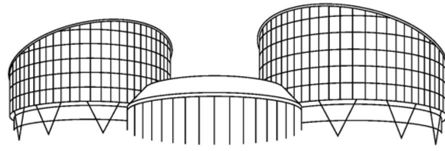

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF BÉLÁNÉ NAGY v. HUNGARY

(Application no. 53080/13)

JUDGMENT

STRASBOURG

10 February 2015

THIS CASE WAS REFERRED TO THE GRAND CHAMBER WHICH DELIVERED JUDGMENT IN THE CASE ON 13/12/2016

This judgment may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Bélánė Nagy v. Hungary,

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

Işıl Karakaş, *President,*
András Sajó,
Nebojša Vučinić,
Helen Keller,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 6 January 2015,

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

PROCEDURE

1. The case originated in an application (no. 53080/13) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Ms Béláné Nagy ("the applicant"), on 12 August 2013.

2. The applicant was represented by Mr A. Cech, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged that she had lost her livelihood, only guaranteed by a disability allowance, as a result of the changes in legislation applied by the authorities without equity, although her health had never improved. She relied on Article 6 of the Convention.

4. On 21 January 2014 the application was communicated to the Government.

5. On 27 August 2014 legal aid was granted to the applicant.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1959 and lives in Baktalórántháza.

7. In 2001 the applicant's loss of capacity to work was assessed to be 67 per cent as of 1 April 2001, and she was granted a disability pension

(see paragraph 18 below). This assessment was maintained in 2003, 2006 and 2007.

8. Pursuant to a modification of the applicable methodology but apparently without any substantial change in her health, the level of the applicant's disability was changed to 40 per cent on 1 December 2009. Without envisaging her rehabilitation, the assessment panel scheduled the next check-up of her medical status for November 2012.

As a consequence of her 40 per cent level of disability, her entitlement to the disability pension was withdrawn as of 1 February 2010.

The applicant challenged this decision in court, but the Nyíregyháza Labour Court dismissed her action on 1 April 2011, notwithstanding an expert opinion stating that the applicant's condition had not improved since 2007. The applicant was obliged to reimburse the amounts received after 1 February 2010.

9. In 2011 the applicant requested another assessment of her disability. In September 2011 the first-instance authority assessed it at 45 per cent, scheduling the next assessment for September 2014. The second-instance authority changed this score to 50 per cent, with a reassessment due in March 2015. Such a level would have entitled her to disability pension, had her rehabilitation not been possible (see paragraph 19 below). However, this time the assessment envisaged the applicant's rehabilitation in a time-frame of 36 months, during which time she was to receive rehabilitation allowance.

10. As of 1 January 2012, a new law on disability allowances (Act no. CXCI of 2011) entered into force. It introduced additional applicability criteria (see paragraph 20 below). Notably, instead of fulfilling the service period required by the former legislation, the disabled person must have at least 1,095 days covered by social security in the five years preceding the submission of his or her request. Persons who do not meet this requirement may nevertheless qualify if they had no interruption of social cover for more than 30 days throughout their career, or if they were in receipt of a disability pension on 31 December 2011.

11. In February 2012 the applicant submitted another request for disability allowance. Her condition was assessed in April 2012, leading to the finding of 50 per cent disability. On 5 June 2012 her request was dismissed because she did not have the requisite period of social cover. Rehabilitation was not envisaged. The next assessment was scheduled for April 2014.

12. On 2 August 2012 the applicant submitted a fresh request for disability pension under the new law on disability allowances and underwent another assessment in which the level of her disability was again established at 50 per cent. Rehabilitation was not envisaged.

13. In principle, such a level of disability would entitle the applicant to a disability pension under the new system. However, since her disability

pension had been terminated in February 2010 (that is, she was not in receipt of a disability pension on 31 December 2011) and, moreover, she was not in a position to accumulate the requisite number of days covered by social security or to demonstrate an uninterrupted social cover, she was not eligible, under any title, for a disability allowance under the new system. Instead of the requisite 1,095 days covered by social security, the applicant had only 947.

14. Accordingly, the applicant's disability pension request was refused both by the competent administrative authorities (on 23 November 2012 and 27 February 2013) and by the Nyíregyháza Administrative and Labour Court, on 20 June 2013.

15. As of 1 January 2014, the impugned legislative criteria have been amended with a view to extending the eligibility for disability allowance to those who have accumulated either 2,555 days covered by social security in ten years or 3,650 days in fifteen years. However, the applicant could not meet these criteria either.

16. It appears that currently the applicant lives on aid.

17. Since 2013 the Constitutional Court has examined a number of complaints attacking in essence the same new rules on disability entitlements (decision nos. 3227/2013, 3156/2013 and 3235/2014). The complainants in those procedures raised their constitutional concerns after the final and binding domestic judgments, without applying to the *Kúria* (Supreme Court) in review proceedings. Although these motions were eventually rejected as inadmissible for other reasons, the Constitutional Court did not consider that, for their constitutional complaints to be entertained, those complainants were required to have approached the *Kúria* beforehand.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

18. The relevant provisions of Act no. LXXXI of 1997 on Social Security Pension[1], as in force until 31 December 2011, provided:

Section 4 (1) c)

"[Under the terms of this law] disability pension [means]: pension to be disbursed in case of disability, on condition that the requisite service time has been accumulated."

