AS TO THE ADMISSIBILITY OF

Application No. 27047/95
by Herbert OCHENSBERGER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 18 October 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 2 February 1995 by Herbert OCHENSBERGER against Austria and registered on 19 April 1995 under file No. 27047/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian national born in 1927 and residing in Graz. Before the Commission he is represented by Mr. R. Tögl, a lawyer practising in Graz.

The facts of the case, as they have been submitted by the applicant, may be summarised as follows.

On 7 November 1985 the applicant requested the Employees Pension Insurance Office (Pensionsversicherungsanstalt der Angestellten) to grant him an invalidity pension (Berufsunfähigkeitspension). On 1 July 1986 the Pension Insurance Office granted him the requested pension with effect from 1 December 1985 onwards.

On 1 September 1988 the Pension Insurance Office granted the applicant upon his request an early retirement pension on the ground of long time of insurance (vorzeitige Alterspension bei langer Versicherungsdauer) in the same amount as his previous invalidity pension.

With effect from 1 July 1993 the General Social Security Act (Allgemeines Sozialversicherungsgesetz) was amended. While before the

basis for calculating the amount of an old age pension were the last 120 months of insurance, they are now the 180 months of insurance with the best income.

On 18 June 1993 the applicant requested the Pension Insurance Office to grant him an old age pension on the basis of the new provisions of the General Social Security Act. On 12 August 1993 the Pension Authority refused to do so and found that the applicant already received an old age pension.

Subsequently the applicant filed a civil law action against the Pension Authority. He submitted that he had reached pension age on 1 March 1993. He was therefore entitled to a regular old age pension from this date onwards which had to be calculated on the basis of the new provisions.

On 22 December 1993 the Graz Regional Court (Landesgericht) sitting as Labour and Social Court (Arbeits- und Sozialgericht) dismissed the applicant's claim. The Regional Court found that there was no legal basis for a recalculation of the applicant's pension claim on the basis of the new provisions of the General Social Security Act. At the time the applicant had reached the age of regular retirement of 65 years, his early retirement pension on the ground of long time of insurance had automatically been commuted into a regular old age pension because he had not acquired further months of insurance since the time his pension claim had been calculated for the first time.

On 8 June 1994 the Graz Court of Appeal (Oberlandesgericht) dismissed the applicant's appeal.

The applicant's further appeal to the Supreme Court (Oberster Gerichtshof) was dismissed on 4 October 1994. The Supreme Court found that when the applicant had reached the age of regular retirement his early retirement pension was automatically commuted into a regular old age pension so that no new time limit for calculating his pension claim had started to run. His request of 18 June 1993 could not lead to a recalculation of his pension claim since he had not in the meantime acquired further months of insurance. Thus, no new elements for calculating his pension claim, of relevance for the applicability of the new provisions of the General Social Security Act, had to be established. In any event, it did not infringe the constitutional principle of equality if improvements in the field of pension rights were only applicable to cases which occurred after a specific time limit and did not apply to previous cases. In view of the financial burden placed on the community of the insured such a limitation based on an objective criterion applicable to all insured persons was a reasonable and necessary measure.

COMPLAINTS

The applicant complains that the Austrian courts refused to grant him an old age pension calculated on the basis of the new provisions and that he was therefore discriminated against in comparison to other persons who retired after 1 July 1993. The legislator had failed to provide for appropriate transitory provisions which would take account of cases of hardship like his own. He invokes Article 14 of the Convention and Article 1 of Protocol No. 1.

THE LAW

1. The applicant complains that the Austrian authorities refused to grant him an old age pension calculated on the basis of the new provisions and that he was therefore discriminated against in comparison to other persons who retired after 1 July 1993. He invokes Article 14 (Art. 14) of the Convention and Article 1 of Protocol No. 1 (P1-1).

Article 1 of Protocol No. 1 (P1-1) 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."

The Commission recalls that a right to a pension is not as such guaranteed by the Convention. In certain circumstances, the payment of contributions to a social security scheme may create a property right in a portion of such a fund and this right might be affected by the manner in which the fund is distributed. However, even assuming that Article 1 of Protocol No. 1 (P1-1) guarantees a person who has paid contributions to a special insurance system the right to derive benefits from the system, it cannot be interpreted as entitling that person to a pension of a particular amount unless there is a substantive reduction affecting the very substance of the right (cf. Müller v. Austria, Comm. Report 1.10.75, paras. 30-33, D.R. 3 p. 25; No. 7624/76, Dec. 6.7.77, D.R. 19, p. 100; No. 15408/89, Dec. 27.5.91, unpublished; No. 15376/89, Dec. 27.5.91, unpublished).

However, the Commission finds that in the present case there is no question of a reduction of the applicant's entitlement to a pension. Consequently, there has been no interference with the applicant's rights under Article 1 of Protocol No. 1 (P1-1).

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The Commission, assuming that the applicant's pension entitlement as such constituted a possession within the meaning of Article 1 of Protocol No. 1 (P1-1), has examined under Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 (Art. 14+P1-1) whether the refusal of a recalculation of the pension in the applicant's case amounted to a discrimination against him in comparison to persons to whom the new provisions of the General Social Security Act were applicable.

Article 14 (Art. 14) of the Convention reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

In this respect the Commission recalls that for the purpose of Article 14 (Art. 14) of the Convention a difference in treatment is discriminatory only if it has no objective and reasonable justification (Eur. Court H.R., Schmidt judgment of 18 July 1994, Series A no. 291-B, p. 32, para. 24).

In the present case the applicant was granted an invalidity pension in 1985, which, on his request, was commuted into an early retirement pension in 1988 and upon reaching the age of regular retirement commuted automatically into a regular old age pension. The Austrian courts found that the applicant was not entitled to a pension calculated under the new provisions of the General Social Security Act since he had been granted a pension before these provisions came into

force on 1 July 1993, and no new time limit for calculating his pension started after the first time his pension had been granted.

The Commission considers that the difference in treatment between persons who reach retirement age before and after the entry into force of new provisions of law and the fact that such provisions are only applied to cases which occur after this date is based on an objective and reasonable criterion (see No. 9707/82, Dec. 6.10.82, D.R. 31, p. 223; No.15464/89, Dec. 8.10.91, unpublished). Accordingly, the applicant has not been discriminated against in the peaceful enjoyment of his possessions.

It follows that also this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)