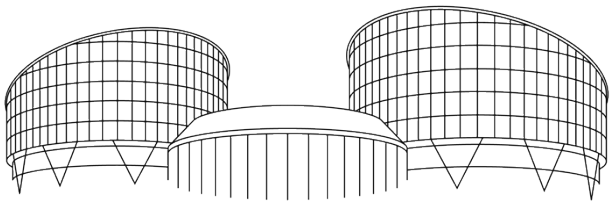

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FOURTH SECTION

CASE OF MOSKAL v. POLAND

(Application no. 10373/05)

JUDGMENT

STRASBOURG

15 September 2009

FINAL

01/03/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Moskal v. Poland,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 25 August 2009,

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

PROCEDURE

1. The case originated in an application (no. 10373/05) 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 Maria Moskal ("the applicant"), on 1 February 2005.

2. The applicant was represented by Ms R. Strzępek, a lawyer practising in Strzyżów. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that the *ex officio* re-opening 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 6 § 1 of the Convention. She also complained that the same facts had given rise to a breach of Article 1 of Protocol No. 1 to the Convention alone and in conjunction with Article 14 of the Convention. She alleged in this connection that the revocation of her acquired right to an early-retirement pension amounted to an unjustified deprivation of property and to discrimination on the grounds of her place of residence. Lastly, the applicant alleged an interference with her right to respect for her private and family life on account of the fact that she had been deprived of her sole source of income.

4. On 19 September 2006 a Chamber of the Fourth Section of the Court decided to give notice to the Government of the complaints under Articles 6 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention alone and read in conjunction with Article 14 of the Convention. It was decided to rule on the admissibility and merits of the application at the same time (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Ms Maria Moskal, is a Polish national who was born in 1955 and lives in Glinik Chorzewski.

6. The applicant is married with three children. She has a medium-level education. Prior to her early retirement she was employed for thirty-one years and had paid her social security contributions to the State. Her child, born in 1994, suffers from atopic bronchial asthma (*atopowa astma oskrzelowa*), various allergies and recurring sino-pulmonary infections.

A. Proceedings for early-retirement pension

7. On 6 August 2001 the applicant filed an application with the Rzeszów Social Security Board 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. The particular type of pension sought by the applicant was at the relevant time regulated 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").

9. Along with her application for a pension, the applicant submitted, among other documents, a medical certificate issued on 2 August 2001 by a specialist in allergy and pulmonology from the Health Service Institution in Strzyżów (*Zespół Opieki Zdrowotnej*). The certificate stated that the applicant's seven-year-old son had suffered from the age of three months from atopic bronchial asthma, various allergies, as well as frequent sino-pulmonary infections often accompanied by fever and bronchial constriction *(spastyczne skurcze oskrzeli)*. Consequently, he was in need of his mother's constant care. It was further noted that the medical certificate had been issued in connection with the application for an early-retirement pension regulated by the 1989 Ordinance in view of the need to provide permanent care to the child from 31 December 1998 onwards.

10. On 29 August 2001 the Rzeszów Social Security Board *(Zakład Ubezpieczeń Społecznych)* issued a decision granting the applicant the right to an early-retirement pension in the amount of 1,683 Polish zlotys (PLN) gross (PLN 1,020 net), starting from 1 August 2001. In the same decision, however, the Social Security Board suspended the payment of the pension

due to the fact that the applicant was still working on the date of the decision.

11. On 31 August 2001 the applicant resigned from her full-time job as a clerk at the Polish Telecommunications Company in Rzeszów, where she had been employed for the past thirty years.

12. Consequently, on an unspecified date, the Rzeszów Social Security Board issued a new decision authorising the payment of the previously awarded retirement pension starting from 1 September 2001.

13. Subsequently, the applicant was issued with a pensioner's identity card marked 'valid indefinitely' and for the following ten months she continued to receive her pension without interruption.

B. Re-opening of proceedings for early-retirement pension

14. On 25 June 2002 the Rzeszów Social Security Board issued two decisions. By virtue of the first decision, the payment of the applicant's pension was discontinued starting from 1 July 2002. By virtue of the second decision, the Board revoked the initial decision of 29 August 2001 and eventually refused to award the applicant the right to an early-retirement pension under the scheme provided for by the 1989 Ordinance. The latter decision stated that on 4 June 2002 the proceedings concerning the applicant's right to a pension had been re-opened *ex officio* and that, as a result, "the medical certificate attached to her application for a pension had been found to raise doubts [as to its accuracy]". Furthermore, the following standard clause appeared in the decision:

> "In the light of the medical documentation obtained concerning the child, it was established that the condition with which the child had been diagnosed was not enumerated in the [1989] Ordinance, and the analysis of the level of severity and the course [of the disease] did not indicate an impairment of bodily functions to such a degree as to justify the award of the pension [on account of] the necessity of permanent care of the child. It follows that the medical certificate serving as the basis for the award of the benefit is not supported by medical documentation. Consequently the right to a retirement pension is denied."

15. The applicant appealed against the decision of 25 June 2002 divesting her of the right to an early-retirement pension. She submitted that she should receive the benefit because her son required her constant care, as confirmed by the medical certificate attached to the original application. Moreover, the applicant alleged that the revocation of her retirement pension was contrary to the principle of vested rights.

16. On 26 February 2003 the Rzeszów Regional Court (*Sąd Okręgowy*) dismissed the applicant's appeal.

17. A medical report by an expert in pulmonology was ordered by the Regional Court. Having examined the medical documentation concerning the applicant's son, as well as the child in person, the expert found that the

applicant's son suffered from sporadic bronchial asthma and recurring sino-pulmonary infections. The expert concluded that the child did not require, as of 31 December 1998 or at the time of the proceedings, his mother's permanent care, her nursing or any further aid, since his bronchial asthma did not significantly impair his respiratory functions. He further observed that the applicant's care was needed only when the child's condition occasionally became more severe.

18. Relying on the above expert opinion, the Regional Court held that the applicant had been rightfully divested of the right to a pension under the scheme provided by the 1989 Ordinance as she did not satisfy the requirement of necessary permanent care. The Regional Court did not examine the case from the standpoint of the doctrine of vested rights.