Section 23 (1)

"Disability pension is due to a person who:

(a) has suffered 67 per cent loss of capacity to work due to health problems, physical or mental impairments, without any perspective of amelioration during the following year... [and]

[1] Repealed by Act no. CXCI of 2011 as of 1 January 2012

(b) has accumulated the necessary service time [a function of the age, as outlined in the law] [and]

(c) does not work regularly or earns considerably less than before having become disabled."

19. Concerning disability pensions to be granted after 31 December 2007, the same Act, as in force between 12 March and 31 December 2011, provided as follows:

Section 36/A

"(1) Disability pension shall be due to a person who:

a) suffered [at least 79 per cent loss of capacity to work, or the same between 50 and 79 per cent if rehabilitation is not feasible], and

b) accumulated the service time required in respect of his age, and

c) [does not have an income or earns considerably less than before], and

d) does not receive sick pay or disability sick pay."

20. Act no. CXCI of 2011 on the Benefits Granted to Persons with Reduced Work Capacity, in so far as relevant and as in force between 26 July 2012 and 31 December 2013, provided as follows:

Section 2

"(1) A person whose health status has been found to be 60 per cent or less, in the rehabilitation authority's complex reassessment (henceforth: persons with reduced work capacity) and who:

a) has been covered for a minimum 1,095 days by the social security under section 5 of [the Social Security Act] in the five years preceding the submission of their request, and

b) is not been engaged in any money-earning activities and

c) is not receiving any regular cash allowance

shall be eligible for allowances granted to persons with reduced work capacity.

(2) By derogation from subsection (1) (a), persons

a) who became covered by the social security within 180 days from the termination of their schooling and whose social security cover was not interrupted for any period exceeding 30 days before the submission of their request, or

b) who received on 31 December 2011 disability pension, accident disability pension, rehabilitation allowance or social allowance for persons with health impairment

shall be eligible for the benefits granted to persons with reduced work capacity irrespective of the duration of the period covered with social security.

(3) The 1,095-day-long insurance period shall include:

a) the period of sick pay, accident sick pay, pregnancy and confinement benefit, child care benefit and jobseeker benefit;

b) the period of disability pension, accident disability pension, rehabilitation allowance, social allowance for persons with health impairment;

c) the service time accumulated under an agreement concluded under section 34 of [the Social Security Act] with a view to accumulating service time and income that generate pension entitlement; provided that the agreement was concluded by 31 December 2011."

Section 3

"(1) Subject to the rehabilitation authority's rehabilitation proposal made in the framework of the complex reassessment, the allowance to be granted for a person with reduced work capacity shall be either:

a) rehabilitation allowance, or

b) disability allowance."

Section 5

"(1) Persons with reduced work capacity shall be entitled to disability allowance where rehabilitation is not recommended."

21. The Constitutional Court examined Act no. CXCI of 2011 in decision no. 40/2012. (XII.6.) AB. It recalled that its jurisprudence differentiated between allowances acquired by compulsory contribution to the social security scheme on the one hand, and social allowances not constituting "purchased rights" on the other hand. The former allowances (e.g. old-age pension or pension for surviving spouse) enjoyed property-like constitutional protection because of their inherent insurance element. As regards the latter, guarantees flowing from the requirements of the rule of law (i.e. protection of legitimate expectations, proper time for preparation) should be observed as criteria of constitutionality – instead of requirements related to the protection of property. In the case-law of the Constitutional Court, protection of legitimate expectations (or, in other words, protection of acquired rights) meant the application of the requirement of due time for preparation, ensuing also from the principle of legal security of already acquired titles. In the absence of an already acquired title, the Constitutional Court might only verify whether the time allowed by the legislation was sufficient for the individuals to become aware of its content. In fact, it was the difference in the solidity of the basis of expectation which was question in the respective situations.

22. The decision contains in particular the following passages:

"30. ... The Constitutional Court has examined modifications to laws and regulations relating to disability pensions in several decisions. Decision no. 321/B/1996 AB categorises disability pensions partly as an allowance prompting protection of property and partly as a social service provision. As stated in the decision, the law 'provides care under the constitutional principle of social security for individuals who before reaching the old age pension age have lost their ability to work by reason of disability or disability due to accident. ... Prior to reaching the official retirement age, the disability pension is a special benefit granted to individuals

based on their disability. Upon reaching pensionable age, individuals who are ... incapable of work ... are not entitled to this special benefit, because on termination of their employment, they are eligible to receive an old age pension based on their age.'

