(51)

Annex 9

Internationaal

Europees Hof voor de Rechten van de Mens
12 oktober 2004, nr. 60669/00 (Ásmundsson)
(Costa, Baka, Jungwiert, Butkevych,
Thomasson, Ugrekhelidze, Björgvinsson)
Noot Barentsen

Recht op eigendom. Wijziging arbeidsongeschiktheidscriterium. Intrekking invaliditeitspensioen. Proportionaliteit. Discriminatie.

[EVRM art. 14; EVRM, Eerste Protocol art. 1]

Ásmundssons arbeidsongeschiktheidsuitkering en bijbehorende kinderbijslag worden in 1997 ingetrokken als gevolg van een wijziging van het arbeidsongeschiktheidscriterium. Beslissend is niet langer de ongeschiktheid voor het voormalige werk (zeeman), maar de ongeschiktheid voor loonvormende arbeid in het algemeen. Ásmundsson was na een ongeval in 1978 niet langer in staat tot werk als zeeman en ontving sindsdien een arbeidsongeschiktheidsuitkering. Daarnaast was hij in een kantoorbaan werkzaam op de vaste wal.
Het hof overweegt dat art. 1 Eerste Protocol personen die premie hebben betaald aan een sociale verzekering geen garantie geeft op een uitkering van een bepaald bedrag. Het gaat erom of het recht op uitkering dusdanig is ingeperkt dat van een aantasting van de kern van zijn pensioenrechten kan worden gesproken.
Het hof geeft aan dat er sprake was van een "legitieme zorg" voor de financiële positie van het pensioenfonds en dat de uitkering op grond van objectieve criteria is beëindigd. Voorts werd het nieuwe arbeidsongeschiktheidscriterium al toegepast in andere bedrijfstakken en waren ook de ouderdomspensioenen gekort in verband met de financieringsproblemen.
Het hof is echter getroffen door het feit dat verzoeker behoorde tot de kleine groep van 54 uitkeringsgerechtigden wier uitkeringen geheel werden stopgezet per 1 juli 1997. Genoemde zorgen over de financiële positie van het fonds lijken moeilijk te rijmen met het feit dat de overgrote meerderheid van de 689 uitkeringsgerechtigden na 1 juli 1997 dezelfde uitkering bleven ontvangen, terwijl een kleine minderheid door algehele stopzetting werd getroffen. Deze ongelijke behandeling maakt aannemelijk dat de aangevochten maatregel in strijd is met art. 14 EVRM. Deze omstandigheid is van groot gewicht bij de beoordeling van de proportionaliteitsvraag in het kader van art. 1 Eerste Protocol.
Het hof oordeelt dat de maatregelen ten opzichte van verzoeker excessief en disproportioneel zijn, wat niet gerechtvaardigd wordt door de gerechtvaardigde algemene belangen die door de overheid zijn ingenomen, zelfs gelet op de ruime "margin of appreciation" van de staat bij sociale wetgeving. Het zou anders zijn geweest indien aan verzoeker slechts een redelijke en evenredige verlaging van de uitkering zou zijn opgelegd.

Kjartan Ásmundsson,
tegen
IJsland.

Procedure
(..., *Red.*)

The facts

I. *The circumstances of the case*
8. The applicant, Mr Kjartan Ásmundsson, is an Icelandic national who was born in 1949 and lives in Reykjavík.
In 1969, at the age of 20, the applicant completed his training as a navigation officer at the Icelandic College of Navigation and started work as a seaman. This he continued to do until 1978 when he sustained a serious work accident on board a trawler. His right leg was struck by a 200 kg stone object causing a compound fracture of his ankle. As a consequence, he had to give up work as a seaman. His disability was assessed at 100%, which made him eligible for a disability pension from the Seamen's Pension Fund ("the Pension Fund"), to which he had paid premiums intermittently from 1969 until 1981. The assessment was made on the basis of the criteria that applied under section 13(1) and (4) of the Seamen's Pension Fund Act (Act no. 49/1974), notably that the claimant was unable to carry out the work he had performed before his disability, that his participation in the Fund had been intended to insure against this contingency, and that he had a sustained loss of fitness for work (of 35 % or more).

The applicant underwent regular disability assessments by a physician accredited by the Pension Fund and was each time assessed as 100% disabled in relation to his previous job.

9. After his accident the applicant joined a transport company, Samskip Ltd., as an office assistant, and is still employed there as head of the claims department.

A. *Legislative amendments leading to the applicant's loss of his disability pension entitlements*

10. In 1992 the aforementioned Act No. 49/1974 was amended by sections 5 and 8 of Act no. 44/1992, which considerably altered the basis for the assessment of disability in that the assessment was to be based, not on the Pension Fund beneficiaries' inability to perform the same work, but work in general. The new provisions had been enacted on the initiative of the Pension Fund and with reference to the Fund's financial difficulties (according to an audit, at the beginning of 1990 the Pension Fund had a deficit of at least ISK 20,000,0000,0000). The Pension Fund applied the new provisions not only to persons who had claimed a disability pension after the date of their entry into force but also to persons who were already in receipt of a disability pension before that date.