19. On 16 October 2003 the Rzeszów Court of Appeal (*Sąd Apelacyjny*) dismissed the applicant's appeal against the aforementioned judgment. The Court of Appeal agreed with the findings of fact contained in the expert opinion produced in the course of the first-instance proceedings to the effect that the applicant's son did not require at the relevant time his mother's permanent care.

20. On the issue of the re-opening of the proceedings, the Court of Appeal observed that decisions concerning retirement and disability pensions were only of a declaratory character. Therefore, they could be quashed by a social security authority where new evidence had been submitted or relevant circumstances, which pre-existed the initial pension award but which had not been taken into consideration by the authority beforehand, had come to light.

21. Furthermore, the Court of Appeal observed that pension decisions could be verified even in the light of pre-existing circumstances which had not been taken into consideration as a result of the authority's own mistake or negligence. On the other hand, the Court of Appeal agreed with the applicant that the proceedings could not be re-opened as a consequence of a different assessment of the very same evidence which had accompanied the original application for a pension.

22. The Court of Appeal found that, in the instant case, the impugned pension proceedings had been re-opened because relevant circumstances pre-existing the initial pension award had been discovered by the authority in the course of a supplementary examination of the child's entire medical record by the Social Security Board's doctor *(lekarz orzecznik)*.

23. Finally, the Court of Appeal stated that the doctrine of vested rights did not apply to rights acquired unjustly, for example when a person had been granted a right to a pension whereas in fact he or she had never met the requirements laid down in the relevant provisions. The Court of Appeal recalled that the purpose behind the 1989 Ordinance was to enable the carers of children with extremely severe disorders to take early retirement. It was aimed at providing a substitute source of income in cases where persons

had lost their wages owing to the need to terminate their employment in order to take care of their sick children on a permanent basis. The Court of Appeal emphasised that, in such circumstances, it was necessary for the social security authorities to make a careful examination of whether or not persons applying for the right in question satisfied all the requirements.

24. On 7 May 2004 (decision served on 7 August 2004) the Supreme Court (*Sąd Najwyższy)* dismissed the applicant's cassation appeal, fully endorsing the Court of Appeal's findings of fact and law. Referring to the particular circumstances of the case, the Supreme Court held that the social security authority had lacked evidence as to the severity of the child's condition, since the medical certificate attached to the application did not specify those activities which the child could not perform due to his alleged impairment. The fact that the aforementioned evidence had been lacking at the date of the decision did not come to light until after the validation of the decision. Therefore, the impugned proceedings had been re-opened due to the discovery of new relevant circumstances and not on the basis of a re-examination of the very same evidence attached to the applicant's application for a pension.

25. The applicant was not ordered to return her early-retirement benefits paid by the Social Security Board from 1 September 2001 until 1 July 2002, despite the revocation of her right to the early-retirement pension.

C. The applicant's social security status after the revocation of the "EWK" pension

26. In the period from 1 July 2002 (the date on which the payment of the applicant's "EWK" pension was discontinued) to 25 October 2005 the applicant was not in receipt of any social benefits. The applicant submitted that in that period she had had no other income.

As a result of separate social security proceedings, which had been instituted by the applicant, the Strzyżów District Labour Office (*Powiatowy Urząd Pracy*) decided on 25 October 2005 to grant the applicant a pre-retirement benefit (*zasiłek przedemerytalny*) in the amount of 523 Polish zlotys (PLN) net. Because, under the applicable law, a three-year statute of limitations applies to social security claims the decision to grant the right had a retroactive effect, with a starting date of 25 October 2002.

As a result, on an unspecified date, presumably on 1 August 2004, the applicant received a pre-retirement benefit in the form of a lump-sum payment for the period between 25 October 2002 and 31 July 2004, without interest.

The benefit was at first paid by the Strzyżów Regional Labour Office (*Powiatowy Urząd Pracy*) and since 1 August 2004 it was paid by the Rzeszów Social Security Board. As of March 2008 the applicant's pre-retirement benefit amounts to 594 Polish zlotys (PLN) net.

27. In the light of the law as it now applies, it appears that the applicant will qualify for a regular retirement pension in 2015.

D. Additional information

28. Approximately 120 applications arising from a similar fact pattern have been brought to the Court. The applicant in the instant case and most of the other applicants form the Association of Victims of the Social Security Board (*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.

29. The applicant submitted, according to the Association, that only 10% of the total number of "EWK" pension recipients had been subjected to review and re-opening under Section 114 of the 1998 Law.

30. The Government submitted that as of the end of 2006 approximately 76,600 individuals had been in receipt of the "EWK" pension. Although there were no statistics as to how many pensions had been revoked either countrywide or in each region, that number was very small.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. System of granting social security benefits in Poland

31. The system of social security in Poland is regulated by the Law of 13 October 1998 on the system of social insurance (*Ustawa o systemie ubezpieczeń społecznych*) and a number of other acts applying to specific occupational groups and regulating specific types of benefits.

Proceedings for granting welfare benefits are two-tier. First, an application for a benefit is made to the regional Social Security Board. The board makes an assessment of the eligibility criteria for each type of benefit and issues a decision. Then, in the event that an individual concerned appeals, the decision becomes subject to judicial review by a social security court, which is a specialised branch of a regional civil court. The Social Security Board is a State authority which carries out administrative functions and issues declaratory decisions. In the judicial review phase, the Board becomes a party to the proceedings before the social security court.

A judicial decision taken by the regional social security court may then be challenged by either party to the proceedings before a special social security branch of a court of appeal. Ultimately, a decision delivered by an appellate court may be appealed to the Supreme Court. This remedy is available irrespective of the amount of the claim.

B. The 1989 Ordinance

32. The 1989 Ordinance ceased to be in force on 31 December 1998. However, its provisions remained in operation with regard to persons who had met the requirements of an early-retirement pension before that date but had failed to apply for the benefit in due time. The conditions to be fulfilled by a person in order to qualify for an early-retirement pension were laid down by paragraph 1 of the 1989 Ordinance.