31. Decision no. 1129/B/2008 AB states that disability pension falls under the category of personal retirement benefits, though their 'purchased right' element is only apparent inasmuch as 'its sum is greater after a longer length of service, or is equal or close to the old age pension. Otherwise the principle of solidarity is predominant, as the disabled individual, who would not be eligible for an old age pension based on his age or length of service, is able to receive pension benefits from the point at which disability is determined.' ...

32. In the Constitutional Court's interpretation, laws giving title to disability pensions do not constitute subjective constitutional rights, but are mixed social security and social service benefits, available – subject to set conditions – to individuals under the retirement age suffering from ill health, who, due to their disability, have a reduced capacity to work and are in need of financial assistance because of the loss of income."

23. The relevant provisions of Convention no. 102 of the International Labour Organisation (ILO) on Social Security (Minimum Standards), adopted on 28 June 1952, read as follows:[2]

Part IX – Invalidity benefit

Article 53

"Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of invalidity benefit in accordance with the following Articles of this Part."

Article 54

"The contingency covered shall include inability to engage in any gainful activity, to an extent prescribed, which inability is likely to be permanent or persists after the exhaustion of sickness benefit."

Article 55

"The persons protected shall comprise--

(a) prescribed classes of employees, constituting not less than 50 per cent of all employees; or

(b) prescribed classes of the economically active population, constituting not less than 20 per cent of all residents; or

(c) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67; or

(d) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees, constituting not less than 50 per cent of all employees in industrial workplaces employing 20 persons or more."

[2] Convention no. 102 has been ratified by 50 countries. As regards Member States of the Council of Europe, 14 of them, not including Hungary, ratified Part IX of this instrument.

Article 56

"The benefit shall be a periodical payment calculated as follows:

(a) where classes of employees or classes of the economically active population are protected, in such a manner as to comply either with the requirements of Article 65 or with the requirements of Article 66;

(b) where all residents whose means during the contingency do not exceed prescribed limits are protected, in such a manner as to comply with the requirements of Article 67."

Article 57

"1. The benefit specified in Article 56 shall, in a contingency covered, be secured at least--

(a) to a person protected who has completed, prior to the contingency, in accordance with prescribed rules, a qualifying period which may be 15 years of contribution or employment, or 10 years of residence; or

(b) where, in principle, all economically active persons are protected, to a person protected who has completed a qualifying period of three years of contribution and in respect of whom, while he was of working age, the prescribed yearly average number of contributions has been paid.

2. Where the benefit referred to in paragraph 1 is conditional upon a minimum period of contribution or employment, a reduced benefit shall be secured at least--

(a) to a person protected who has completed, prior to the contingency, in accordance with prescribed rules, a qualifying period of five years of contribution or employment; or

(b) where, in principle, all economically active persons are protected, to a person protected who has completed a qualifying period of three years of contribution and in respect of whom, while he was of working age, half the yearly average number of contributions prescribed in accordance with subparagraph (b) of paragraph 1 of this Article has been paid.

3. The requirements of paragraph 1 of this Article shall be deemed to be satisfied where a benefit calculated in conformity with the requirements of Part XI but at a percentage of ten points lower than shown in the Schedule appended to that Part for the standard beneficiary concerned is secured at least to a person protected who has completed, in accordance with prescribed rules, five years of contribution, employment or residence.

4. A proportional reduction of the percentage indicated in the Schedule appended to Part XI may be effected where the qualifying period for the pension corresponding to the reduced percentage exceeds five years of contribution or employment but is less than 15 years of contribution or employment; a reduced pension shall be payable in conformity with paragraph 2 of this Article."

Article 58

"The benefit specified in Articles 56 and 57 shall be granted throughout the contingency or until an old-age benefit becomes payable."

24. The International Classification of Functioning, Disability and Health (ICF), endorsed by the Member States of the World Health Organisation (WHO) in 2001, provides in its relevant part as follows:

Annex 6
Ethical guidelines for the use of ICF, Social use of ICF information

> "(10) ICF, and all information derived from its use, should not be employed to deny established rights or otherwise restrict legitimate entitlements to benefits for individuals or groups."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 OF THE CONVENTION

25. The applicant complained that she had lost her livelihood, previously secured by the disability pension, because under the new system, in place as of 2012, she was no longer entitled to such an allowance, although her health was as bad as ever, and this as a consequence of the amended legislation containing conditions she could not possibly fulfil. She relied on Article 6 of the Convention.

The Court considers that this complaint falls to be examined under Article 1 of Protocol No. 1 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."

26. The Government contested that argument.

A. Admissibility

27. The Government argued that the application should be rejected for non-exhaustion of domestic remedies because the applicant had not filed a petition for review against either of the judgments of 1 April 2011 or 20 June 2013, an effective remedy to exhaust in administrative litigation.

They further submitted that the application had been introduced out of time, the six-month time-limit to be counted from the 2011 judgment originally withdrawing the applicant's entitlement. In their view, neither the

enactment of the new law nor the ensuing re-assessments interrupted the running of this time-limit.

