CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 15638/06
by Christian PHOCAS
against France

The European Court of Human Rights (Third Section), sitting on 13 September 2007 as a Chamber composed of:

Boštjan M. Zupančič, *President,*
Corneliu Bîrsan,
Jean-Paul Costa,
Elisabet Fura-Sandström,
Egbert Myjer,
David Thór Björgvinsson,
Isabelle Berro-Lefèvre, *judges,*

and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 7 April 2006,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Christian Phocas, is a French national who was born in 1943 and lives in Pierrevert. He was represented before the Court by Mr Frédéric Weyl, a lawyer practising in Paris.

A. The circumstances of the case

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

The applicant is a civil servant and the father of three children. His pension was calculated on 2 September 2003 by an order of 7 July 2003. However, the calculation did not take account of the service credits for children established in Article L. 12 of the Civil and Military Pensions Code then in force, which provided:

> "Under conditions determined by a regulation of the Prime Minister, the following service credits shall be added to the periods of service actually completed: ... (b) A service credit granted to female civil servants for each legitimate child, each natural child of established paternity and each adopted child, and, subject to the condition that they have been brought up for at least nine years before reaching their twenty-first birthday, for each of the other children listed in paragraph II of Article L.18."

By a judgment of 29 November 2001 the Court of Justice of the European Communities held that Article L. 12 was contrary to the principle of equal pay as laid down in the Treaty establishing the European Community. Following that judgment, the *Conseil d'Etat* held, in a judgment of 29 July 2002 concerning Mr G., a litigant other than the applicant, that Mr G. was entitled to the service credit provided for in Article L. 12.

On 4 August 2003 the applicant requested a review of his pension with a view to obtaining the service credits to which he considered he was entitled in respect of his three children. He submitted that he should be awarded three years of service credits in respect of his three children, by strict reference to the *Conseil d'Etat*'s analysis in its judgment in favour of Mr G. on 29 July 2002, and also the principle of equal pay for men and women, which precluded civil servants being refused entitlement to the benefit of the provisions on the ground of their sex.

On 21 August 2003 a new Act amended the provisions of Article L.12 of the Pensions Code. Section 48 I stated:

> "Under the conditions determined by a decree of the *Conseil d'Etat*, the following service credits shall be added to the periods of service actually completed: ... (b) For each legitimate child and each natural child born before 1 January 2004... civil servants and military personnel shall receive a service credit fixed at one year, in addition to the periods of service actually completed, provided that they have interrupted their employment in the conditions determined by the decree of the *Conseil d'Etat* ...."

Section 48 II was worded as follows:

> "The provisions of Article L. 12(b) of the Civil and Military Retirement Pensions Code resulting from the wording of [sub-subsection] 2 of [Part] I shall apply to pensions calculated from 28 May 2003."

The above-mentioned decree of the *Conseil d'Etat* was adopted on 26 December 2003.

On 15 September 2003 the Minister for the Economy and Finance rejected the applicant's request in the following terms:

> "...

> Given the date of calculation of your pension, a service credit is payable only if you can provide evidence of having interrupted your employment on the birth of your children.
>
> If that condition is satisfied, it will then be necessary to consider whether the duration of that interruption does in fact correspond to the duration due to be fixed by the forthcoming decree."

On 23 September 2003 the applicant lodged an application with the Marseilles Administrative Court, seeking judicial review of the order of 7 July 2003 awarding the pension and of the decision of the Minister for the Economy and Finance refusing to review the applicant's pension entitlement. He alleged that since the order of 7 July 2003 containing the calculation of his pension had failed to take account of his situation as a father of three children, it had disregarded his rights under Article L.12b of the Pensions Code, which was intended to apply to both female and male civil servants, and was thus discriminatory. He also maintained that, given the refusal to review his pension, the new Act had been applied retrospectively. When the Constitutional Council had decided that there could be no retrospective effect for female civil servants, the resulting situation had established discrimination, since, for the same retirement date, women continued to be covered by the old provisions whereas men were subject to the new, retrospective provisions. The applicant concluded that there had been a violation of Article 1 of Protocol No. 1 and of the principle of non-discrimination.

In a number of judgments, in particular that of 29 December 2004, the *Conseil d'Etat* adjudicated in cases identical, both in law and in fact, to the applicant's case. On the complaint based on Article 1 of Protocol No. 1, the *Conseil d'Etat* held that, while section 48 II of the Act of 21 August 2003 "retrospectively [deprived] civil servants whose pension [had been] calculated after 28 May 2003 of entitlement to the credit, the principle and the amount of which were certain..., that retrospective effect, applicable to a period of less than three months, constitute[d] an interference with the asset in question which was justified, in line with the legislature's intention, by public-interest considerations related to the desire to ensure that the announcement of the tabling of the Bill did not lead to an increase in litigation." It concluded that "this interference, which [did] not affect the substance of the right to a pension but only one of the elements of its calculation, [was proportionate] to the aim thus pursued."