Paragraph 1.1 contained a reference to section 26 paragraph 1 point 2 of the Law of 14 December 1982 on retirement pensions of employees and their families. In the relevant part it provided that persons entitled to an early-retirement pension were those persons (both women and men) who had been employed for at least 20 or 25 years and who personally took care of a child.

Paragraph 1.2 provided that for children under the age of 16 it was not necessary to submit an official Social Security Board disability certificate. It was sufficient to present a medical certificate issued by a specialist medical clinic stating: "due to the health condition, caused by one of the diseases enumerated in paragraph 1.3, the child requires permanent care".

Paragraph 1.3 provided that early retirement was justified by the following physical and/or mental conditions of the child:

> "1. Complete dysfunction of upper or lower limbs, pareses and palsies, which prevent the child from independent movement and from controlling his or her physiological functions;
>
> 2. Mild, moderate and severe mental retardation, mental disorders, injury or disease of the central nervous system, making impossible autonomy in decisions or in daily activities;
>
> 3. Mild mental retardation with accompanying significant impairment of movement, sight, hearing or other chronic diseases significantly impairing bodily functions;
>
> 4. Other diseases impairing body effectiveness to a very serious degree."

C. Law of 17 December 1998 on retirement and disability pensions paid from the Social Insurance Fund

33. The re-opening of the proceedings concerning the benefit in question is regulated in section 114 of the 1998 Law**,** which at the relevant time read as follows:

> "114.1 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."

D. The Supreme Court's resolution of 5 June 2003

34. In its resolution of 5 June 2003 (no. III UZP 5/03), adopted by a bench of seven judges, the Supreme Court (*Sąd Najwyższy*) dealt with the question submitted by the Ombudsman *(Rzecznik Praw Obywatelskich*) as to whether a different assessment of the evidence attached to the application for a pension, carried out by a social security authority after validation of the decision concerning the pension, might constitute a ground for re-opening the proceedings leading to a review of the right to a pension in accordance with section 114 of the Law of 17 December 1998 on retirement and disability pensions paid from the Social Insurance Fund. The answer was in the negative. The Supreme Court held, *inter alia*:

> "A different assessment of the [same] evidence as attached to the application for a retirement or disability pension, carried out by a social security authority after validation of the decision awarding the right to a pension, is not one of the circumstances justifying the *ex officio* re-opening of the proceedings for a review of the right to a pension in accordance with section 114 of the Law of 17 December 1998 on retirement and disability pensions paid from the Social Insurance Fund."

THE LAW

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

35. The applicant complained 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. 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

1. Government's preliminary objection on incompatibility ratione materiae

(a) The Government

36. The Government submitted that the scope of Article 1 of Protocol No. 1 to the Convention did not extend to erroneously acquired rights to pensions and welfare benefits, rights which, in fact, had never arisen under the domestic law.

(b) The applicant

37. The applicant submitted that the provision in question applied in her case and that she had been unjustly deprived of her property.

2. The Court's assessment

(a) General principles on the applicability of Article 1 of Protocol No. 1

38. The principles which apply generally in cases under Article 1 of Protocol No. 1 are equally relevant when it comes to social and welfare benefits. In particular, Article 1 of Protocol No. 1 does not create a right to acquire property. This provision places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit-whether conditional or not on the prior payment of contributions-that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 54, ECHR 2005-...).

39. In the modern democratic State many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable (see, among other authorities, *Stec*, cited above, § 51).

40. The mere fact that a property right is subject to revocation in certain circumstances does not prevent it from being a "possession" within the

meaning of Article 1 of Protocol No. 1, at least until it is revoked (*Beyeler v. Italy* [GC], no. 33202/96, § 105, ECHR 2000-I).

On the other hand where a legal entitlement to the economic benefit at issue is subject to a condition, a conditional claim which lapses as a result of the non-fulfilment of the condition cannot be considered to amount to "possessions" for the purposes of Article 1 of Protocol No. 1 (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 82-83, ECHR 2001-VIII, and *Rasmussen v. Poland*, no. 38886/05, §71, 28 April 2009).

(b) Application of the Convention principles to the instant case

41. The applicant in the instant case had been employed for thirty-one years and paid her social security contributions to the State. Because her minor child suffered from asthma, various allergies and recurring sino-pulmonary infections she wished to take early retirement under the "EWK" pension scheme in order to provide better care to her child (see paragraph 6 above).

42. The early-retirement pension in question, regulated by the 1989 Ordinance, was conditional on the existence of three elements (see paragraph 28 above). The first element was the duration of the pensioner's employment prior to his or her application for a pension. The second element was the requirement that the pensioner personally took care of the child concerned. These requirements, by their nature, were susceptible to an objective assessment. On the other hand, the third element, which concerned the health condition of the pensioner's child – severe enough to make it necessary for the child to be under the permanent care of the pensioner (the requirement of necessary permanent care) – was variable and uncertain, and in the instant case had indeed been a matter of contention.

43. The Court notes that the decision issued by the Rzeszów Social Security Board on 29 August 2001 conferred on the applicant the entitlement to receive the "EWK" pension of 1,683 Polish zlotys (PLN) gross as of 1 September 2001. In doing so the social security authority agreed that the applicant had satisfied all the statutory conditions and qualified for the pension. The applicant was issued with a pensioner's identity card marked as 'valid indefinitely'. The 2001 decision was enforced without any interruption for ten consecutive months, until 1 July 2002. On 25 June 2002 the Rzeszów Social Security Board quashed the 2001 decision and refused to award the applicant the right to the "EWK" pension, noting that she had not satisfied one of the conditions necessary to qualify for that type of welfare benefit, namely that her child's health condition was not severe enough to require, as of 31 December 1998 or at the time of the revocation, his mother's permanent care (see paragraphs 10-14 above).