28. The applicant argued that a review before the Supreme Court, later renamed as *Kúria*, whose scope was statutorily limited to points of law, would have been futile in either procedure, because she was objectively unable to meet the criteria contained in the law. Moreover, her grievance was of a continuing character or, alternatively and more importantly, to be counted from the second judgment reflecting the 2012 legislation, reasons for which the six-month rule must be seen as respected.

29. The Court recalls that a petition for review before the *Kúria* is normally a remedy to be exhausted in civil, including administrative, litigations (see *Béla Szabó v. Hungary*, no. 37470/06, 9 December 2008). However, the exhaustion rule must be applied with some degree of flexibility and without excessive formalism. Indeed, the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV). Under Article 35 § 1, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. There is no obligation to have recourse to remedies which are inadequate or ineffective (see *Akdivar*, cited above, §§ 66, 67).

30. In the present case, the Court observes that the subject matter of the first litigation was the degree of disability as established under a new statutory methodology. That of the second case – that is, the issue actually complained of – was the question whether or not the volume of the applicant's past contributions to the social security scheme was sufficient for the purposes of the applicable regime of disability care. For the Court, the domestic courts did no more in either case than apply the statutory rules to the applicant's situation, without any particular interpretation of the law or assessment of the evidence. Since, in the Court's understanding, a review before the *Kúria* is limited to points of law (an assertion of the applicant not disputed by the Government), it is satisfied that a review motion to challenge the rules themselves would have been without any reasonable prospect of success. Therefore, in the particular circumstances of the present case, this legal avenue would have been ineffective and therefore futile, and its non-pursuit cannot be reproached to the applicant. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies.

31. Notwithstanding the arguably continuous character of the applicant's legitimate expectation to receive disability care (see the Merits chapter and in particular paragraph 45 below), the Court notes, as regards the first

litigation, that the final domestic decision in that case on the fulfilment of the medical eligibility criteria applicable at that time was given on 1 April 2011, that is, more than six months prior to the date of introduction of the application (12 August 2013). The Court is therefore prevented, pursuant to Article 35 § 1 of the Convention, from examining that procedure.

Concerning the second case, it was on 20 June 2013 that, by a final and binding judicial decision, the applicant was denied eligibility for disability pension under the 2012 rules, for lack of sufficient period of social cover. The application, to the extent that it concerns the applicant's grievance finding its source in that decision, cannot therefore be rejected for non-compliance with the six-month rule.

32. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

33. The applicant submitted that the removal of her disability pension by means of consecutive amendments of the relevant eligibility rules culminating in the 2012 situation, but without any amelioration in her health, constituted an unjustified interference with her Convention rights. In her view, the interference did not pursue any identifiable legitimate aim and imposed on her an excessive individual burden, taking into account that the termination of the disability pension divested the applicant of her means of subsistence.

34. The Government were of the opinion that the applicant had neither a possession nor a legitimate expectation for the purposes of Article 1 of Protocol No. 1. In their view, she had ceased to be entitled to the disability pension already under the former rules and, by the time of the entry into force of the new legislation, had no "possession" within the meaning of Article 1 of Protocol No. 1. Nor could she claim to have a legitimate expectation, for want of meeting the relevant eligibility criteria under the new scheme.

2. The Court's assessment

a. General principles

35. 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 (see *Van der Mussele v. Belgium*, 23 November 1983, § 48, Series A no. 70). Nor does it guarantee, as such, any right to a pension of a particular amount (see, for example, *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 39, ECHR 2004-IX). Indeed, the right to an old-age pension or any social benefit in a particular amount is not included as such among the rights and freedoms guaranteed by the Convention (see, for example, *Aunola v. Finland* (dec.), no. 30517/96, 15 March 2001).

36. Article 1 of Protocol No. 1 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, in the context of Article 14 read in conjunction with Article 1 of Protocol No. 1, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 54, ECHR 2005-X). For the Court, the latter principle allows for a particular interpretation in the context of disability care, which is a welfare benefit of a special character. Since 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 *Kjartan Ásmundsson*, quoted above, § 39), the Court considers that if the benefit, which had been granted on the basis of the legislation in force and which had been generated by the making of appropriate contributions to the scheme and the satisfaction of the requirements of the legislation in force during one's active employment, was removed – notably by a retrospective amendment to the contribution rules – such a measure will require a convincing justification for the purposes of Article 1 of Protocol No. 1, as long as the other key requirement, namely a deteriorated health status, is in place.

37. 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; *Moskal v. Poland*, no. 10373/05, § 39, 15 September 2009).

38. The Court has accepted the possibility of reductions in social security entitlements in certain circumstances. In particular, the Court has noted the significance which the passage of time can have for the legal

existence and character of social insurance benefits. This applies both to amendments to legislation, which may be adopted in response to societal changes and evolving views on the categories of persons who need social assistance, and also to the evolution of individual situations (see *Wieczorek v. Poland*, no. 18176/05, § 67, 8 December 2009, and further case-law references cited therein). However, where the amount of a benefit is reduced or discontinued, this may constitute interference with possessions which requires to be justified (see *Kjartan Ásmundsson*, cited above, § 40; and *Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009).

