

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

FOURTH SECTION

CASE OF MIGALSKA v. POLAND

(Application no. 10368/05)

JUDGMENT

STRASBOURG

4 December 2012

FINAL

04/03/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Migalska v. Poland,

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

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 13 November 2012,

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

PROCEDURE

1. The case originated in an application (no. 10368/05) 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 Teresa Migalska ("the applicant"), on 7 February 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 1957 and lives in Sedziszów Małopolski.

6. The applicant is married with children. Prior to her application for an early-retirement pension she had been employed and paid social security contributions to the State.

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

7. On 9 November 2001 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 daughter's health condition, a medical certificate issued by a specialist medical centre. The certificate stated that the child (born in 1992) suffered from bronchial asthma and that she was in need of her parent's constant care.

9. On 15 November 2001 the Rzeszów Social Security Board ("the SSB") issued a decision granting the applicant the right to an early-retirement pension as of 1 November 2001 in the net amount of 712 Polish zlotys (PLN).

10. The Social Security Board initially suspended the payment of the pension due to the fact that the applicant was still working on the date of the decision. On 28 November 2001 the applicant resigned from her full-time job in a filter plant in Sedziszów. On 3 December 2001 the payment of the pension was resumed.

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

12. On 17 June 2002 the Rzeszów SSB issued simultaneously two decisions in respect of the applicant. By virtue of one decision, the payment of the applicant's pension was discontinued with immediate effect. By virtue of the other decision, the Board reopened the proceedings, 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 Cabinet's Ordinance of 15 May 1989 on the right to early retirement of employees raising children who require permanent care (*Rozporządzenie Rady Ministrów z dn. 15 maja 1989 w sprawie uprawnień do wcześniejszej emerytury pracowników opiekujących się dziećmi wymagającymi stałej opieki*) ("the 1989 Ordinance").

13. 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 applicant's original application for a pension. Moreover, the applicant alleged that the revocation of her retirement pension was contrary to the principle of vested rights.

14. On 29 August 2002 the Rzeszow Regional Court (*Sąd Okręgowy*) quashed the SSB's decisions and granted the applicant the right to an early-retirement pension under the scheme provided for by the 1989 Ordinance. The court considered that the SSB should not have reopened the proceedings *ex officio*. The SSB appealed.

15. On 10 April 2003 the Rzeszów Court of Appeal (*Sąd Apelacyjny*) quashed the first-instance judgment and remitted the case.

16. On 14 October 2003 the Rzeszow Regional Court dismissed the applicant's appeal. The Regional Court concluded on the basis of the evidence, including expert medical evidence, that while indeed the applicant's child suffered from bronchial asthma she did not require her mother's permanent care since her health condition did not significantly impair her bodily functions. 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 did not satisfy the requirement of necessary permanent care.

17. The applicant further appealed against this judgment.

18. On 12 February 2004 the Rzeszów Court of Appeal dismissed the appeal.

19. On 21 June 2004 the Supreme Court (*Sąd Najwyższy*) refused to entertain the cassation appeal lodged by the applicant. The decision was served on the applicant on 16 September 2004.

B. The applicant's financial situation following the revocation of the EWK pension

20. 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.

21. The applicant submitted that her farm had not generated any profit.

22. The Government submitted that after revocation of the EWK pension the applicant worked during the following periods: between 8 and 30 June 2005 and between 3 December 2007 and 26 January 2008. In addition, between 9 February and 8 August 2009 she had been receiving a scholarship during her training or internship. Also for some time in 2009 she was registered as an unemployed person. The applicant's husband had been nearly continuously employed. Lastly the applicant owned 0.18 ha of agricultural land (after 1 December 2004 - 0,096 ha).

23. In addition, the Government submitted information as regards the various types of social benefits available in Poland. However, they did not

specify which of those benefits, if any, were available in the applicant's situation.

24. Under the relevant laws currently in force, it appears that the applicant will qualify for a regular retirement pension in 2017.

C. Other EWK cases pending before the Court

25. Some 130 applications arising from a similar fact pattern have been brought to the Court. The majority of the applicants form the Association of Victims of the SSB (*Stowarzyszenie Osób Poszkodowanych przez ZUS*) ("the Association"), an organisation monitoring the practices of the Social Security Board in Poland, in particular in the Podkarpacki region.

26. Out of all applications lodged with the Court, about twenty-four applicants decided not to lodge a cassation appeal against the judgment of the Court of Appeal given in their case.

