CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 23960/02
by Walter ZEMAN
against Austria

The European Court of Human Rights (First Section), sitting on 30 June 2005 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. QUESADA, *Deputy Section Registrar,*

Having regard to the above application lodged on 10 June 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Walter Zeman, is an Austrian national, who was born in 1939 and lives in Vienna. He is represented before the Court by Mr J. Stöhr, a lawyer practising in Vienna. The respondent Government are represented by Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

A. The circumstances of the case

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

The applicant is a civil servant in the administration of the Vienna Municipality. On 21 June 1988 the applicant's wife, who was also a civil servant in the administration of the Vienna Municipality, died. During her working life she had paid contributions to the pension scheme established under the Pension Act (*Pensionsordnung*) and the Pension Allowance Act (*Ruhe-und Versorgungsgenußzulagengesetz*).

By decision of 22 August 1988 the Vienna Municipality (*Stadtwerke*) granted the applicant a survivor's pension (*Versorgungsgeld- und Versorgungsgeldzulage*) under the relevant provisions of the Pension Act of 1966, and the Pension Allowance Act. S.15 of the Pension Act in force at the relevant time provided for a survivor's pension in the amount of 60 % of the retirement pension of the applicant's late wife. Hereto was added a proportionate supplementary allowance under S.6 of the Pension Allowance Act.

According to the transitory provision contained in Article II of the Pension Act the monthly payments to which the applicant was entitled amounted to one-third of the survivor's pension from 1 July 1988, two-thirds of the survivor's pension from 1 January 1989 and the full survivor's pension from 1 January 1995.

On 31 December 1994 the fourteenth amendment of the Pension Act of 1966 came into force. Article II became invalid with effect from 1 January 1995.

According to Section 15 of the amended Pension Act the survivor's pension amounted to between 40 and 60% of the retirement pension of the deceased civil servant, the concrete percentage to be calculated on the basis of the retirement pensions of both spouses.

According to Section 64e of the Amended Pension Act, former Section 15 was still applicable to entitlements to a widow's pension or a pension of a widower who was incapable of gainful employment and indigent, which had been acquired prior to 1 January 1995.

On 2 January 1995 the Vienna Municipality reduced the amount of the applicant's survivor's pension to 40% of his late wife's retirement pension.

On 16 January 1995 the applicant appealed against this decision.

He submitted that, had he been a woman in a similar position, former Section 15 of the Pension Act would have applied to him and he would have been entitled to a survivor's pension in the amount of 60% of his late wife's retirement pension instead of the 40% which he received now under the amended Pension Act and the Pension Allowance Act. This violated his constitutional right to equal treatment.

On 16 May 1995 the Appeals Board of the Vienna Municipality (*Berufungssenat*) dismissed the appeal.

On 13 July 1997 the applicant filed a complaint with the Constitutional Court (*Verfassungsgerichtshof*).

On 8 October 1997 the Constitutional Court declined to deal with the applicant's complaint for lack of prospects of success.

On 19 December 2001 the Administrative Court (*Verwaltungs-gerichtshof*) to which the case had been transferred upon the applicant's request, dismissed the applicant's complaint.

It referred, *inter alia,* to case-law of the Constitutional Court concerning similar provisions of the Pension Act 1965. The Constitutional Court had found that in the light of continuing change in attitudes towards the equality of sexes, an exclusion of a widower from survivor's payments would, as a rule, constitute a violation of the principle of equal treatment.

There was, however, no constitutional concern about provisions which, in the course of an adjustment process, provided for equal rights of widows and widowers to a survivor's pension as of a certain date, but maintained differences as regards the entitlement to survivor's pensions acquired prior to that date. This decision was served on the applicant's counsel on 25 January 2002.

B. Relevant domestic law

In its 1986 version the relevant provisions of the Pension Act (*Pensionsordnung*) read as follows:

Section 14 (1)

"The surviving spouse of a civil servant is entitled to a monthly pension if the civil servant himself had such a claim on the day of his death, or if he would have had such a claim upon retirement on that day."

Section 15(1)

" A survivor's pension shall amount to 60 % of the civil servant's retirement pension....."

Article II (2)

"The monthly instalments to which the widower or the former husband are entitled, are - from 1 August 1986 onwards the amount of one third; - from 1 January 1989 onwards the amount of two thirds; - and from 1 January 1995 onwards the full amount. If the widower or former husband is incapable of gainful employment and indigent, this restriction does not apply."

Since 1 January 1995, when the fourteenth amendment to the Pension Act came into force, the relevant provisions of this Act have been as follows:

Section 15

"1. A survivor's pension shall amount to a certain percentage of the civil servant's retirement pension ...

3. ...the percentage shall lie between 40 and 60 ..."

Section 64e (1)

"Provided the entitlement [to a survivor's pension] had been acquired before 1 January 1995, Section 15 of the Pension Act as in force on 31 December 1994 is still applicable

- to the survivor's pension of a widow...