11. Under an interim provision in section 5, the above change to the reference criteria was not to apply for the first five years after the commencement of Act no. 44/1992 to a person who, before its entry into force, was already receiving a disability pension.

12. Under the new rules, a fresh assessment of the applicant's disability was carried out by an officially accredited Pension Fund physician, who concluded that the applicant's loss of capacity for work in general was 25% and thus did not reach the minimum level of 35 %. As a consequence, from 1 July 1997 onwards the Pension Fund stopped paying the applicant the disability pension and related child benefits which he had been receiving for nearly 20 years ever since the accident in 1978.

13. According to information obtained by the Government from the Pension Fund and submitted to the Court, the applicant had been one of 336 Fund members who were receiving disability pensions in June 1992 under the interim provision in section 5 of Act no. 44/1992 (see paragraph 21 below). On 1 July 1997 the total number of disability pension recipients was 689. This included Fund members who had not become entitled to a disability pension until after the commencement of Act no. 44/1992 in June 1992. The cases of the aforementioned 336 persons receiving disability pensions from the Fund, who had acquired their entitlement before that time and were still drawing disability pensions in 1996, were reviewed in late 1996 and early 1997 in the light of their capacity for general work. Altogether, 104 members of this group of disability pensioners had their benefits reduced in July 1997 as a result of the new rules on disability assessment under Act no. 44/1992. In the case of 54 Fund members, including the applicant, the disability rating for work in general did not reach the level of 35% required under the Act to retain entitlement to disability benefit, and so benefit payments were discontinued. The disability ratings of 29 members were reduced from 100% to 50% and those of 21 members from 100% to 65%.

14. The applicant instituted proceedings against the Pension Fund and, in the alternative, against both the Fund and the Icelandic State, challenging the Fund's decision to terminate the payments to him. In a judgment of 12 May 1999 the Reykjavík District Court found for the defendants.

15. The applicant appealed to the Supreme Court, which by a judgment of 9 December 1999 upheld the judgment of the District Court.

16. The Supreme Court accepted that the applicant's pension rights under Act No. 49/1974 were protected by the relevant provisions of the Icelandic Constitution as property rights. However, it considered that the measures taken by virtue of Act no. 44/1992 had been justified by the Pension Fund's financial difficulties. The Supreme Court stated:

"The pension rights that the appellant had earned under Act no. 49/1974 were protected under what was then Article 67 of the Constitution (presently Article 72 of the Constitution, cf. Article 10 of the Constitutional Law Act. no. 87/1995). Under the constitutional provision referred to above, he could not be deprived of those rights except under an unequivocal provision of law. The Court does not consider that section 8 of Act no. 49/1974 provided authorisation for the [Pension Fund] Board to curtail the benefit provisions; this could only be done

under an unequivocal provision of law. Nor can the Court accept that the wording of subsection 1 of section 13 of Act no. 49/1974 meant that the Fund member did not have an unequivocal right to have his disability assessed in terms of his capacity to do his previous job.

The evidence in the case shows that the Pension Fund had been operated at a considerable deficit, and that at the end of 1989 more than ISK 20,000 million would have been needed for the principal of the Fund, together with the premiums that it could expect, to be sufficient to cover its commitments, this estimate being based on an annual interest rate of 3%. In order to tackle this large deficit, the Fund's Board asked for amendments to be made to the Act under which the Fund operated. It is clear that the reduction of the pension rights that resulted from Act no. 44/1992 was based on relevant considerations. Even though that Act was repealed by Act no. 94/1994, this does not change the fact that the appellant's legal position had already been determined by Act no. 44/1992. The Court concurs with the District Court's view that Act no. 94/1994 did not constitute a valid legal authorisation for making amendments to the rights that the Fund member had earned during the period of validity of the former legislation.

The reduction according to Act no. 44/1992 was of a general nature as it treated in a comparable manner all those who enjoyed or could enjoy pension rights. An adaptation period of five years applied to all pensioners, as stated above. All those who can be considered to be in a comparable situation have been treated equally..."

B. *Details on the applicant's loss of income*

17. On 1 July 1997 the applicant lost pension rights (disability and children's annuity benefits) amounting to ISK 12,637,600. (...; *Red.*)

II. *Relevant domestic law*

20. In so far as relevant, section 13(1) and (4) of the Seamen's Pension Fund Act no. 49/1974 formerly read:

"1. Each Fund member who has paid premiums to the Fund for the past 3 calendar years, and for at least 6 of the past 12 months, shall be entitled to a disability pension if he suffers a loss of fitness for work that the senior consulting physician assesses at 35% or greater. This disability assessment shall be based mainly on the Fund member's incapacity to do the job in which he was engaged and on which his membership of the Fund is based. Despite being disabled, no person shall be entitled to a disability pension while retaining full wages for the job that he used to do, or while receiving equally high wages for another job which grants pension rights, and the pension shall never be higher than the equivalent of the loss of income demonstrably incurred by the Fund member as a result of his disability. [...]