39. An essential condition for interference to be deemed compatible with Article 1 of Protocol No. 1 is that it should be lawful.

Moreover, any interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public (or general) interest. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide 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 interfering with the peaceful enjoyment of possessions (see *Terazzi S.r.l. v. Italy*, no. 27265/95, § 85, 17 October 2002; and *Wieczorek v. Poland*, cited above, § 59).

Article 1 of Protocol No. 1 also requires that any interference be reasonably proportionate to the aim sought to be realised (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, §§ 81-94, ECHR 2005-VI). 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).

b. Application of those principles to the present case

40. The applicant was, as of 2001, entitled to receive a disability pension because she met all the statutory conditions (see paragraph 7 above). Under the rules in force at that time, one of the conditions of eligibility for disability pension was the accumulation of the requisite service period (see paragraph 18 above).

41. It is true that she subsequently lost her pension (see paragraph 8 above) because, under a new methodology of assessment, her health was no longer considered sufficiently impaired to qualify her for the pension. The Court notes at this juncture that this was due to a change in the applicable methods rather than to an actual improvement in her health.

42. The Court observes that, as of January 2012, the disability pension system was replaced by an allowance system, which contained new criteria of eligibility. When in 2012 the applicant applied for the allowance which replaced the pension, she was found ineligible, not because she did not have the requisite disability condition, but because of the insufficient period of

social cover – and this irrespective of the volume of her past contributions to the social security system, previously recognised, in terms of service time, as sufficient (see paragraphs 11, 13 and 14 above).

43. For the Court, these changes in the applicant's status under the regulations on disability pension/allowance must be examined from the perspective of the inherent features of such schemes. It is noteworthy in this connection that the Constitutional Court found that allowances acquired by compulsory contributions to the social security scheme may partly be seen as "purchased rights" (see paragraphs 21 and 22 above); in particular, that court categorised disability pensions "partly as an allowance prompting protection of property and partly as a social service provision". In the Constitutional Court's view, the guarantees flowing from requirements of the rule of law, namely the protection of legitimate expectations, apply to social allowances as well.

Largely sharing the views of the Constitutional Court, the Court is therefore satisfied that the disability pension/allowance is an assertable right to a welfare benefit recognised under the domestic law, and therefore Article 1 of Protocol No. 1 is applicable (see paragraph 37 above). Indeed, being a special element of the pension system, the disability pension/allowance is nothing less than a security, guaranteed by virtue of societal solidarity, that where a person has made the requisite contributions to the scheme, for example by paying payroll burdens over a certain period of time, he or she should be entitled to an allowance, if a serious deterioration of health, resulting in inability to perform gainful activities, so requires.

44. In the particular case, the applicant had made such contributions to the social security scheme as were required during the time of her employment. The resultant legitimate expectation to receive disability care was recognised and honoured by the authorities when the contingency occurred, and she was granted a disability pension in 2001. She continued to enjoy that "possession" until 2010. Her health situation appears to have remained materially unchanged throughout this and the ensuing period, and the various disability degrees attributed to this condition were only the consequence of successive changes in the methodology.

45. For the Court, the existence of the applicant's continued, recognised legitimate expectation to receive disability care – if her health so requires and even after the withdrawal of the pension in 2010 – is well demonstrated by the fact that she, as a person who had satisfied the requirement of contributions, was subject to ensuing periodic reviews (in September 2011, as well as in April and August 2012, with reassessment scheduled for 2014 and 2015).

46. Although it has not been ratified by Hungary or the majority of the Council of Europe Member States, the Court nevertheless finds noteworthy Article 57 § 1(b) of the ILO Convention on Social Security (see in

paragraph 23 above), according to which a person protected who has completed a qualifying period of three years of contribution and in respect of whom, while he or she was of working age, the prescribed yearly average number of contributions has been paid is considered to be eligible for benefits.

47. In these circumstances, the Court is satisfied that, once meeting the administrative requirement of the disability pension scheme as in force at the first material point in time (that is, in 2001), the applicant obtained, for the purposes of Article 1 of Protocol No. 1, a formal recognition of her legitimate expectation to receive a disability pension/allowance as and when her medical condition would so necessitate. This expectation originates in the law in force during her employment and at the time of the original acquisition of disability pension rights. Given the statutory provisions on eligibility, this recognised legitimate expectation is of a nature more concrete than a mere hope as it was based on legal provisions (compare and contrast *Gratzinger and Gratzingerova v. the Czech Republic* (dec.), no. 39794/98, § 73, ECHR 2002-VII).