44. In the light of the parties' submissions, the Court accepts that the applicant applied for the early-retirement pension in good faith and in compliance with the applicable law. Because her child was not yet sixteen years old, she was not required to have her son examined by a board of doctors appointed by the social security authority. Instead, she had to attach to her pension application a health certificate concerning her child, signed by a specialist doctor. By submitting her pension dossier to the Rzeszów Social Security Board the applicant subjected her case to the evaluation of the State authorities (see paragraphs 7 and 9 above). As described above, the grant of the benefit in question depended on a number of statutory conditions, assessment of which rested fully with the social security authority. Consequently, the applicant could not be certain of the outcome of her application. On the other hand, as soon as the authorities confirmed that the applicant qualified for the benefit, she was justified in considering that decision accurate and in acting upon it. She resigned from her job, which was necessary to trigger the pension payment (see paragraphs 10-11 above), and organised her family's life accordingly. She could not have realised that her pension right had been granted by mistake and was justified in thinking that unless there was a change in the condition of her child's health the decision would not lose its validity.

45. The Court finds that, in the instant case, a property right was generated by the favourable evaluation of the applicant's dossier attached to the pension application which had been lodged in good faith and by the Social Security Board's recognition of the right. The decision of the Rzeszów Social Security Board of 29 August 2001 provided the applicant with an enforceable claim to receive the so-called "EWK" early-retirement pension in a particular amount, payable as soon as she resigned from her job. Based on this decision the applicant was in receipt of the pension from 1 September 2001 until 1 July 2002.

In so far as the Government submitted that the applicant did not qualify for the "EWK" benefit, the Court will address this matter from the point of view of justification for the withdrawal of the benefit.

(c) Conclusion on admissibility

46. It follows that in the circumstances of the case considered as a whole, the Court finds that the applicant may be regarded as having a substantive interest protected by Article 1 of Protocol No. 1 to the Convention.

The Court also notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 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' general submissions

(a) The applicant

47. 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. She also argued that even if the right had indeed been granted erroneously, an individual who had applied for the right in good faith should not be expected to pay the price for the mistake of public authorities acting without due diligence.

(b) The Government

48. 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

49. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws" (see *The former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 79 and 82, ECHR 2000-XII).

50. Article 1 of Protocol No. 1 also requires that a deprivation of property for the purposes of its second sentence be in the public interest and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see, among others authorities, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, §§ 81-94, ECHR 2005).

51. Moreover, the principle of "good governance" requires that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency (see *Beyeler*, cited above, § 120, and *Megadat.com S.r.l. v. Moldova*, no. 21151/04, § 72, 8 April 2008).

52. The requisite "fair balance" will not be struck where the person concerned bears an individual and excessive burden (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §§ 69-74, Series A no. 52, and *Brumărescu*, cited above, § 78).

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

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

53. The parties agreed that the decisions of the Rzeszów Social Security Board of 25 June 2002, 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

(α) The parties' submissions

The applicant

54. The applicant submitted that the interference had not been in accordance with the law since the decision of the Rzeszów Social Security Board of 29 August 2001 had been quashed as a result of the review of the same evidence as attached to her original application for the pension. Such procedure was contrary to section 114 of the 1998 Law which, at the relevant time, allowed for the re-opening of pension proceedings only if new evidence was introduced or previously-existing circumstances came to light. The applicant also relied on the 2003 Resolution of the Supreme Court (see paragraph 30 above).

The Government

55. In the Government's submission, the interference had been in accordance with the law. They relied on the reasoning of the domestic courts which had reviewed the decision of 25 June 2002 (see paragraphs 16-24 above). The domestic courts found that the impugned re-opening had been triggered by the assessment of medical reports other than those attached to the applicant's pension application. That material had existed but had not been taken into account by the social security authority at the time when the applicant's right to a pension was being examined. This was considered to constitute newly-discovered circumstances within the meaning of section 114 of the 1998 Law.

(β) The Court

56. In the instant case the measure complained of was based on section 114 of the 1998 Law, which at the relevant time provided that the right to

benefits could be re-assessed *ex officio*, if, after the validation of the decision concerning benefits, new evidence was submitted or relevant circumstances which had existed before the decision was issued were discovered. As previously observed, such a procedure is common to the legal systems of many member States.

The Court, giving due deference to the findings of the domestic courts, accepts that the proceedings in the applicant's case had been re-opened as a consequence of the discovery of the welfare authority's own mistake in its original assessment of the applicant's eligibility for the early-retirement pension under the 1989 Ordinance. The procedure was thus used to correct an error on the part of the social security board and to divest the applicant of the right to a pension which she had acquired unjustly (see paragraphs 88 and 89 below).

57. The Court therefore concludes that the interference with the applicant's property rights was provided for by law, as required by Article 1 of Protocol No. 1 to the Convention.

(iii) Legitimate aim

58. The Court must now determine whether this deprivation of property pursued a legitimate aim, that is, whether it was "in the public interest", within the meaning of the second rule under Article 1 of Protocol No. 1.

(α) The parties' submissions

The applicant

59. The applicant made a general statement that the interference in question did not pursue a legitimate aim.

The Government

60. The Government submitted that the 1989 Ordinance had been put in place as part of the State's social policy aimed at assisting parents who, due to their child's health condition, could not reconcile their employment with the need to provide constant care to their child. Given the specific nature of the "EWK" pension, it was understandable why the requirements for eligibility for that benefit had to be defined rigidly and precisely. The applicant had been divested of her right to the early-retirement pension because, in fact, she did not satisfy the statutory requirements in order to qualify for this particular type of benefit. To continue the payment of the "EWK" pension to the applicant and other beneficiaries in a similar position would be accepting their unjust enrichment.

(β) The Court

61. Because of their direct knowledge of the society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities, accordingly, enjoy a certain margin of appreciation.

Furthermore, the notion of "public interest" is necessarily extensive. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98; *The former King of Greece and Others*, cited above, § 87; and *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 67 *in fine*, ECHR 2002-IX).

62. As already stated above, the aim of the interference in question was to correct a mistake of the social security authority, which resulted in the applicant unjustly acquiring a right to the "EWK" pension.

63. The Court considers that depriving the applicant of her early-retirement pension pursued a legitimate aim, namely to ensure that the public purse was not called upon to subsidise without limitation in time undeserving beneficiaries of the social welfare system.