4. A disabled person who applies for a disability pension from the Fund or receives such a pension shall be obliged to provide the Board of the Fund with all the information on his health and earned income that is necessary to determine his right to receive the pension."

Under section 15(3) of the 1974 Act the applicant was eligible to receive child benefits.

21. Section 5 of Act no. 44/1992 formerly read: "For the first five years after the commencement of this Act, the disability assessment of disability pensioners who already receive benefit due to loss of working capacity before the commencement of the Act shall be based on their incapacity for the job in which they were previously engaged and on which their membership of the Fund is based, but after that time it shall be based on their incapacity for general work. Furthermore, the change in the child benefit entitlement of the recipients of disability pensions resulting from section 8 of this Act shall not take effect until five years after the commencement of the Act."

22. Act no. 49/1974, as amended by Act no. 44/1992, was replaced by Act no. 94/1994 when it entered into force on 1 September 1994. All the provisions covering the basis of disability pensions and child benefit payments were removed from the Act and included in Regulations on the Seamen's Pension Fund, which also entered into force on 1 September 1994. According to the Government, this did not affect the applicant specifically, since the interim provision of Act no. 44/1992 still applied to his situation until 1 July 1997. The applicant contended that the interim provision had been repealed on 1 September 1994.

The law

I. *Alleged violation of Article 1 of Protocol No. 1 to the Convention and of Article 14 of the Convention*

23. The applicant complained that the discontinuation of his disability pension had given rise to a violation of Article 1 of Protocol No. 1 to the Convention, on its own and in conjunction with Article 14 of the Convention. (...; *Red.*)

24. The Government disputed the applicant's allegation and invited the Court to find that no violation had occurred in the present case.

A. *Alleged violation of Article 1 of Protocol No. 1*

1. *The applicant*

25. The applicant argued that his pension rights fell within the scope of protection of Article 1 of Protocol No. 1 and that the national measures depriving him of these rights entailed an interference with his peaceful enjoyment of possessions within the meaning of this provision.

26. The applicant further submitted that, contrary to former Article 67 (currently Article 72) of the Icelandic Constitution, the deprivation of his pension rights had not been based on any clear and unequivocal national legal provision. Indeed, the measure had been taken without any legal authority. The retroactive application of the new rules had been founded on an interim provision which had been repealed three years before the authorities in June 1997 decided to terminate his pension. Thus, the interference with his peaceful enjoyment had been unlawful.

27. In the applicant's view, there was no reasonable relationship between the interference and the interests pursued. According to figures supplied by the Government, at the material time there were 689 persons receiving disability pensions from the Pension Fund. The applicant was one of 54 individuals who had lost their entitlement in similar circumstances, a tiny group constituting only about 0.1 % of the Fund's total membership, which last year comprised 38,584 members. On any analysis, the restrictions imposed affected only a very small minority and could by no means be regarded as having been of any significant financial advantage to the Fund or as having served the purpose of the Fund.

28. No comparable restrictions had been imposed on the pension rights of other Fund members. The contested measure could not be described as a general measure aimed at an unspecified group of persons in accordance with the principle of equality. In Iceland there was no legal tradition of depriving active pensioners of annuity rights without the payment of compensation.

29. The applicant refuted the Government's suggestion that his disability rating of 100% in terms of loss of fitness for work as a seaman did not affect his chances of earning income to support himself through work on shore. The applicant stated that he had been employed on shore since 1978, but as his disability had substantially reduced his employment possibilities, he had been employed in office work for a transport company on a salary which was only a fraction of what he would have earned as a seaman. Even if he had continued to receive a pension, his total income would have been considerably less than he would have had as a seaman.

30. The applicant stressed that his income was irrelevant. As a result of the impugned measures, he had been totally deprived of his disability pension entitlements. This would have happened even if he had been unemployed. His subsistence had become completely dependent on his maintaining his office job ashore.

31. Finally, the applicant strongly objected to the Government's contention that he had not suffered any financial loss in that, by reason of the level of his income from employment, the payment of a disability pension would normally have been discontinued under section 13 of the 1974 Act according to the rules operated by the Fund. However, to the applicant's knowledge no such rules had been in force and accessible at the material time. Indeed, any such rules would have been inconsistent with the applicable legislation. The fact was that he would have received a much higher salary had he continued to work as a seaman. He had neither retained a full salary for the job that he used to do nor an equally high salary for another job. This was amply demonstrated by the figures that he had presented to the Court and to which the Government had not objected.