As for the complaint based on Article 6 § 1 of the Convention, the *Conseil d'Etat* considered that the enactment of section 48, on a date preceding the application submitted by the litigants, at a time when no dispute existed between them and the State concerning the calculation of their pensions, had had neither the aim nor effect of influencing the outcome of pending judicial proceedings and that it had thus not deprived those concerned of their right of access to a court in order to assert their rights.

On the basis of those considerations, the Marseilles Administrative Court dismissed the applicant's application on 24 October 2005.

In view of the aforementioned judgments of the *Conseil d'Etat*, the applicant did not lodge an appeal on points of law.

B. Relevant domestic law and practice

By a judgment of 29 November 2001, the Court of Justice of the European Communities held that the principle of equal pay precluded limiting to women credits granted for the purpose of calculating a retirement pension to persons who had raised their children, whilst men who had raised their children were excluded from entitlement to the credit. It held that Article L. 12(b) of the Civil and Military Retirement Pensions Code, which introduced, for the calculation of pensions, a service credit of one year for each child, limited to female civil servants, was incompatible with the principle of equal pay as laid down in the Treaty establishing the European Community and the Agreement annexed to Protocol No. 14 on Social Policy annexed to the Treaty on European Union.

On 29 July 2002 the *Conseil d'Etat*, which had stayed proceedings pending the ruling of the Court of Justice, held that in so far as provisions were maintained which were more favourable to female civil servants who had raised their children, Mr G., who had raised [his] children himself, was entitled to the credit provided for in Article L. 12(b) of the Pensions Code.

COMPLAINTS

Under Article 6 § 1 of the Convention, the applicant claimed that there had been a violation of his right to a fair hearing.

Relying on Article 1 of Protocol No. 1, in conjunction with Article 14 of the Convention, the applicant complained that he had not been granted a service credit of one year in respect of each child when his pension was calculated.

THE LAW

1. The applicant complained that there had been a violation of his right to a fair hearing, guaranteed by Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The applicant claimed that the Act of 21 August 2003 amending Article L. 12 of the Pensions Code was promulgated in order to prevent applications of the same type as his and to neutralise his right to a fair hearing and an effective remedy, by ensuring that decisions in respect of which the time allowed for bringing an action had just begun to run were subject to unfavourable provisions, enacted for the sole benefit of the administration.

Although the applicant did not lodge an appeal on points of law, the Court considers it unnecessary to examine whether he exhausted all domestic remedies, since the application must be dismissed for the following reasons.

The Court has already held that the principle of the rule of law and the notion of a fair trial enshrined in Article 6 precludes any interference by the legislature with the administration of justice for the purpose of influencing the judicial determination of a dispute. In cases raising similar issues, it has observed that the legislature's intervention took place at a time when judicial proceedings to which the State was a party were pending. In consequence, the Court concluded that the State had infringed the applicants' rights under Article 6 by intervening in a manner which was decisive to ensure that the imminent outcome of proceedings to which it was a party was favourable to it (see, among other authorities, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, Series A no. 301-B, and *Papageorgiou v. Greece*, 22 October 1997, *Reports of Judgments and Decisions* 1997-VI). Furthermore, the Convention institutions have never accepted that the equality of arms may be upset by measures "anticipating", as it were, proceedings that have yet to begin and it would be going too far to extend the doctrine by some form of analogy (see *O.N.S.I.L. v. France* (dec.), no. 39971/98, ECHR 2000-IX).

In the present case, the Court notes that the applicant's pension was calculated on 2 September 2003 on the basis of an order of 7 July 2003. On 4 August 2003 the applicant sought a review of that order. On 21 August 2003 the new Act amended Article L.12 of the Pensions Code. On 15 September 2003 the Minister for the Economy and Finance rejected, on the basis of the new Act, the applicant's request of 4 August 2003.

The Court notes that the legislature intervened after the date on which the applicant sought a review of the order calculating his pension. However, that request cannot be regarded as the preliminary phase of judicial proceedings to which the applicant was a party, which began only on 23 September 2003 when the applicant lodged an application with the Marseilles Administrative Court. In that regard, the present case also differs from the case of *Clinique du Château de la Maye v. France* ((dec.) no. 2794/04, 6 June 2006), in which a similar problem was raised in relation to social security, but in which the application to an arbitration committee

for reconsideration of the decision at issue was a mandatory preliminary to the action brought before the administrative court.