(iv) Proportionality

64. Lastly, the Court must examine whether an interference with the peaceful enjoyment of possessions strikes a fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights, or whether it imposes a disproportionate and excessive burden on the applicant (see, among many other authorities, *Jahn and Others* [GC], cited above, § 93). Despite the margin of appreciation given to the State, the Court must nevertheless, in the exercise of its power of review, determine whether the requisite balance was maintained in a manner consonant with the applicant's right to property (see *Rosinski v Poland*, no. 17373/02, § 78, 17 July 2007). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 to the Convention as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 38,

Series A no. 332, and *The former King of Greece and Others*, cited above, § 89). Thus the balance to be maintained between the demands of the general interest of the community and the requirements of fundamental rights is upset if the person concerned has had to bear a "disproportionate burden" (see, among many other authorities, *The Holy Monasteries v. Greece*, 9 December 1994, §§ 70-71, Series A no. 301-A).

(α) The parties' submissions

The applicant

65. In the applicant's view, there was no reasonable relationship between the interference and the interests pursued. In her submission, because the practice of reviewing applications for the "EWK" pension was limited to 10% of the total number of the benefit's recipients, the measure in question could not be regarded as having been of any significant financial advantage to the social security fund.

The applicant also claimed that she had borne an excessive burden in that the decision of 25 June 2002 had deprived her of her only source of income with immediate effect.

The Government

66. The Government submitted that the decision to divest the applicant of her right had not been disproportionate.

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 variable conditions, were subject to verification and possible rescission.

The Government also argued that the impugned measure had been applied on a small scale and equally throughout the entire country. The cases for review had been selected at random. The social security authority had the power to undertake the review at its own discretion within the limits provided by law, in particular by section 114 of the 1998 Law.

(β) The Court

67. The Court observes that in the instant case the Government did not justify the measure in question by the need to make savings in the interests of the social security fund (unlike in *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 43, ECHR 2004-IX). The State aimed primarily at achieving concordance between the factual situation of beneficiaries and their compliance with the statutory requirements for this type of pension.

68. In the instant case, a property right was generated by the favourable 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 also paragraph 45 above). Before being invalidated the decision of 29 August 2001 had undoubtedly produced effects for the applicant and her family (see in particular paragraph 11 above).

69. It must also 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 ten months 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 paragraph 14 above).

70. 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 25 above) did not mitigate sufficiently the consequences for the applicant flowing from the interference in her case.

71. Even though the applicant had an opportunity to challenge the Social Security Board's decision of 25 June 2002 in judicial review proceedings, her right to the pension was determined by the courts only two years later and during that time she was not in receipt of any welfare benefit (see paragraphs 15-24 and 26 above).

72. As stated above, in the context of property rights, particular importance must be attached to the principle of good governance. It is desirable that public authorities act with the utmost scrupulousness, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other property rights. In the instant case, the Court considers that having discovered their mistake the authorities failed in their duty to act in good time and in an appropriate and consistent manner.

73. The Court, being mindful of the importance of social justice, considers that, as a general principle, public authorities should not be prevented from correcting their mistakes, even those resulting from their own negligence. Holding otherwise would be contrary to the doctrine of unjust enrichment. It would also be unfair to other individuals contributing to the social security fund, in particular those denied a benefit because they failed to meet the statutory requirements. Lastly, it would amount to sanctioning an inappropriate allocation of scarce public resources, which in itself would be contrary to the public interest.

Notwithstanding these important considerations, the Court must, nonetheless, observe that the above general principle cannot prevail in a situation where the individual concerned is required to bear an excessive burden as a result of a measure divesting him or her of a benefit.

If a mistake has been caused by the authorities themselves, without any fault of a third party, a different proportionality approach must be taken in determining whether the burden borne by an applicant was excessive.

74. In this connection it should be observed that as a result of the impugned measure, the applicant was faced, practically from one day to the

next, with the total loss of her early-retirement pension, which constituted her sole 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.

75. In addition, the Court notes that, despite the fact that under the applicable law the applicant qualified for another type of pre-retirement benefit from the State as soon as she lost her entitlement to the "EWK" pension, her right to the new benefit was not recognised until the decision of 25 October 2005, which finally brought an end to proceedings which had lasted three years. The amount of the applicant's pre-retirement benefit is approximately 50 % lower that her "EWK" pension (see paragraph 26 above). Even though the decision to grant the benefit was backdated, the benefit due for the period between 25 October 2002 and 31 July 2004 was paid without any interest (see paragraph 26 above). The mistake of the authorities left the applicant with 50% of her expected income, and it was only after proceedings lasting three years that she was able to obtain the new benefit.

Lastly, the fact that the applicant retained her full right to receive, as of 2015, an ordinary old-age pension from the pension fund is immaterial since this would have been the case even if she had continued to receive her "EWK" pension.

76. In view of the above considerations, the Court finds that 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.

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

II. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

A. As regards the principle of legal certainty

77. The applicant also complained that the *ex-officio* re-opening 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 Article 6 § 1 of the Convention.

Article 6 § 1 of the Convention in its relevant part reads as follows:

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

1. The parties' submissions

(a) The applicant

78. The applicant argued that the decision of 29 August 2001 of the social security authority granting her a right to an early-retirement pension was final. She submitted that the durability of social security decisions was crucial for the stability of the legal effects produced by such decisions. The principle of finality of such decisions corresponded to the principle of legal certainty of administrative decisions. In civil law that principle was referred to as *res judicata* and it resulted in the impossibility to institute new proceedings with the same subject matter involving the same parties.

79. The applicant referred to the Supreme Court's resolution of 2003 in which it had been observed that section 114 of the 1998 Law did not allow for a new assessment of the same evidence accompanying the original application for a pension. The right to a pension could be reviewed only on the basis of new evidence or newly-revealed circumstances.

The applicant maintained that her right to an early-retirement pension had been revoked solely as a result of a new assessment of the evidence which had been attached to the original application for a pension in 2001.