- to the survivor's pension of a widower, if he is incapable of gainful employment and indigent....."

Section 6 of the Pension Allowance Act (*Ruhe-und Versorgungsgenußzulagengesetz*) grants a survivor entitled to a survivor's pension [under the Pension Act] a supplementary pension allowance amounting to a certain percentage of the civil servant's retirement supplementary allowance. The percentage corresponds to the percentage relied on when calculating the survivor's pension under the Pension Act.

COMPLAINT

The applicant complained under Article 1 of Protocol 1 taken alone and in conjunction with Article 14 of the Convention that the reduction of his survivor's pension under the amended Pension Act and the Pension Allowance Act was discriminatory and violated his right to property.

He submits that, had he been a woman in a similar position, former Section 15 of the Pension Act would have applied to him and he would have been entitled to a survivor's pension in the amount of 60 % of his late wife's retirement pension instead of the 40% which he received under the legislation in force now.

THE LAW

The applicant complained under Article 1 of Protocol 1 taken alone and in conjunction with Article 14 of the Convention that the reduction of his survivor's pension under the amended Pension Act was discriminatory and violated his right to property.

Article 1 of Protocol 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."

Article 14 reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] 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 Government argued in the first place that Article 1 of Protocol No. 1 was not applicable. They submitted in this regard that the applicant's claim to a survivor's pension was based in public law and was not linked to contributions made by the applicant himself.

In the alternative, the Government denied that the adjustment of the applicant's survivor pension to 40 % of his late wife's retirement pension interfered with any existing possession. They argued in this regard that before 1 January 1995 the applicant was not entitled to the full amount of a survivor's pension, namely 60 % of his late wife's retirement pension, but had only an expectation to obtain such entitlement in the future. This expectation was based on the legislator's effort to adjust gradually a widower's pension to that of a widow. However, the applicant had to be aware of the fact that constant legal adjustment was required until full equal treatment would actually be achieved.

The applicant, referring to the Court's findings in the cases *Koua Poirrez v. France* (no. 40892/98, § 37, ECHR 2003-X; concerning an non-contributory allowance for disabled adults) and *Willis v. United Kingdom* (no. 36042/97, § 35, ECHR 2002-IV; concerning Widow's Payment and Widowed Mother's Allowance), submitted that his right to a survivor's pension amounted to a "pecuniary right" within the meaning of Article 1 of Protocol No.1. The Vienna Municipality, on 22 August 1988, had granted him a right to a survivor's pension in the amount of 60 % of his late wife's retirement pension, even though the

respective monthly payments were only due as from 1 January 1995. The subsequent reassessment of his survivor's pension amounted to an interference with his existing pecuniary rights.

The Court recalls that, according to the Convention organs' established case-law, the right to an old-age pension or related pension benefits is not included as such among the rights and freedoms guaranteed by the Convention. The Convention organs have nevertheless recognised that payment of contribution to a compulsory pension fund may, at least in certain circumstances, create a property right in a portion of such a fund and that such a right might be affected by the manner in which the fund is distributed (see *Saarinen v. Finland* (dec.), no. 69136/01, 28 January 2003). In the present case, the applicant was granted a survivor's pension under the Pension Act and Pension Allowance Act to which the applicant's late wife had made contributions. The Court further notes that under the relevant legislation in force in 1988, when the applicant was granted the pension, he was entitled to 60 % of his late wife's retirement pension as from 1 January 1995. The Court, thus, considers that the subsequent amendment of the Pension Act leading to the reduction of the applicant's entitlement to 40 % of his late wife's retirement pension, affected the applicant's property interests protected in Article 1 of Protocol 1. Accordingly, Article 14 is also applicable.

As regards the substance of the complaint under Article 1 of Protocol No. 1, the Government argued that the re-assessment of the widower's pension of the applicant was reasonable and justified as it served the legitimate aim of preventing excessive benefits.

Concerning the applicant's complaint under Article 14 of the Convention, the Government argued that the fourteenth amendment of the Pension Act provided for equal rights of widows and widowers to a survivor's pension as from 1 January 1995 on. The differences between widows and widowers as regards the entitlement to a survivor's pension acquired prior to that date were in line with the gradual adjustment process between widows' and widowers' pensions. Widows, unlike widowers, already received a survivor's pension in the amount of 60 % of their late husband's retirement pension before 1 January 1995, so that a new assessment of their pensions would have interfered with their acquired pension rights and violate their confidence.

The applicant submitted that the discrimination of widows and widowers under the amended Pension Act in fact prolongates the discrimination of widows and widowers in respect of entitlement to a survivor's pension before 1 January 1995. He maintained that there is no reason why excessive benefits should only be prevented when paying survivor pensions to widowers but not also to widows who had acquired a survivor's pension before 1 January 1995. He submitted that his position as a widower was just as well worth protecting than those of widows.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President