2. *The Government*

32. The Government disputed the applicant's submissions. It was clear that the legislative amendments in question were the logical and necessary consequences of the financial position of the Pension Fund at the material time. Their aim was to serve the general interest of its members and the amendments had been made in accordance with law. The Government emphasised that the decision to adopt new criteria for the assessment of disability applied in an objective manner to all those who were in the same position. The changes made had been instigated by the Fund's Governing Board, composed of representatives of employers and employees, including those of the employees' organisation of which the applicant was a member.

The purpose of a disability pension paid from the Fund was indisputably to provide financial assistance to those who had had their working capacity reduced and who had need of special assistance in order to ensure their subsistence. In instances where this mattered, recipients of a disability pension would be given time to adapt themselves to changed conditions, notably through the provision of re-training, irrespective of whether they had started to receive a disability pension before or after the entry into force of the new legislation.

33. The Government accepted that the impugned measure constituted an interference with the applicant's peaceful enjoyment of possessions for the purposes of paragraph 1 of Article 1 of Protocol No. 1. However, they maintained that the interference was justified under paragraph 2 of that Article. The measure was provided for by law, it was in accordance with the general interests of the community and there was a reasonable relationship between the interference and the interests pursued.

34. The Government stressed that the applicant retained his full right to receive a retirement pension from the Pension Fund.

35. The right to disability pension benefits should be subject to the ordinary considerations of compensation, namely the basic principle in the law on liability that the claimant should receive full compensation, but not more. In the Seamen's Pension Fund it had been seen that a considerable number of former seamen who had paid premiums to the Fund and who were no longer considered capable of working at sea due to disability had been receiving disability pensions from the Fund, notwithstanding the fact that they were in full employment on shore. The applicant was such a person. He was in full employment on shore and thus earned income to support himself, but under the former rules he also received a full disability pension.

36. After it had been established by the methods prescribed by law, according to section 8 of Act no. 49/1974, that there was an operational deficit in the Seamen's Pension Fund, the first obligation of the Board of the Fund was to reduce or stop expenditure such as the payment of disability pensions to those who had not suffered any loss of income through their loss of fitness to work, as they were demonstrably able to perform work other than as seamen.

These measures, which curtailed the applicant's rights to disability benefit, were no more extensive than necessary in terms of the aim they were intended to achieve. Admittedly they only curtailed the rights of those Fund members who were no longer able to work as seamen, but this was done in such a way that this group had the full possibility of earning income on shore, and the majority of them were in fact already earning such income.

37. The Government strongly contested the applicant's view that he could lawfully expect to receive an undiminished disability pension from his pension fund for the next 20 years in addition to receiving his income from full employment, and that his financial plans for the future had been based on this premise. They pointed out that at no time was the applicant's right unconditional in the way he maintained, and the Seamen's Pension Fund Act, no. 49/1974 gave him no grounds for harbouring any such expectations. Even if no amendments had been made to that Act, the applicant had already become ineligible to receive a pension, having regard to the terms of the condition stated in the final sentence of section 13 (1). This clearly stated that no person was entitled to a disability pension if he received equally high wages for another job which granted pension rights, and that the pension could never be higher than the equivalent of the loss of income demonstrably incurred by the Fund member as a result of his disability. During the period until 1 July 1997 when it was making

pension payments to him, the Seamen's Pension Fund had no information about the applicant's employment earnings, despite pension beneficiaries' duty under section 13(4) of the Act to provide such information. At the time when the Act was in force, the Pension Fund did not actively monitor whether disability pensioners received wages from paid employment at the same time as drawing compensation payments. For example, disability pensioners were not required to submit tax returns to the Fund. In all likelihood, the applicant's right to receive compensation had actually expired before 1 July 1997; judging by the information submitted by the applicant regarding his income as a head of department at Samskip after 1 July 1997 (cf. his letter to the Court dated 12 June 2003), it could be stated with certainty that he was no longer entitled after that date.

38. The Government rejected the view that other Fund members had been treated differently from the applicant when it came to the restriction of their benefit rights, so resulting in a violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention. There were many Fund members in a similar or identical position to the applicant.

The Government stressed that Fund members already in receipt of disability pensions had certainly not been singled out as a small and isolated group of beneficiaries who were expected to shoulder the entire burden of the Fund's financial difficulties. Many other changes of various types had been made to the laws and regulations of the Fund as part of its measures to put its finances on a sound basis, Act no. 44/1992 being a part of these, and they affected all Fund members in one way or another. Thus, in 1994, Act no. 94/1994 and the regulations issued under it had made considerable changes to the rights of both current and potential beneficiaries of the Fund. The rights of Fund members aged 60–65 to receive old-age pensions had been altered, and considerably reduced. These changes also brought the rules of the Seamen's Pension Fund on old-age pensions into line with those of other Icelandic pension funds, where entitlement to draw an old-age pension generally began at the age of 65.