(b) The Government

80. The Government submitted that a social security decision did not benefit from the protection of the principle of legal certainty, construed as the principle of *res judicata*. They also argued that the notion of legal certainty was not absolute and that in the instant case there had been relevant and sufficient reasons to depart from that principle in order to secure respect for social justice and fairness. In particular, the Government submitted that section 114 of the 1998 Law enumerated the instances when a re-assessment of a right to a benefit or the amount of the benefit was required. Any such re-assessment implied that administrative or social security proceedings could be re-opened and a new decision – replacing the previous one – issued.

Moreover, the Government relied on the principle, stated in a Supreme Court judgment of 2001 and resolution of 2003, that a party to proceedings was not entitled to claim a right to benefits which had been established on the basis of an erroneous and subsequently revoked decision of an administrative authority.

81. The Government also drew attention to the fact that in the instant case the decision of 25 June 2002 to divest the applicant of the right to the early-retirement pension in question had been the subject of judicial control, with all guarantees derived from Article 6 § 1 of the Convention.

They argued that if social security decisions were to benefit from the protection of a strictly applied principle of *res judicata*, administrative

authorities would have no possibility to correct their decisions not to grant benefits to persons who were legitimately entitled to receive them.

Lastly, the Government observed that even if applied in the case of a social security decision, the principle of legal certainty, as defined in the Court's case-law, should not prevent a domestic authority from revoking an administrative decision by which a welfare authority had erroneously granted a never-existing right to a pension. Such revocation should be regarded as a legitimate departure from the principle of legal certainty.

2. The Court's assessment

82. The Court considers that the principle of legal certainty applies to a final legal situation, irrespective of whether it was brought about by a judicial act or an administrative or, as in the instant case, a social security decision which, on the face of it, is final in its effects.

It follows that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

83. 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 complaint under Article 6 regarding the principle of legal certainty of the Convention does not require a separate examination.

B. As regards the alleged unfairness of the proceedings

84. The applicant also made a general complaint that the proceedings in her case had been unfair. In particular, she alleged that the domestic courts had wrongly assessed the evidence.

85. This complaint falls to be examined under Article 6 § 1 of the Convention.

However, pursuant to Article 35 § 3 of the Convention:

> "The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded ..."

86. The Court has no jurisdiction under Article 6 of the Convention to substitute its own findings of fact for the findings of domestic courts. The Court's only task is to examine whether the proceedings, taken as a whole, were fair and complied with the specific safeguards stipulated by the Convention.

87. In this connection, the Court notes that the applicant submitted that, contrary to the findings of the domestic courts, the impugned proceedings had been instituted as a result of a review of the same evidence as attached to her original application for a pension, and therefore not in compliance

with the domestic law which stipulated the grounds for the re-opening of pension proceedings.

88. Assessing the circumstances of the instant case as a whole, the Court finds no indication that the impugned proceedings were conducted unfairly.

The applicant failed to submit any evidence that the national judicial authorities had in any way breached her rights or reached arbitrary conclusions. The national courts held hearings on the merits of the case, heard statements from all necessary witnesses, including the applicant, and examined and assessed all the evidence before them, including the medical records of the applicant's child submitted by both parties and the reports of an independent medical expert. Moreover, the factual and legal reasons for the national courts' findings were set out at length in the judgments of the Regional Court of 26 February 2003 and the Court of Appeal of 16 October 2003, as well as in the judgment of the Supreme Court of 7 May 2004. In their judgments the national judicial authorities gave a very persuasive and detailed analysis of all the relevant circumstances of the case and provided relevant and sufficient reasons for their decisions (see paragraphs 15-24 above).

89. It follows that the applicant's complaint under Article 6 § 1, concerning the alleged unfairness of the proceedings is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION

A. As regards the loss of the "EWK" pension

90. The applicant complained 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 financial resources indispensable for her livelihood.

This complaint falls to be examined under Article 8 of the Convention, which in its relevant part reads as follows:

> "1. Everyone has the right to respect for his private and family life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

(a) The applicant

91. The applicant submitted that prior to her early retirement her salary from the Polish Telecommunications Company had been an essential part of her family budget. Her husband's salary was low and they had to maintain three minor children, including the one who was chronically ill. In the first years of her son's life the applicant received regular help from her elderly mother. Afterwards, however, her mother could no longer be relied on because of her old age. This was when it became necessary for the applicant to take early retirement to stay at home with her son. The applicant submitted that in order to trigger the payment of the benefit granted in 2001 she had completely terminated her employment contract. She claimed that she had little prospect of finding a new job in the region, which had a high rate of unemployment. She also submitted that as a result of a legal loophole, having acquired the right to the "EWK" retirement pension she was considered to have waived indefinitely her right to other social security benefits.

(b) The Government

92. The Government submitted that the applicant was now in receipt of a pre-retirement benefit paid at first by the Strzyżów Regional Labour Office and currently, by the Rzeszów Social Security Board. Therefore, the applicant's argument that she was considered to have waived her right to any social benefit was untrue.

The Government also stated that a right to work was not guaranteed by the Convention. In any event, there was no link between the decision divesting the applicant of her early-retirement pension and the fact that she stood little chance of finding a new job.

2. The Court's assessment

93. The "EWK" pension is a social security benefit aimed at enabling parents to stop working in order to look after their seriously sick children. Moreover, in the instant case, the pension in question constituted the basis of the applicant's family budget.

In these circumstances, the Court accepts that divesting the applicant of the "EWK" pension must constitute an interference with her right to respect for her family life, given that the measure in question entails severe consequences for the quality and enjoyment of the applicant's family life and necessarily affects the way in which the latter is organised (see *Petrovic v. Austria*, 27 March 1998, § 27, *Reports of Judgments and Decisions* 1998-II).

It follows that the instant complaint falls within the scope of Article 8 of the Convention. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

94. However, having regard to the reasons which led the Court to find a violation of Article 1 of Protocol No. 1 to the Convention, it finds that the applicant's complaint under Article 8 of the Convention does not require a separate consideration.