27. One hundred-and-four applicants lodged cassation appeals against the final judgments given in their cases. The Supreme Court entertained and dismissed on the merits fifteen appeals. In eighty-one applications the Supreme Court refused to entertain cassation appeals on the ground that they did not raise any important legal issues or require the Supreme Court to give a new interpretation to legal provisions which raised serious doubts or gave rise to ambiguity in the jurisprudence of the domestic courts. In the remaining eight cases cassation appeals were rejected for failure to comply with various procedural requirements.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Social security system

28. The legal provisions applicable at the material time and questions of practice are set out in the judgment in the case of *Moskal v. Poland*, no. 10373/05, § 31-34, 15 September 2009.

29. The social security scheme for farmers is regulated by the Farmers' Social Security Act of 20 December 1990 ("the 1990 Act"; *ustawa o ubezpieczeniu społecznym rolników*).

30. The reopening of the proceedings concerning the early-retirement pension is regulated in section 114 (1) of the Law of 17 December 1998 on retirement and disability pensions paid from the Social Insurance Fund (*Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*) ("the 1998 Law"), which at the relevant time read as follows:

> "The right to benefits or the amount of benefits will be re-assessed upon application by the person concerned or, *ex officio*, if, after the validation of the decision concerning benefits, new evidence is submitted or circumstances which had existed

before issuing the decision and which have an impact on the right to benefits or on their amount are discovered."

On 1 July 2004 a new subparagraph 114 (1)(a) was added, which reads as follows:

"Section 1 shall apply respectively, if, after the validation of the decision it is discovered that the evidence that had been submitted did not give the right to a pension, disability pension or its amount."

B. Cassation appeal

31. A party to civil proceedings could, at the material time, lodge a cassation appeal with the Supreme Court against a judicial decision of a second-instance court. A party had to be represented by an advocate or a legal adviser.

32. Article 393^{1} of the Code of Civil Procedure as applicable at the material time listed the grounds on which a cassation appeal could be lodged. It read as follows:

"The cassation appeal may be based on the following grounds:

1) a breach of substantive law as a result of its erroneous interpretation or wrongful application;

2) a breach of procedural provisions, if that defect could significantly affect the outcome of the case."

33. Pursuant to Article 393^{13} the Supreme Court, having allowed a cassation appeal, could quash the challenged judgment in its entirety or in part and remit the case for re-examination. Where the Supreme Court failed to find non-conformity with the law, it dismissed the cassation appeal. According to Article 393^{15} if the cassation appeal was well-founded the Supreme Court could also amend the impugned judgment and adjudicate on the merits.

C. Constitutional Court's judgments

1. Judgment no. K 18/99

34. On 22 June 1999 the Ombudsman made an application to the Constitutional Court, asking for section 186 (3) of the Law of 17 December 1998 on retirement and disability pensions paid from the Social Insurance Fund (*Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*) ("the 1998 Law") to be declared unconstitutional in so far as it restricted the application of the 1989 Ordinance to persons born before 1 January 1949. More specifically, the Ombudsman submitted

that the introduction of an age-limit in respect of persons taking care of a child, which in essence amounted to a deprivation of the right to a benefit, constituted a violation of the principle of equality set forth in Article 32 § 1 of the Constitution.

35. On 4 January 2000 the Constitutional Court (K18/99) declared the impugned section 186 (3) of the 1998 Law unconstitutional in so far as it restricted the application of the 1989 Ordinance to persons born before 1 January 1949. The Constitutional Court reiterated among other things the constitutional principle of acquired rights which guarantees particularly strong protection for the right to receive social welfare benefits.

2. Judgment no. K5/11

36. On 10 February 2011 the Ombudsman made an application to the Constitutional Court, asking for section 114 (1)(a) of the 1998 Law to be declared unconstitutional in so far as it allowed the SSB to reopen *ex officio* proceedings relating to the grant of a pension or a disability pension on the basis of a new assessment of evidence which had already been submitted.

37. On 28 February 2012 the Constitutional Court (K5/11) declared the impugned section 114 (1)(a) of the 1998 Law unconstitutional in so far as it allowed the SSB to reopen such proceedings following a new assessment of evidence which had already been submitted.

THE LAW

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

38. 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. The 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 her possessions. No one shall be deprived of her 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

1. The Government's preliminary objections

(a) Abuse of the right of an individual application

(i) The parties' submissions

39. The Government submitted that the present application constituted an abuse of the right of individual application under Article 35 § 3 of the Convention in that the applicant had misrepresented to the Court her current social security status and the financial situation of her family.