It was clear from the figures presented (see paragraph 13 above) that the new rules, which were based on general, objective and, not least, completely relevant considerations, had affected nearly 30% of all the members of the Fund who had acquired active disability pension rights prior to the commencement of Act no. 44/1992, and had had exactly the same consequences for all those who were in a comparable position.

3. *The Court's assessment*

39. The Court reiterates that Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules (see James and Others v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, pp. 29–30, § 37). The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.

According to the Convention institutions' case-law, the making of contributions to a pension fund may, in certain circumstances, create a property right and such a right may be affected by the manner in which the fund is distributed (see Bellet, Huertas and Vialatte v. France (dec.), nos. 40832/98, 40833/98 and 40906/98, 27 April 1999; and Skorkiewicz v. Poland (dec.) no. 39860/98). Moreover, the rights stemming from payment of contributions to social insurance systems are pecuniary rights for the purposes of Article 1 of Protocol No. 1 to the Convention (see Gaygusuz v. Austria, judgment of 16 September 1996, Reports of Judgments and Decisions 1997, p. 1142, §§ 39–41). However, even assuming that Article 1 of Protocol No. 1 guarantees benefits to persons who have contributed to a social insurance system, it cannot be interpreted as entitling that person to a pension of a particular amount (see Müller v. Austria, no. 5849/72, Commission's report of 1 October 1975, Decisions and Reports (D.R.) 3, p.

25; and the above-mentioned Skorkiewicz v. Poland decision). An important consideration in the assessment under this provision is whether the applicant's right to derive benefits from the social insurance scheme in question has been infringed in a manner resulting in the impairment of the essence of his pension rights (see Stanislaw Domalewski v. Poland (dec.), no. 34610/97, 15 June 1999).

40. In the instant case, the applicant had contributed to the Pension Fund from 1969 to 1981 under a system according to which he did not acquire any claim to an identifiable share in the fund but only what could be characterised as a right to receive a pension subject to the fulfilment of certain conditions. It has not been contended that the measure amounted to a deprivation or a measure to control the use of property. However, the parties agreed that the termination of the applicant's disability pension amounted to an interference with his right to peaceful enjoyment of his possessions for the purposes of the first sentence of paragraph 1 of Article 1 of Protocol No. 1. The Court sees no reason to hold otherwise.

However, the Government disputed the applicant's contention that the application of the new disability criteria to him was unlawful, discriminatory and disproportionate to the community interests pursued. As regards the issue of lawfulness, the Court notes that the applicant's argument was rejected by the Icelandic Supreme Court and sees no need to consider that aspect of the matter any further. It is the issue of proportionality which lies at the heart of the case under the Convention.

Accordingly, it will determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In this connection, regard will be had to whether unjustified differential treatment occurred in the instant case.

Whereas the Government approached the case from a broad angle as raising issues of fundamental principles pertaining to the entire Icelandic pension system, the Court will confine its examination to the concrete circumstances of the applicant's case.

41. At the outset the Court takes note of the Government's argument, based on information provided by the Pension Fund on 14 July 2003, that even if no amendment had been made to the Seamen's Pension Fund Act 1974, the applicant had in all likelihood already become ineligible for a pension before 1 July 1997 by virtue of the last sentence of section 13(1) and thus did not have a legal ground for expecting to receive a full disability pension until the age of 65. The argument was not reviewed by the national courts, but was apparently developed for the first time at the merits stage of the proceedings under the Convention and was rejected by the applicant. The Court is not convinced by these submissions, which are based on facts that are both uncertain and unclear, and will not attach any weight to them in its examination of this case. In any event, whether the applicant, as argued by the Government, could have forfeited his entitlement to a disability pension under a different legal ground is a matter that falls outside the scope of the case, which concerns the effects of the legislative amendments that entered into force on 1 July 1997.

42. Although the national authorities' decision to discontinue payment of the applicant's disability pension was taken without reference to his income from his office job, the Court will have regard to this income in its examination of the question of proportionality under Article 1 of Protocol No. 1 to the Convention.

In that connection, the Court notes that the introduction of the new pension rules had been prompted by legitimate concerns about the need to resolve the Fund's financial difficulties. Furthermore, the changes made to disability entitlements were based on objective criteria, i.e. an obligatory renewed medical assessment of each disability pensioner's ability to carry out, not just the same work he had performed before his or her disability, but work in general (cf. Buchen v. the Czech Republic, no. 36541/97, § 75, 26 November 2002), the standard that already applied in other sectors in Iceland. According to the Government's submission, the new rules on disability assessment were intended to ensure that a considerable number of former seamen did not receive disability pensions from the Fund despite being in full employment on shore. The applicant fell within that group of disability pension recipients. One hundred and four – over 30% – of the 336 persons who were in receipt of a disability pension on 1 July 1997 experienced a substantial reduction in their entitlements. Sixty of these experienced a reduction ranging from 100% to 50%.

