaration showed a loss of PLN 3,751.85 (approx. EUR 938).

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. The legal provisions applicable at the material time and questions of practice are set out in the judgments in the case of *Moskal v. Poland*, no. 10373/05, §§ 31-34, 15 September 2009 and *Antoni Lewandowski v. Poland*, no. 38459/03, §§ 36-43, 2 October 2012).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

30. The applicant complained that divesting her, in the circumstances of the case, of her acquired right to an early-retirement pension amounted to an unjustified deprivation of property. This complaint falls to be examined under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

31. The Court notes that the Government raised several objections to the admissibility of the case. They submitted that the applicant had failed to comply with the six-month rule and that her application constituted an abuse of the right to individual application. They further claimed that the applicant had failed to exhaust domestic remedies because she had failed to contest the final ruling by means of a constitutional complaint.

32. The applicant disagreed with the Government's argument concerning non-compliance with the six-month time-limit. She made no comments as regards the remaining preliminary objections.

33. As regards non-compliance with the six-month rule, the Court has already considered in other EWK cases that the applicants should not be penalised for having tried to file a cassation appeal with the Supreme Court in order to avoid any risk of having their case rejected by the Court for non-exhaustion of domestic remedies (see, for example, *Frączek-Potęga v. Poland*, no. 39430/04, § 55, 4 December 2012). Accordingly, the final decision in the case under consideration was given by the Supreme Court on

24 February 2005, served on the applicant's lawyer on 15 March 2005, whereas the applicant lodged her application with the Court on 24 August 2005. That being so, the Court concludes that the applicant complied with the six-month term laid down in Article 35 § 1 and the Government's objection should therefore be dismissed.

34. The Court further notes that it has already examined identical objections regarding abuse of the right of individual application, non-exhaustion as regards the applicant's failure to lodge a constitutional complaint and dismissed them, in the follow-up cases to *Moskal* (see, for instance, *Lewandowski*, cited above, §§ 45-72 and *Lew* v. Poland, no. 34386/04, §§ 35-62, 4 December 2012). The Court sees no reason to depart from its previous findings.

35. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

36. The applicant submitted that divesting her, in the circumstances of the case, of her acquired right to an early-retirement pension had amounted to an unjustified deprivation of property.

(b) The Government

37. The Government claimed that the interference with the applicant's property rights had been lawful and justified. In particular, divesting the applicant of her right to the early-retirement pension had been provided for by law and was in the general interest. There was also a reasonable relationship of proportionality between the interference and the interests pursued.

2. The Court's assessment

(a) General principles

38. The relevant general principles are set out in the *Moskal* judgment, cited above, paragraphs 49-52. The Court would nevertheless reiterate that any interference by a public authority with the peaceful enjoyment of possessions should be lawful and must pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see *Moskal*, cited above, §§ 49 and 50).

(b) Application of the above principles to the present case

(i) Whether there has been an interference with the applicant's possessions

39. The parties agreed that the decisions of the Rzeszów Social Security Board of 25 April 2003, subsequently validated by two court instances (the regional court and the court of appeal), which deprived the applicant of the right to receive the EWK pension, amounted to an interference with her possessions within the meaning of Article 1 of Protocol No. 1 to the Convention. The Court sees no reason to hold otherwise.

(ii) Lawfulness of the interference and legitimate aim

40. As in the *Moskal* case the Court considers that this interference was provided for by law and pursued a legitimate aim, as required by Article 1 of Protocol No. 1 to the Convention (see *Moskal*, cited above, §§ 56, 57 and 61-63 and also *Iwaszkiewicz v. Poland*, no. 30614/06, §§ 47, 48, 26 July 2011).

(iii) Proportionality

41. In the instant case, a property right was generated by the favorable evaluation of the applicant's dossier attached to the application for a pension, which was lodged in good faith, and by the Social Security Board's recognition of the right (see paragraphs 8-9 above). Before being invalidated the decision of 19 April 2000 had undoubtedly produced effects for the applicant.

42. It must be stressed that the delay with which the authorities reviewed the applicant's dossier was relatively long. The decision of 19 April 2000 was left in force for three years before the authorities became aware of their error. On the other hand, as soon as the error was discovered the decision to discontinue the payment of the benefit was issued relatively quickly and with immediate effect (see paragraphs 13-15 above). Even though the applicant had an opportunity to challenge the Social Security Board's decision of 25 April 2003 in judicial review proceedings, her right to the pension was eventually determined by the courts almost two years later (see paragraphs 17-20 above).