40. In particular, the Government argued that the applicant had misled the Court submitting that the EWK pension was the main source of income for her family. In reality, the applicant's husband had had a full-time job when her pension was revoked earning above the average salary.

41. The applicant contested the Government's submissions and argued that her application had been truthful and sincere.

(ii) The Court's assessment

42. The Court considers that, except in extraordinary cases, an application may only be rejected as abusive if it was knowingly based on untrue facts (see the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1206, §§ 53-54; *I.S. v. Bulgaria* (dec.), no. 32438/96, 6 April 2000, *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X; or *Rehak v. the Czech Republic*, (dec.), no. 67208/01, 18 May 2004).

43. The Court notes that in the present case the gist of the Government's arguments does not actually concern "untrue facts" allegedly adduced by the applicant before the Court. Rather, their objection is based on their own perception of the applicant's overall financial situation after the revocation of the pension. It has not been disputed that the applicant quit her job when she was officially judged eligible to obtain an EWK pension and had been able to find part-time employment only three years after her pension had been withdrawn.

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

(b) Non-exhaustion of domestic remedies

(i) The parties' submissions

45. The Government argued that the applicant had not exhausted the domestic remedies available to her, as required by Article 35 § 1 of the Convention.

46. They submitted that the applicant should have made an application to the Constitutional Court challenging the compatibility of the relevant social security provisions with the Constitution. They relied on a judgment delivered by the Constitutional Court on 4 January 2000 (see paragraphs 34 and 35 above).

47. In their further submissions, the Government referred to the Constitutional Court's judgment of 28 February 2012 (see paragraph 37). They maintained that even though the decisions issued in the EWK cases had been based on section 114 (1) of the 1998 Law and not on section 114 (1)(a), the applicant should nevertheless have availed herself of the possibility of lodging a constitutional complaint.

48. The applicant did not comment on this objection.

(ii) The Court's assessment

49. The Court reiterates that it has already held that in Poland a constitutional complaint was an effective remedy for the purposes of Article 35 § 1 of the Convention only in situations where the alleged violation of the Convention resulted from the direct application of a legal provision considered by the complainant to be unconstitutional (see, among other authorities, *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003).

50. Furthermore, Article 35 of the Convention, which sets out the rule on exhaustion of domestic remedies, provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available not only in theory but also in practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant's complaints, and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V, and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII).

51. In so far as the Government referred to the Constitutional Court's judgment of 4 January 2000, the Court observes that the Government failed to indicate which provision of the 1998 Law should have been challenged by the applicant before the Constitutional Court. They have merely stated that the applicant could have contested "the relevant social security provisions" without specifying any constitutional provision that could have been relied on in the applicant's situation. Furthermore, they have not

adduced any relevant case-law of the Constitutional Court which would have demonstrated that such complaint, in the circumstances of the applicant's case, offered any prospects of success.

52. As regards the second limb of the Government's objection, the Court observes that, as the Government have acknowledged, section 114(1)(a) of the 1998 Law was not applicable in the present case. The SSB's decision to reopen the proceedings concerning the relevant benefit was based on section 114(1) (see paragraphs 30 and 47 above). While it is true that the Ombudsman's application was successful (see paragraph 37 above), this does not of itself indicate that a hypothetical complaint lodged by the applicant would have had a similar effect. Moreover, it should be noted that the Ombudsman's challenge was examined nearly ten years after the events complained of in the present case. In reality, the Government's objection is based on a theoretical and retrospective, and therefore highly speculative, comparison between the applicant's situation at the material time and recent developments in the Constitutional Court's case-law.

53. In consequence, the Court considers that in the present case a constitutional complaint cannot be considered with a sufficient degree of certainty to have been a remedy offering reasonable prospects of success. For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

(c) Six months

(i) The parties' submissions

54. The Government submitted that should the Court consider that the cassation appeal had not been an effective remedy in the instant case, the calculation of the time-limit should start from the date on which the judgment of the court of appeal had been given. If that decision had been given more than six months before the date of introduction of the application to the Court, the application should be considered as having being lodged out of time and rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

55. The applicant contested the argument and claimed that she had complied with the six-month requirement.

(ii) The Court's assessment

56. The Court reiterates that the object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, amongst other authorities, *Varnava*

and Others v. Turkey [GC], nos. 16064/90; 16065/90; 16066/90; 16068/90; 16069/90; 16070/90; 16071/90; 16072/90 and 16073/90, §§ 156 et seq., ECHR 2009-...; and *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

The final decision for this purpose is the decision taken in the process of exhaustion of effective domestic remedies which exist in respect of the applicant's complaints (see *Kozak v. Poland*, no. 13102/02, § 64, 2 March 2010, with further references).