The Court is also mindful of the Government's submission that, concurrently with those changes, the Pension Fund's old-age pensions too had been considerably reduced by virtue of Act no. 94/1994.

43. However, the Court is struck by the fact that the applicant belonged to a small group of 54 disability pensioners (some 15 % of the 336 persons mentioned above) whose pensions, unlike those of any other group, were discontinued altogether on 1 July 1997. The above-mentioned legitimate concerns about the need to resolve the Fund's financial difficulties seem hard to reconcile with the fact that after 1 July 1997 the vast majority of the 689 disability pensioners continued to receive disability benefits at the same level as before the adoption of the new rules, whereas only a small minority of disability pensioners had to bear the most drastic measures of all, namely the total loss of their pension entitlements. In the Court's view, although changes made to pension entitlements may legitimately take into account the pension holders' needs, the above differential treatment in itself suggests that the impugned measure was unjustified for the purposes of Article 14, which consideration must carry great weight in the assessment of the proportionality issue under Article 1 of Protocol No. 1.

44. The discriminatory character of the interference was compounded by the fact that it affected the applicant in a particularly concrete and harsh manner in that it totally deprived him of the disability pension that he had been receiving on a regular basis for nearly 20 years. He had joined the Fund in 1969 and had contributed to it for nearly 10 years when he had his accident, which left him 100% unfit for work as a seaman. Under section 13 of the Seamen's Pension Fund Act 1974, disability was to be assessed mainly on the basis of incapacity to perform the job occupied, and to which Fund membership related, at the time of the injury. According to the Icelandic Supreme Court, there was an unequivocal right to have disability so assessed. In the Court's view, the applicant could validly plead an individual legitimate expectation that his disability would continue to be assessed on the basis of his incapacity to perform his previous job.

Regard should be had to the fact that, under the former rules, gainful employment was not incompatible with a Fund member's receipt of a full disability pension, provided that that pension did not exceed the member's loss of income. Understandably, after having become unfit for work as a seaman, and encouraged by the pension system to which he had contributed over a number of years, the applicant, like many other disability pensioners, had pursued alternative employment whilst at the same time receiving a disability pension.

It is significant that when the applicant lost his pension on 1 July 1997 this was not due to any circumstance of his own but to changes in the law altering the criteria for disability assessment. Although he was still considered 25% incapacitated to perform work in general, the applicant was deprived of the entirety of his disability pension entitlements, which at the time constituted no less than one third of his gross monthly income, as can be deduced from the figures submitted to the Court.

45. Against this background, the Court finds that, as an individual, the applicant was made to bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation to be enjoyed by the State in the area of social legislation, cannot be justified by the legitimate community interests relied on by the authorities. It would have been otherwise had the applicant been obliged to endure a reasonable and commensurate reduction rather than the total deprivation of his entitlements (see Müller v. Austria and Skorkiewicz v. Poland, cited above, and, mutatis mutandis, James v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, § 54, and Lithgow and Others v. the United Kingdom, judgment of 8 July 1986, Series A no. 102, § 121).

Accordingly there has been a violation of Article 1 of Protocol No. 1 to the Convention in the applicant's case.

B. *Alleged violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1*

46. (...; *Red.*)

47. The Court, having already taken those arguments into account in its examination of the complaint under Article 1 of Protocol No. 1, finds that no separate issue arises under Article 14 and that, accordingly, it is unnecessary to examine the matter under these provisions taken together.

II. *Application of Article 41 of the Convention*
48. (...; *Red.*)

A. *Damage*

1. *Pecuniary damage*
49. The applicant sought compensation for the pecuniary damage he had suffered as a result of the termination of his disability pension on 1 July 1997. He claimed sums totalling ISK 39,524,772 (currently corresponding to approximately 450,000 euros (EUR)) in respect of the following items:
a. ISK 12,637,600 (approximately EUR 143,000) for the loss of his disability pension entitlements, of which (i) ISK 9,373,300 were for the loss of his own pension (ISK 61,356 per month until the age of 65), and (ii) ISK 3,264,300 were for the loss of child benefits in respect of his three children (see paragraph 17 above);
b. Default interest in respect of the above from 1 July 1997 until the date of payment, which on 26 November 2003 amounted to ISK 26,887,172 (approximately EUR 305,000).
50. (...; *Red.*)
51. The Court is satisfied that the applicant has suffered pecuniary damage as a result of the violation and considers that he should be awarded compensation in an amount reasonably related to any prejudice suffered. It cannot award him the full amount claimed, precisely because a reasonable and commensurate reduction in his entitlement would have been compatible with his Convention rights (see paragraph 45 above). Deciding in the light of the figures supplied by the applicant and equitable considerations, the Court therefore awards him EUR 60,000 on account of item (a) above and EUR 15,000 for item (b), plus any tax that may be chargeable on those amounts.