48. That recognised legitimate expectation and the proprietary interests generated by the legislation of a Contracting State in force at the time of becoming eligible (see *Stec*, cited above, § 54) cannot be considered extinguished by the fact that, in a new methodology of assessment, the applicant's disability was scored down to 40 per cent in December 2009 (see paragraph 8 above), apparently without material change in her condition. For the Court, the crux of the matter is that during her employment, the applicant had contributed to the social security system as was required by the law, which fact alone prompted the social solidarity-based obligation on the State's side to provide disability care, should a contingency occur. By granting disability pension in 2001, the authorities implicitly recognised that she satisfied the relevant criteria. Between 2001 and 2010 the applicant enjoyed the resultant possession of disability pension, and when her disability was considered less serious, this possession was replaced with the recognised legitimate expectation of continued care, should the circumstances again so require.

Irrespective of the loss of the pension in 2010, the Court is therefore of the view that the expectation of the applicant, as a contributor to the social security scheme who once satisfied the condition of eligibility, is legitimate and continuous in its legal nature.

It should be recalled that "if any distinction can still be said to exist in the case-law between contributory and non-contributory benefits for the purposes of the applicability of Article 1 of Protocol No. 1, there is no ground to justify the continued drawing of such a distinction" (see *Stec*, cited above, § 53). In the Court's view, this consideration cannot be regarded as doing away with any protection previously afforded to the contributory schemes, in excess to the one due to non-contributory ones. In

any case, the Court notes that the disability pension scheme in question included elements of a contributory character, as held by the Constitutional Court (see paragraphs 21, 22 and 43 above).

49. This right of the applicant was then interfered with by the authorities, when in 2012 she was denied disability care on the strength of insufficient contributions made in the past, although her medical condition was again deemed sufficiently impaired. It must be stressed again that these contributions, originally formulated as service time, were once adequate for that purpose, and the new requirement, expressed in terms of duration of social security cover, was introduced only later, at a time when the applicant was virtually no longer able to meet it.

50. It was not in dispute between the parties that this interference was prescribed by law and the Court sees no reason to hold otherwise. Indeed, the denial of disability allowance was precisely due to a change in the law (see, *mutatis mutandis*, *Lakićević and Others v. Montenegro and Serbia*, nos. 27458/06, 37205/06, 37207/06 and 33604/07, § 70, 13 December 2011).

51. As regards public or general interest, the Court accepts that the impugned legislation pursued the legitimate aim of the society's economic well-being.

52. As regards the question of proportionality, the State obviously has a certain margin of appreciation in regulating citizens' access to disability benefits, notably by requiring a certain volume of contributions to the scheme as well as a statutory minimum level of disability. These elements are susceptible to evolution in the light of societal changes, development of the labour market and progress of medical science, including options of rehabilitation.

53. However, the liberty States enjoy in this field cannot go as far as depriving this entitlement, once granted, of its very essence. Moreover, the requirements of the rule of law must be observed, and a retrospective disregard of acquired rights and legitimate expectations, as is the case with social security contributions, must be avoided when passing measures of social reforms. As to the question whether the legitimate expectation to receive disability care entails a right not to have the eligibility conditions changed, the Court notes, by analogy, the Ethical guidelines of the WHO's document on International Classification of Functioning, Disability and Health which should not be employed to deny established rights or otherwise restrict legitimate entitlements to benefits for individuals (see paragraph 24 above). The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III). This consideration entails, in the context of the present case, a State obligation to secure, on the basis of societal solidarity, a certain income for those whose working capacity fell below the statutorily set level, provided that they have made

sufficient contributions to the scheme – and this without prejudice to the general principle ubiquitous in the Court's case-law, according to which Article 1 of Protocol No. 1 does not create a right to acquire property, nor does it place any 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 (see *Stec*, § 54, quoted above in paragraph 36).

The Court would add at this juncture that, as matter of the rule of law, the principle *impossibilium nulla obligatio est* is of particular relevance in the present case where the applicant was *ex post* reproached for not having made in the past sufficient contributions as determined by the new legislation – a condition she could not possibly meet at that point in time.

54. In the present case, when the applicant was forced to apply for the pension for the first time, she had already fulfilled the then relevant administrative requirement and was granted a pension.

Despite her essentially unchanged health status, years later she was excluded from the benefit, since the ailments she had were no longer considered substantial enough for the continuation of the pension.

Once her disability score was subsequently raised again, this could not result in granting a pension or allowance, because the intervening new administrative criterion was effectively unattainable in the applicant's particular case.

55. Eventually, the applicant was wholly denied the social security entitlements which would have been otherwise due to her in view of her ill-health. It is noteworthy from the perspective of proportionality that she was totally divested of her pension/allowance, due to a new condition of eligibility instead of being obliged to endure a reasonable reduction, commensurate with the proportion of her accumulated social security cover, that is, 947 days instead of 1,095 (see, *mutatis mutandis*, *Kjartan Ásmundsson*, cited above, § 45; *Wieczorek*, cited above, § 67; *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, § 62, 31 May 2011; *Banfield v. the United Kingdom* (dec.), no. 6223/04, 18 October 2005; and *Lakićević and Others*, cited above, § 72).