43. In examining the conformity of these events with the Convention, the Court reiterates the particular importance of the principle of good governance. It requires that where an issue pertaining to the general interest is at stake, especially when it affects fundamental human rights, including property rights, the public authorities must act promptly and in an appropriate and above all consistent manner (see *Beyeler v. Italy* [GC], no. 33202/96, § 120, ECHR 2000-I; *Öneryıldız v. Turkey* [GC], no. 48939/99, § 128, ECHR 2004-XII; *Megadat.com S.r.l. v. Moldova*, no. 21151/04, § 72, 8 April 2008; and *Rysovskyy v. Ukraine*, no. 29979/04, § 71, 20 October 2011). It is desirable that public authorities act with the

utmost care, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other such rights. In the present case, the Court considers that having discovered their mistake, the authorities failed in their duty to act speedily and in an appropriate and consistent manner (see *Moskal*, cited above, § 72).

44. Moreover, in the Court's opinion, the fact that the State did not ask the applicant to return the pension which had been unduly paid (see paragraph 21 above) did not mitigate sufficiently the consequences for the applicant flowing from the interference in her case. As a result of the impugned measure, the applicant was faced, without any transitional period enabling her to adjust to the new situation, with the total loss of her early-retirement pension, which constituted her only source of income at that time. Moreover, the Court is aware of the potential risk that, in view of her age and the economic reality in the country, particularly in the undeveloped Podkarpacki region, the applicant might have had considerable difficulty in securing new employment.

It is true that the applicant registered a business activity immediately after the EWK pension had been revoked. The Court notes however that the income generated from this activity was very modest and in the year in which the pension was revoked amounted to approx. EUR 737. In 2004 the applicant's income was even lower, approx. EUR 312 and in 2005 her business generated loss (see paragraph 28 above). The Court notes first that the applicant had no other source of income during the whole period when she was entitled to the EWK pension and the income she had after the revocation could not sufficiently mitigate the consequences of the revocation.

45. In view of the above considerations, the Court does not see any reason to depart from its ruling in the leading case concerning EWK pensions, *Moskal v. Poland*, and finds that in the instant case a fair balance has not been struck between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights and that the burden placed on the applicant was excessive.

46. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 8 OF THE CONVENTION

47. The applicant also alleged that the *ex officio* reopening of the social security proceedings, which had resulted in the quashing of the final decision granting her a right to a pension, was in breach of the principle of legal certainty under Article 6 § 1 of the Convention.

She also complained under Article 8 of the Convention of an interference with her right to respect for her private and family life in that by divesting her of the EWK pension the authorities deprived her of her sole source of income and the financial resources indispensable for her livelihood.

48. The Court notes that these complaints are linked to the one examined above and must therefore likewise be declared admissible.

49. However, having regard to the reasons which led the Court to find a violation of Article 1 of Protocol No. 1 to the Convention, the Court finds that the applicant's complaints under Articles 6 and 8 of the Convention do not require a separate examination (see *Moskal*, cited above, §§ 83 and 94).

III. REMAINING COMPLAINTS

50. Lastly, the applicant alleged a breach of Articles 14 and 53 of the Convention. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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

52. The applicant claimed 50,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

53. The Government considered the applicant's claim groundless. They submitted that since the application is inadmissible, the just-satisfaction claims should be dismissed.

54. The Court finds that the applicant was deprived of her income in connection with the violation found and must take into account the fact that she undoubtedly suffered some pecuniary and non-pecuniary damage (see *Moskal*, cited above, § 105 with a further reference). Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 5,000 to cover all heads of damage.

B. Costs and expenses

55. The applicant also submitted that she had to incur costs of travelling to and from the courts and pay the lawyers' fees for legal representation before the domestic courts. She produced copies of her appeals and cassation appeal lodged by her lawyers.

56. The Government submitted that the applicant had not claimed reimbursement of costs and expenses.

57. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 300 for costs and expenses in the domestic proceedings.

C. Default interest

58. 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, UNANIMOUSLY,

1. *Declares* the complaints under Articles 6 and 8 of the Convention and under Article 1 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that there is no need to examine separately the applicant's complaints under Articles 6 and 8 of the Convention;

4. *Holds*

(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 pecuniary and non-pecuniary damage;

(ii) EUR 300 (three 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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 28 January 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ledi Bianku
Deputy Registrar	President