2. *Non-pecuniary damage*
52. The applicant further asked the Court to award him ISK 3,000,000 (currently corresponding to approximately EUR 34,000) in compensation for non-pecuniary damage on account of the suffering and distress caused by the discriminatory deprivation of his disability pension entitlements and the financial insecurity in which he had been left.
53. The Government asked the Court to reject any claim for non-pecuniary damage.
54. The Court considers that the applicant must have suffered anxiety and distress as a result of the violation that cannot be compensated solely by the Court's finding of a violation in his case and awards him EUR 1,500 under this heading.

B. *Costs and expenses*
(...; *Red.*)

C. *Default interest*
(...; *Red.*)

For these reasons, the court unanimously
1. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
2. *Holds* that no separate issue arises under Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 and that it is not necessary to examine the matter under these provisions;
3. *Holds*
a. that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
i € 75,000 (seventy-five thousand euros) in respect of pecuniary damage;
ii € 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage;
iii € 20,000 (twenty thousand euros) in respect of costs and expenses;
iv any tax that may be chargeable on the above amounts;
b. that from the expiry of the above mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses the remainder of the applicant's claim for just satisfaction.

Concurring opinion of judge Thomassen
I agree with the majority that in the present case Article 1 of Protocol No.1 has been breached.
However, my conclusion is based on different grounds.
In a situation of limited financial resources and

in the interest of upholding a fair social insurance system, a State must be free to change the conditions for entitlement to a disability pension. In this respect, the majority's approach does not seem to be different from mine.

The majority attach much weight to the discriminatory character of the measure. They note in this context that the applicant lost his disability pension completely, whereas 85% of the disability pensioners continued to receive disability benefits.

I have difficulties in following this reasoning since, in my view, the fact that only 15% of the pensioners lost their whole pension cannot in itself lead to the conclusion that the measure was tainted with unjustified differential treatment. The applicant lost his pension after his disability was assessed anew by a physician who found him fit for work in general. This means that his situation cannot be compared with that of other disability pensioners whose loss of capacity for work was considered to be more serious and who therefore continued to receive a full or limited disability pension.

Nevertheless, I agree with the majority that the application of the new rules affected the applicant in such a harsh manner that he suffered an excessive burden as a result of the changes to the social security system. It is true that he earned a salary from full-time employment and that he retained his full right to receive a retirement pension. However, after a physician in 1997 had established the percentage of his disability under the new rules, the applicant lost the pension which he had been receiving over a period of 20 years immediately after that assessment. It is this lack of an appropriate transitional period, which could have allowed the applicant to adapt his situation to the new circumstances, which amounts in my view to a violation of Article of Protocol No. 1.

criterium, wordt Asmundssons uitkering stopgezet. Het hof acht dit in strijd met het recht op eigendom, beschermd in art. 1 van het Eerste Protocol bij het EVRM.[1] Het abrupt stopzetten van de uitkering is disproportioneel (rov. 35, slot). Bovendien zijn er volgens het hof sterke aanwijzingen dat de maatregel discriminerend is, nu zij een betrekkelijk kleine groep van de uitkeringsgerechtigden treft.[2]

De verleiding is natuurlijk groot dit arrest te extrapoleren naar de recente en aanstaande ingrepen in de Nederlandse arbeidsongeschiktheidsverzekering. Het valt bijvoorbeeld niet uit te sluiten dat WAO'ers na een herbeoordeling op grond van het nieuwe Schattingsbesluit iets vergelijkbaars als Asmundsson overkomt: de intrekking van de uitkering is zuiver het gevolg van een wetswijziging, niet van enige verandering in de toestand van betrokkene, de ingetrokken uitkering vormde een aanzienlijk deel van het maandinkomen, terwijl betrokkene ook op grond van de nieuwe criteria in zekere mate arbeidsongeschikt is (vgl. rov. 35, slot).

Voorzichtigheid lijkt me echter geboden. Zo overweegt het hof uitdrukkelijk (rov. 31 slot) dat het zijn beoordeling toespitst op de concrete omstandigheden van dit individuele geval. Verder overweegt het hof dat art. 1 Eerste Protocol geen recht geeft op een uitkering van een bepaalde hoogte (rov. 30) en dat staten bij de inrichting en aanpassing van sociaalzekerheidsrechten een ruime beoordelingsmarge hebben, zij het dat die in dit geval is overschreden (rov. 36).