56. The Court considers that this course of events amounts to a drastic change in the conditions of the applicant's access to disability benefits which she was unable to foresee or pre-empt, in that her legitimate expectation of receiving disability pension, if in need and on the strength of the previously paid payroll burdens, was completely removed; and she was never in a position to rectify her situation.

57. Having regard to the above considerations, the Court finds that the applicant was made to bear an excessive and disproportionate individual burden. Consequently, there has been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed 9,834 euros (EUR) in respect of pecuniary and EUR 5,000 in respect of non-pecuniary damage. The former figure should correspond to the aggregate value of disability pension undisbursed in the material period.

60. The Government contested these claims.

61. The Court considers it appropriate to award EUR 5,000 in respect of pecuniary damage (having regard to the fact that the violation found only relates to the period after 1 January 2012) and, on the basis of equity, EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

62. The applicant also claimed EUR 6,240 for the costs and expenses incurred before the Court. This sum corresponds to 38.6 hours of legal work, charged at an hourly rate of EUR 150, and 9 hours of paralegal work, charged at an hourly rate of EUR 50, to be billed by her lawyer.

63. The Government contested this claim.

64. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000 covering costs under all heads, from which amount EUR 850 – the sum which has been awarded to the applicant under the Council of Europe's legal-aid scheme – must be deducted.

C. Default interest

65. The Court considers it appropriate that the default interest rate 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*, by a majority, the application admissible;

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

3. *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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;
(ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(iii) EUR 4,150 (four thousand one hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(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*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Işıl Karakaş
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Keller, Spano and Kjølbro is annexed to this judgment.

A.I.K.
S.H.N.

JOINT DISSENTING OPINION OF JUDGES KELLER, SPANO AND KJØLBRO

I.

1. Article 1 of Protocol No. 1 to the Convention has never, before today, been interpreted by this Court as obliging member States to provide persons with the right to social security benefits, in the form of disability pensions, independently of their having an assertable right to such a pension under domestic law. The majority have thus expanded the scope of the right to property under the Convention in a manner that is flatly inconsistent with this Court's case-law and the object and purpose of Article 1 of Protocol No. 1. As the right to property under the European Convention on Human Rights is not an autonomous repository for economic and social rights not granted by the member States, we respectfully dissent.

II.

2. We will start by recapitulating the case-law of the Court in this area.

3. As explained in the Grand Chamber's admissibility decision in *Stec and Others v. the United Kingdom* ((dec.) [GC], nos. 65731/01 and 65900/01, § 50, ECHR 2005-X):

> "The Court's approach to Article 1 of Protocol No. 1 should reflect the reality of the way in which welfare provision is currently organised within the member States of the Council of Europe. It is clear that within those States, and within most individual States, there exists a wide range of social security benefits designed to confer entitlements which arise as of right. Benefits are funded in a large variety of ways: some are paid for by contributions to a specific fund; some depend on a claimant's contribution record; many are paid for out of general taxation on the basis of a statutorily defined status ... Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No. 1. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through the payment of tax."

4. As the Grand Chamber went on to observe (ibid., § 51, emphasis added):

> "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."

5. However, the Grand Chamber cautiously introduced an important caveat in this regard by stating (ibid., §§ 54-55, emphasis added) that:

> "It must, nonetheless, be emphasised that the principles ... which apply generally in cases under Article 1 of Protocol No. 1, are equally relevant when it comes to welfare benefits. In particular, the Article does *not create a right to acquire property*. It 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* ..."

In relation to cases concerning a complaint under Article 14, in conjunction with Article 1 of Protocol No. 1, to the effect that the applicant had been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the Grand Chamber concluded:

> "the relevant test is whether, but for the condition of entitlement about which the applicant complains, *he or she would have had a right, enforceable under domestic law*, to receive the benefit in question ... *Although Protocol No. 1 does not include the right to receive a social security payment of any kind*, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14."

6. Thus, it follows clearly from *Stec and Others* (cited above), as confirmed by the Grand Chamber in *Andrejeva v. Latvia* ([GC], no. 55707/00, § 77, ECHR 2009), and again more recently in *Stummer v. Austria* ([GC], no. 37452/02, § 82, ECHR 2011), that the Convention itself does not provide a right to become the owner of property, a right to receive any pension or other social security benefits, or a right to social security benefits of a particular amount. We observe, however, that *Stec and Others* (cited above) was limited to the question whether the welfare benefit concerned by the complaint fell within the "ambit" of Article 1 of Protocol No. 1 for the purposes of Article 14. But the Court has subsequently applied a similar test of applicability to complaints inviting it to find an independent violation of Article 1 of Protocol No. 1, thus examining whether the withdrawal of social security and welfare benefits was in conformity with the requirements of legality and proportionality under Article 1 of Protocol No. 1 (see, for example, *Wieczorek v. Poland*, no. 18176/05, § 67, 8 December 2009, and *Moskal v. Poland*, no. 10373/05, § 39, 15 September 2009). In such cases the Court has maintained its constant position that such a claim of an unjustified interference with a right in the field of welfare rights will not be considered to fall under Article 1 of Protocol No. 1 if the applicant cannot demonstrate, as *an absolute threshold issue*, that he or she had, at the time of the interference, an "assertable right" under domestic law. Consequently, as most recently confirmed once again by the Court in *Richardson v. the United Kingdom* ((dec.) no. 26252/08, 10 April 2012, § 17), where "the person concerned *does not satisfy*, or *ceases to satisfy*, the

legal conditions laid down in domestic law for the grant of any particular form of benefits or pension, there is no interference with the rights under Article 1 of Protocol No. 1" (emphasis added); the Court referred to the cases of *Bellet, Huertas and Vialatte v. France*, (dec.) no. 40832/98, 27 April 1999, and *Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009.