B. As regards the domestic proceedings

95. The applicant also complained that Article 8 of the Convention had been breached because her child's health condition had been the subject of an open dispute before the domestic courts during the pension proceedings. Moreover, the applicant claimed that her son had been examined in person by a court-appointed medical expert, which had caused him considerable stress. Lastly, the applicant complained that the report produced by the expert had been transferred to the Rzeszów Social Security Board.

96. The Court observes that the applicant instituted judicial proceedings to review the decision of the Rzeszów Social Security Board of 25 June 2005. As the Court has noted in the preceding paragraphs, in order to qualify for the "EWK" pension the applicant had to prove that her son's health was fragile enough to make him dependent on the applicant's permanent care.

97. In these circumstances, the Court finds it natural that the domestic courts examined all relevant evidence, which comprised various medical documents. Ordering a report on the child's health to be prepared by an independent doctor was both in compliance with the domestic law and legitimate in view of the subject matter of the proceedings. Finally, the Court does not consider that the applicant's son could have been particularly distressed by the medical check-up carried out by the court-appointed doctor. The child was about eight years old at the relevant time and used to medical personnel since he had received regular medical treatment from a very young age.

98. In view of the above, the Court finds that the applicant's complaint does not disclose any appearance of lack of respect for the privacy of the applicant's child or of interference with his rights protected by Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

99. Lastly, the applicant complained under Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1, of discrimination based on her place of residence. In particular, she alleged that limiting the practice of reviewing applications for the "EWK" pension to the Podkarpacki region had led to unjustified discrimination of "EWK" pensioners from that location. Without referring to any official statistics, the applicant submitted that the majority of the recipients of the "EWK" pension who had been subjected to a re-examination of their initial pension claims, had come from the Podkarpacki region.

This complaint falls to be examined under Article 14 of the Convention, in conjunction with Article 1 of Protocol No. 1 to the Convention.

Article 14 of the Convention 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."

100. Noting that Article 1 of Protocol No. 1 to the Convention has been found to apply in the instant case (see paragraph 46 above) and assuming that a place of residence applied as a criterion for the differential treatment of citizens in the grant of State pensions is a ground falling within the scope of Article 14 of the Convention, the Court observes that in the instant case the applicant failed to submit precise data to substantiate her allegation of discrimination. In any event, the Court observes that the law on the re-opening of pension proceedings was at the relevant time implemented universally throughout the country. The contested measure was general and aimed at an unspecified group of persons benefiting from public funds in accordance with the principle of equality.

Even if there had been a difference in the treatment of "EWK" pensioners in the Podkarpacki region, and particularly the applicant, the Court observes that it cannot be excluded that such difference may have resulted from the more efficient practices implemented by the local social security authority for verifying pension applications as compared to other regions. In particular, there is no evidence which would indicate that persons in receipt of the "EWK" pensions in the Podkarpacki region were deliberately targeted by the State authorities.

101. In consequence, this complaint must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. 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

1. Pecuniary damage

103. The applicant claimed 78,209 Polish zlotys (PLN) (currently corresponding to approximately 18,000 euros (EUR)) in respect of pecuniary damage. This amount comprised: (1) an equivalent of the "EWK" pension, which was not paid to her in the period from June until September 2002, (2) the difference between the "EWK" pension, which she did not receive and the special pre-retirement benefit, paid to her from October 2002 until March 2007, and (3) the difference between the "EWK" pension which she did not receive and the special pre-retirement benefit due for the period from April 2007 until October 2015, when the applicant qualified for a retirement pension under the general scheme.

The applicant also claimed 25,000 Polish zlotys (PLN) in respect of non-pecuniary damage.

104. The Government submitted that there was no causal link between the alleged violation and the pecuniary damage claimed. In respect of the claim for non-pecuniary damage, the Government observed that it was exorbitant. If the Court were to find a violation in the present case, the Government requested it to rule that that finding constituted in itself sufficient just satisfaction.

105. 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, the Court awards the applicant EUR 15,000 to cover all heads of damage.

B. Costs and expenses

106. The applicant did not make a claim for any costs and expenses incurred.

C. Default interest

107. The Court considers it appropriate that the default interest 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. *Declares* unanimously the complaint under Article 6 of the Convention concerning the principle of legal certainty, the complaint under Article 8 of the Convention concerning the loss of the "EWK" pension, and the complaint under Article 1 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible;

2. *Hold*s unanimously that it is not necessary to examine separately the applicant's complaints under Article 6 of the Convention concerning the principle of legal certainty and under Article 8 of the Convention concerning the loss of the "EWK" pension;

3. *Holds* by four votes to three that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

4. *Holds* by four votes to three
   (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 15,000 (fifteen thousand euros), in respect of pecuniary and non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (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;

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

Done in English, and notified in writing on 15 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Bratza, Hirvelä and Bianku is annexed to this judgment.

N.B.
F.A.

JOINT PARTLY DISSENTING OPINION OF JUDGES BRATZA, HIRVELÄ AND BIANKU

1. The case is one of considerable importance, raising as it does an issue common to a number of applications against Poland which are currently pending before the Court. It concerns primarily the compatibility with Article 1 of Protocol No. 1 of the revocation of the grant to the applicant of an early-retirement pension (the "EWK" pension) on the grounds that her son's health condition was not such as to require permanent care and that accordingly she had not been entitled to the pension at the time it was granted. To our regret, we are unable to join the majority of the Chamber in finding that the revocation of the EWK pension violated the applicant's rights under the Protocol.

2. It is not disputed by the parties, and we accept, that the decision of the Rzeszów Social Security Board of 25 June 2002 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. We also agree that the revocation served a legitimate aim, namely to ensure that the public purse was not required to continue to bear the cost of providing a benefit to which the applicant had never been entitled. Where we part company with the majority of the Chamber is on the question whether the revocation was in the circumstances of the case proportionate to the legitimate aim pursued and, more particularly, whether a fair balance was preserved between the demands of the general interest of the public and the requirement of the protection of the individual's fundamental rights.