57. The Court further notes that there were essentially two types of decisions terminating the proceedings in the EWK cases. First, in all cases where the applicants lodged cassation appeals in accordance with the correct procedural requirements the Supreme Court either examined them on the merits as in *Moskal* (cited above, § 24) or, as in the instant case, decided not to entertain them. Second, in cases where the applicants desisted from lodging cassation appeals claiming that the practice of the Supreme Court showed that this remedy had no prospects of success, the final decisions were those given by the courts of appeal.

58. The cassation appeal was thus a remedy that had been used by the applicant in the lead *Moskal* case as well as by ninety-six other applicants whose cases are pending before the Court regarding the same subject-matter. Although the effectiveness of this remedy has been contested by certain applicants, the Court nevertheless considers that the applicant in the instant case should not be penalised for having tried to file a cassation appeal with the Supreme Court in order to avoid any risk of having his/her case rejected by the Court for non-exhaustion of domestic remedies.

Accordingly the final decision in the case was given by the Supreme Court on 21 June 2004 and served on the applicant on 16 September 2004 whereas the applicant lodged her application with the Court on 7 February 2005.

59. 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.

(d) No significant disadvantage

(i) The parties' submissions

60. Lastly, the Government argued that the present application should be declared inadmissible on the ground that the applicant had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention as amended by Protocol No. 14. They stressed that the applicant's family income in 2002 (during the time she had received the EWK pension) amounted to 110 % of the average gross salary and in 2005 (after the EWK pension had been suspended) it amounted to 136 % of the

average gross salary. In their opinion, respect for human rights did not require examination of the present application. The case was duly examined by the domestic authorities: the Social Security Board and the domestic courts.

61. The applicant disagreed with the Government's objection.

(ii) The Court's assessment

62. The Court observes that the main element of the criterion set by Article 35 § 3 (b) of the Convention is whether the applicant has suffered any significant disadvantage (see *Adrian Mihai Ionescu v. Romania* (dec.), no. 36659/04, 1 June 2010, and *Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010).

63. The severity of a violation should be assessed taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case (see *Korolev*, cited above). In other words, the absence of any significant disadvantage can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant (see *Adrian Mihai Ionescu*, cited above).

64. However, in the present case the alleged lack of significant disadvantage is inseparably linked with the Court's assessment of the proportionality of the measure complained of, in particular with the question whether, in consequence of the revocation of her pension, the applicant suffered an "excessive burden" for the purposes of Article 1 of Protocol No. 1 to the Convention. That being so the Government's argument would, in the Court's view, more appropriately be dealt with at the merits stage.

65. The Court accordingly joins the Government's plea of inadmissibility on the ground of the absence of any significant disadvantage to the merits of the case.

2. Conclusion on admissibility

66. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also 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

67. 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.

68. In the applicant's view, there was no reasonable relationship of proportionality between the interference and the interests pursued. She had quit her employment in order to take care of her sick child. The special measures taken by the Government in the Podkarpacki region had no relevance for her professional situation, in view of her age and education. For these reasons it had been impossible for her to find a job. She stressed that her little farm did not bring in any income.

69. The applicant also claimed that she had borne an excessive burden in that the decision of 17 June 2002 had deprived her of her main source of income with immediate effect.

(b) The Government

70. 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 public interest. There was also a reasonable relationship of proportionality between the interference and the interests pursued. In the Polish social security system only retirement pensions granted under the general scheme, were, in principle, permanent and irrevocable. All other benefits based on conditions subject to change were subject to verification and possible revocation.

71. They further noted that even though the decision to revoke the EWK pension had a retroactive effect, the applicant had not been required to reimburse the sum of PLN 8,633.66.

2. The Court's assessment

(a) General principles

72. 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

73. The parties agreed that the decisions of the Rzeszów Social Security Board of 17 June 2002, subsequently validated by three court instances**,** 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.

(ii) Lawfulness of the interference and legitimate aim

74. 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, §§ 61-63).

(iii) Proportionality

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

76. It must be stressed that the delay with which the authorities reviewed the applicant's dossier was relatively long. The 2001 decision was left in force for seven months before the authorities became aware of their error. Even though the applicant had an opportunity to challenge the Social Security Board's decision of 17 June 2002 in judicial review proceedings, her right to the pension was determined by the courts more than two years later and during that time she was not in receipt of any welfare benefit.