In conclusion, the enactment of the Act of 21 August 2003 did not constitute a violation of Article 6 § 1 of the Convention and this part of the application must be dismissed as manifestly unfounded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant alleged that there had been a violation of Article 1 of Protocol No. 1, taken in conjunction with Article 14 of the Convention, which provide:

Article 1 of Protocol No. 1

> "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."

Article 14 of the Convention

> "The enjoyment of the rights and freedoms as 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."

The applicant maintained that the refusal to apply the legislation in force at the time of calculating his pension and to condemn the resulting discrimination, which restricted entitlement to the child credits to women, infringed his rights under those provisions, as interpreted in accordance with the principle of equal pay for men and women and the right to peaceful enjoyment of his possessions, in that he was granted a pension at the rate of 72%, whereas he was entitled to a rate of 78%.

In the applicant's submission, the retrospective application of the Act of 21 August 2003 to pensions calculated with effect from 28 May 2003 could not be considered justified, as the argument based on a desire to avoid multiple actions before the courts could be understood only as a desire to protect public finances, which could not constitute justification for breach of a property right deriving from work performed and contributions paid by an individual. Nor could that retrospective effect be deemed proportionate, since it had the direct consequence of removing two annuities from the basis on which his pension had been calculated and thus necessarily affected the substance of the right to a pension, rather than one of the elements of its calculation.

The applicant alleged that there had also been a breach of the right of property, through the effect of discrimination prohibited by Article 14, as a result of application of the new Act, which retrospectively subjected some

civil servants to conditions which could not be met: the date of 28 May 2003 had been chosen arbitrarily, since those conditions related to interruptions in employment on the birth of children more than twenty-seven to thirty-four years previously, at a time when the law did not allow a male civil servant to interrupt his employment on the birth of his children, or at best would have allowed him to do so only on condition that he lost all remuneration, unlike female civil servants. Those conditions were intended purely to maintain discrimination on the ground of sex, in order to interfere retrospectively with the property rights of the applicant in particular and fathers in general.

In the applicant's submission, the retroactive application of the provisions of the new Act also introduced discrimination, in any event for between the period 28 May 2003 and 21 August 2003, since for the same retirement date women continued to be covered by the former provisions whereas men were subject to the new provisions.

The Court reiterates that an applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions relate to his "possessions" within the meaning of this provision. "Possessions" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it is impossible to exercise effectively cannot be regarded as a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 82 and 83, ECHR 2001-VIII, and *Gratzinger and Gratzingerova v. Czech Republic* (dec) [GC], no. 39794/98, § 69, ECHR 2002-VII).

The Court's first task is therefore to determine whether or not the applicant had a "possession" capable of being safeguarded by Article 1 of Protocol No. 1 and whether his legal situation can fall within the scope of Article 1 (see *Lecarpentier and Another v. France*, no. 67847/01, 14 February 2006, § 36).

The Court observes firstly that, under Article L.12 of the Pensions Code, in force at the material time, a service credit of one year for each child could be granted to female civil servants who had raised their children. The order of 7 July 2003 calculating the amount of the applicant's pension reflected the state of the legislation then in force. On 4 August 2003 the applicant, relying on a judgment of the Court of Justice of the European Communities of 29 November 2001 (and a judgment of the *Conseil d'Etat* adopted on the basis of the former judgment) which had held that Article L.12 was incompatible with the principle of equal pay, as laid down in the Treaty establishing the European Community, requested a review of that order. On 21 August 2003 a new Act amended Article L.12, thus granting entitlement

to the credit to all civil servants, provided that they had interrupted their employment in order to raise their children. On 15 September 2003 the Minister for the Economy and Finance rejected the applicant's request for review of the order: he requested the applicant to provide evidence of having interrupted his employment on the birth of his children and informed him that, if that condition were satisfied, he would subsequently consider whether the duration of that interruption did in fact correspond to the period to be determined by decree.

The Court considers that the applicant did not have any "claim having a sufficient basis in domestic law" or even a "legitimate expectation" of obtaining the requested credit. Neither the law in force at the time nor the judgments of the Court of Justice and the *Conseil d'Etat* – which the applicant attempted to present as being favourable to his case – could grant him the credit unconditionally.

In those circumstances, Article 1 of Protocol No. 1 is not applicable to the present case and this part of the application must be dismissed as incompatible *ratione materiae* with the provisions of the Convention, in application of Article 35 §§ 3 and 4 thereof.

For those reasons, the Court unanimously

Declares the application inadmissible.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President