3. The factors to be weighed on the applicant's side of the scale are undeniably powerful. In August 2001 the applicant lodged her application for the EWK pension in good faith and attached to it, as required, a medical certificate which was signed by a specialist on allergies and pulmonology and which certified that her son suffered from atopic bronchial asthma, various allergies and recurring sino-pulmonary infections which required his mother's constant care. After examining the application, the Social Security Board granted the applicant the right to an EWK pension as from 1 August 2001 but suspended payment of the pension since the applicant was still working. Shortly thereafter, the applicant resigned from her full-time employment and a new decision was issued by the Board authorising payment of the pension from 1 September 2001. The applicant was subsequently issued with a pensioner's identity card marked "valid indefinitely" and for the following 10 months continued to receive the pension without interruption. Until payment of the pension was discontinued and the decision to grant it was revoked in July 2002, the applicant had no reason to believe that she was not entitled to the pension

and no reason to doubt that she would continue to receive it as long as there was no change in her child's medical condition. It is clear that the loss of the EWK pension had serious financial consequences for the applicant, who appears to have had no other source of income at the time and who is likely to have faced considerable difficulty in finding new employment. It is clear, too, that the blame for what had occurred lay not with the applicant but exclusively with the Social Security authorities who had erroneously approved the grant of the pension on the grounds that her son's health condition qualified the applicant to receive it.

4. We could readily accept that, in these circumstances, it would have been disproportionate had the authorities sought to recover from the applicant the EWK pension sums which they had erroneously paid. But this was not the case. Where we differ from the majority is in their view, which is confirmed by the award of just satisfaction, that a fair balance required that the applicant should continue to be paid the pension which she had mistakenly been awarded but to which she had no legal entitlement until the date of her retirement in 2015, or at least until her son attained the age of majority in 2012. In our view, it would, on the contrary, upset any fair balance if, once having discovered their mistake, the authorities were precluded from ever redressing its effects and were required to perpetuate the error by continuing to pay the pension which had been wrongly granted. This would, as the judgment expressly recognises, not only lead to the unjust enrichment of the recipient but would have an unfair impact on other individuals contributing to the Social Security fund, in particular those who were denied benefits because they failed to meet the statutory requirements; it would also amount to sanctioning an improper allocation of scarce public resources.

5. In this respect, the case is clearly distinguishable from that of *Stretch v. the United Kingdom* (No. 25543/02, judgment of 24 June 2003) in which the Court found to be a disproportionate interference with the applicant's property rights a local authority's refusal to permit the applicant to exercise an option to renew a lease on the expiry of the initial term, on the grounds that the original grant of the option had been *ultra vires* the local authority. The Court in that case observed that the lease agreement between the applicant and the local authority was one of a private law nature, that the local authority had received the agreed rent for the lease and that, on exercise of the option to renew, it had the possibility of negotiating an increase in the ground rent. In these circumstances, there was no ground for holding that the local authority had acted against the public interest in the way in which it had disposed of the property under its control or that any third party interests would have been prejudiced by giving effect to the renewal option and there was nothing *per se* objectionable in the inclusion of such a term in lease agreements. The Court further noted that there was no unjust enrichment of the applicant, who had the expectation of deriving a

future return from his investment in the lease, the option to renew having been an important part of the lease for a person such as the applicant who had undertaken building obligations.

6. The majority in the present case place emphasis on the principle of good governance in the context of property rights and criticise the authorities for an alleged failure to act in good time and in an appropriate and consistent manner once having discovered their mistake. While we accept the importance of the principle of good governance, we cannot find that the principle was breached in the present case; the review of the award of the EWK pension took place, in our view, with reasonable promptness and, once having discovered the error, the authorities acted both properly and without any undue delay.

7. It is further argued that where, as here, a mistake has been caused by the authorities themselves without any fault of a third party, a "different proportionality approach" is called for when determining whether the burden borne by an applicant was excessive. It is unclear to us in what respect the approach to be adopted in such a case is said to differ from that in other cases. However, even accepting that a more stringent test may be required where the national authorities are responsible for the error which resulted in the original grant of the EWK pension, we do not find that the revocation of the grant imposed on the applicant an individual and excessive burden. We are confirmed in this view by four factors. In the first place, although the EWK pension awarded to the applicant was expressed to be valid indefinitely, it was not in any event a benefit which was permanent or immutable; the payment of the pension was subject to periodic review and was liable to be discontinued if, *inter alia*, the medical condition of the applicant's child was found no longer to require permanent care. Moreover, it was as the domestic courts found liable to be discontinued where new evidence had been submitted or where relevant circumstances, which pre-existed the initial pension award but which had not been taken into consideration by the authorities, had subsequently come to light. Secondly, the decision of the Social Security Board to revoke the grant of the pension was itself subjected to careful examination at three levels of jurisdiction by the domestic courts, which examined fresh medical evidence concerning the applicant's son before concluding that the applicant had been rightfully divested of the right to a pension under the scheme provided by the 1989 Ordinance as she did not satisfy the requirement of necessary permanent care. Thirdly, as noted above, despite the fact that the revocation was retrospective, the applicant was never required to repay the sums which had been mistakenly paid to her. Fourthly, when the applicant lost her entitlement to the EWK pension, she qualified for another form of pre-retirement benefit from the State, albeit one of significantly less value than the EWK pension. It is true that, for reasons which are unclear but may have been related to the fact that the applicant was concurrently pursuing

proceedings in the domestic courts to challenge the revocation of the EWK pension, the proceedings to obtain the alternative pre-retirement benefits were not concluded until 25 October 2005. However, the award of these benefits was backdated to 25 October 2002, with the consequence that the applicant received a lump sum equivalent to 3 years' pension payments.

8. In these circumstances, we are unable to conclude that a fair balance was not struck between the competing public and private interests or that the applicant's rights under Article 1 of Protocol No. 1 were violated.

9. As to Article 6 of the Convention, the reasons which we have relied on above serve also to answer the applicant's complaint that the revocation of the decision to award the EWK pension offended against the principle of legal certainty. Thus, like the majority of the Chamber, we do not consider that the applicant's complaint under that Article requires a separate examination.