77. 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). The initial decision to

grant the applicant an early-retirement pension appears to have been taken lightly and without appropriate checks having been first undertaken.

78. 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 71 above) did not mitigate sufficiently the consequences for the applicant flowing from the interference in her case. The Court notes in this connection that the applicant, after her right to the EWK pension had been confirmed by the authorities, decided to resign from her employment.

79. It should be also observed that 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 main source of income. 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 considerable difficulty in securing new employment. Indeed it took the applicant three years to find a temporary job (see paragraph 22 above).

80. The Government submitted that the applicant's husband had been almost continuously employed. However, the Court considers that this fact is not decisive for the matter at hand, namely whether the revocation of the EWK pension placed an excessive burden on the applicant as an individual in her own right irrespective of third party financial support.

81. The Government further maintained that the applicant's little farm might have been a source of income for her. However, they failed to submit any evidence that after the revocation of the EWK pension she indeed derived any income from the farm. Moreover, the farm clearly did not constitute her main source of income, since for many years she had been employed outside the farm, in a non-agricultural enterprise.

82. In so far as the Government listed various benefits available in Poland, the Court considers that they have failed to specify which of those benefits, if any, were available in the applicant's situation. It should be noted that the applicant submitted that she had not been eligible to apply for any welfare benefits.

83. 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.

84. It follows that there has been a violation of Article 1 of Protocol No. 1 to the Convention and the Government's objection based on no significant disadvantage (see paragraph 65 above) must accordingly be rejected.

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

85. 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.

86. 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 had deprived her of her sole source of income and the financial resources indispensable for her livelihood.

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

88. 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

89. Lastly, the applicant alleged a breach of Article 14 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 (see *Moskal*, cited above, § 100).

90. 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

91. 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

92. The applicant claimed 20,419.37 euros (EUR) in respect of pecuniary damage. The amount corresponded to the EWK pension which

she would have received for several years had it not been revoked, together with interest. She also claimed EUR 5,000 in respect of non-pecuniary damage.

93. The Government contested these claim.

94. 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 *Koua Poirrez*, cited above, § 70). Making an assessment on an equitable basis, as is required by Article 41 of the Convention, and taking into account in particular the amount of the pension involved and the difficulty in finding employment after the pension was stopped, the Court awards the applicant EUR 8,000 to cover all heads of damage.

B. Costs and expenses

95. The applicant also claimed, without specifying any details, EUR 2,500 for the costs and expenses incurred before the domestic courts the Court.

96. The Government contested this claim.

97. According to the Court's case-law, 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 the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses.

C. Default interest

98. 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. *Joins* unanimously the Government's preliminary objection concerning no significant disadvantage to the merits of the applicant's complaint under Article 1 of Protocol No. 1 to the Convention;

2. *Declares* unanimously 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;

3. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol No. 1 to the Convention and dismisses in consequence the Government's above mentioned objection;

4. *Holds* unanimously that there is no need to examine the complaints under Articles 6 and 8 of the Convention;

5. *Holds* by six votes to one
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of both pecuniary and non-pecuniary damage to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 4 December 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Hirvelä is annexed to this judgment.

I.Z.
F.A.

PARTLY DISSENTING OPINION OF JUDGE HIRVELÄ

To my regret, I am unable to agree with the majority in this and the other eleven cases (8578/04, 18683/04, 27680/04, 31803/04, 34386/04, 35538/04, 39430/04, 6112/05, 39225/05, 11815/05, 10368/05 and 31492/05) examined simultaneously on the same day by the Court. This case and the other cases are based on the same or at least very similar circumstances as in *Moskal v. Poland* (no. 10373/05, 15 September 2009) and *Lewandowski v. Poland* (no. 38459/03, 2 October 2012) as regards the revocation of the early retirement pension (the EWK pension) following a review of the applicant's dossier.

The reasons for my dissent are identical to those expressed in the joint partly dissenting opinion which I expressed together with Judges Bratza and Bianku in the leading case of *Moskal v. Poland* and later in the dissenting opinion which Judge Bianku and I expressed in *Lewandowski v. Poland* and other cases examined by the Court together with *Lewandowski*.

To avoid repetition, I refer to the arguments and reasons set out in the above-mentioned dissenting opinions to conclude that there has been no violation of Article 1 of Protocol No. 1. Like the majority of the Chamber, I do not consider that the complaints under Articles 6 and 8 require a separate examination.