Van groot belang lijkt mij ook dat het hof vooral zwaar tilt aan de omstandigheid dat de uitkering van de ene op de andere dag volledig is ingetrokken. (Waarbij een overgangstermijn van 5 jaar kennelijk niet relevant is: dat het nieuwe criterium in 1992 is ingevoerd en eerst in 1997 is toegepast maakt de inkomens-

NOOT

Op het eerste gezicht een spectaculair arrest. IJsland kiest voor een strenger arbeidsongeschiktheidscriterium in de invaliditeitsverzekering van zeelieden. In plaats van ongeschiktheid voor het werk van zeeman (eigen arbeid) wordt ongeschiktheid voor work in het algemeen (loonvormende arbeid in het algemeen) het criterium. Na een herbeoordeling aan de hand van het nieuwe

1. Vgl. EHRM 16 september 1996, «USZ» 1997/83, NJ 1998/738 (Gaygusuz) en G.J. Vonk, "Social security and property: Gaygusuz and after", in: J.P. Loof e.a., *The right to property*, p. 145–154.
2. Rov. 34. In haar *concurring opinion* geeft rechter Thomassen aan het op dit punt niet eens te zijn met het meerderheidsoordeel: dat een maatregel slechts een beperkt deel van een grotere groep treft is op zichzelf geen discriminatie.

terugval niet minder abrupt). Over een gedeeltelijke en evenredige verlaging van de uitkering zou het hof anders hebben geoordeeld (rov. 36). Mogelijk vormt de mogelijkheid van "afgeschatte" WAO'ers om een WW-uitkering aan te vragen voor de niet-benutte restcapaciteit voldoende verzachting van de intrekking van de arbeidsongeschiktheidsuitkering. Nu is een WW-uitkering "eindig" en gelden er aanvullende voorwaarden (sollicitatieplicht), maar mij lijkt wel dat het bestaan van een andere regeling mee mag wegen in de beoordeling van de evenredigheid van de maatregel. Daarbij is vervolgens wel van belang hoe sterk de uitkeringsvoorwaarden afwijken van de oude regeling.
Het is ook goed om te bedenken dat de "nieuwe WAO" die in 2006 voor volledig en duurzaam arbeidsongeschikte werknemers zal worden ingevoerd, in beginsel niet voor de huidige WAO-gerechtigden gaat gelden. Ik denk niet dat het eigendomsrecht van art. 1 Eerste Protocol in beeld komt.
Een balletje dat nog wel zou kunnen worden opgegooid is de vraag of het overgangsrecht rond de herbeoordelingsoperatie aan de hand van het nieuwe Schattingsbesluit spoort met het eigendomsrecht in combinatie met het discriminatieverbod. Aanvankelijk zouden 55+'ers hiervan worden uitgezonderd, na de acties van de bonden werd deze grens in het Sociaal Akkoord verlaagd naar 50 jaar. Weliswaar zijn er goede redenen te bedenken om oudere werknemers anders te behandelen, omdat hun kansen op de arbeidsmarkt geringer zijn en zij in de regel al langer een uitkering ontvangen. Maar wanneer die leeftijdsgrens kennelijk niet alleen van een beoordeling van het gewicht van dergelijke objectieve factoren afhangt, maar van de verkoopbaarheid aan de maatschappij, boeten zij wel aan gewicht in. Een leeftijdsgrens die met een pennenstreek met vijf jaar wordt verlaagd, kan immers haast niet geboseerd zijn op een goed doordachte afweging van objectieve factoren, wat een rechtvaardigingsgrond zou kunnen hebben vormen. Het is op zich prachtig dat de wetgever of de minister ingrijpende maatregelen willen aanpassen als er maatschappelijk verzet ontstaat, maar dat maakt die maatregelen voor degenen die er onder blijven vallen niet minder zuur. Ik geef toe: gezien de beoordelingsmarge van staten en gezien het op zichzelf verdedigbare onderscheid tussen oudere en jongere werknemers, is de kans van slagen van zo'n beroep vrij gering.

B. Barentsen

Diversen

Centrale Raad van Beroep
28 oktober 2004, nr. 02/3815 AAW (Rectificatie)
(mrs. Spaas, Schultel, Bruning)

Niet tijdig besluit op aanvraag. Wettelijke rente. Ingangsdatum.

(Awb art. 8:73; Besluit beslistermijnen sociale verzekeringswetten art. 8)

Zoals de Raad reeds eerder heeft overwogen, zie onder meer «USZ» 2007/309 en «JB» 2004/128, is in een situatie waarin niet tijdig op de aanvraag is beslist, wettelijke rente verschuldigd vanaf de eerste dag na de maand volgende op die waarin uiterlijk op de aanvraag had moeten worden beslist.[1]

A, te *B*,
appellant,
en
de Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen,
gedaagde.

I. Ontstaan en loop van het geding
Met ingang van 1 januari 2002 is de Wet structuur uitvoeringsorganisatie werk en inkomen in werking getreden. Ingevolge de Invoeringswet Wet structuur uitvoeringsorganisatie werk en inkomen treedt in dit geding de Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringswetten (Uwv) in de plaats van het Landelijk instituut sociale verzekeringen

1. Zie ook «USZ» 2003/14 en «USZ» 1999/269.