III.

7. It is undisputed in the present case, and the majority acknowledge as much (see paragraphs 41-42 of the judgment), that the applicant had no assertable right under domestic law to the disability pension she requested in February and August 2012, the rejection of which subsequently formed the basis of her claim that was ultimately dismissed by the Administrative and Labour Court on 20 June 2013. More than two years had thus passed since her right to a disability pension had been withdrawn and the judicial proceedings, in which the applicant challenged that withdrawal, had come to an end on 1 April 2011. Therefore, her application to the Court, as regards those proceedings, was correctly dismissed by the Court as inadmissible under Article 35 § 1 of the Convention (see paragraph 31 of the judgment).

This irrefutable legal fact should, in our view, have been the end of the matter, as the existence of an arguable claim under Article 1 of Protocol No. 1, in the field of welfare benefits, is firmly conditioned on the existence of a right to such benefits *under domestic law*, as we have explained in paragraphs 2-6 above. In other words, the Convention does not provide for a right to a disability pension independently of national law.

8. The majority attempt to circumvent this limitation of the scope of Article 1 of Protocol No. 1 in the field of social and welfare rights by introducing, *for the first time*, the notion that an applicant, having once had a right to a disability pension under domestic law, indefinitely retains a "legitimate expectation to receive a disability pension/allowance as and when her medical condition would so necessitate" (see paragraph 47 of the judgment). Although it is clear that the applicant lost any assertable right to a disability pension in 2010, the majority thus nevertheless conclude that the "expectation of the applicant, as a contributor to the social security scheme who once satisfied the condition of eligibility, is legitimate and continuous in its legal nature" (see paragraph 48, *in fine*, of the judgment).

9. Firstly, we note, with respect, that the majority refrain from openly recognising that this approach entails a completely novel understanding of the concept of "legitimate expectations" under Article 1 of Protocol No. 1 never before seen in this Court's case-law and certainly not in the field of social and welfare rights. The majority thus purport to "apply" the general principles of the Court's case-law, as reiterated in paragraphs 35-39 of the

judgment, the correct application of which could not possibly have led to the result arrived at by the majority.

10. Secondly, we would point out that the Court has previously held that the autonomous concept of "possessions" under Article 1 of Protocol No. 1 is not limited to "existing possessions", but may also cover assets, including claims, in respect of which the applicant can argue that he or she has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right (see, among other authorities, *Öneryıldız v. Turkey*, no. 48939/99, § 124, ECHR 2004-XII). Thus, for there to be any possibility for an applicant to have an arguable right under Article 1 of Protocol No. 1, on the basis of a "legitimate expectation", that expectation must be based on some normative legal source at domestic level that can reasonably confer a property right on him or her. It goes without saying that a legitimate expectation to a property right does not arise where the person in question cannot possibly be the recipient of such a right in national law in the light of its nature and legal origins. As the Grand Chamber stated unequivocally in *Kopecký v. Slovakia* ([GC], 44912/98, § 50, ECHR 2004-IX), "no legitimate expectation [under Article 1 of Protocol No. 1] can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts" (see also *Anheuser-Busch Inc v. Portugal*, [GC], no. 73049/01, § 65, ECHR 2007-I).

11. Consequently, the majority's reasoning raises the following crucial question: what is the normative legal source of the "continuous" legitimate expectation that the majority consider the applicant to have? It is undisputed that it is not to be found in the domestic law of Hungary. Again, the applicant had no right to the pension in question in 2012. The existence of such a right was unambiguously rejected by the national courts. Therefore, as Article 1 of Protocol No. 1 does not create a right to acquire property and, more importantly, places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, it is self-evident that in 2012, two years after she lost her domestic right to the disability pension, the applicant could not possibly have had a legitimate expectation under Article 1 of Protocol No. 1 of retaining an autonomous right that was non-existent within the confines of the right to property under the Convention. Again, as the Court stated as a general principle just over three years ago in *Richardson* (cited above, § 17), where the person concerned does not satisfy, or "ceases to satisfy", the legal conditions laid down in domestic law for the grant of any particular form of benefits or pension, there is no interference with the rights under Article 1 of Protocol No. 1.

12. The majority seem to be influenced by the notion that the applicant contributed to the pension scheme in question during the time she was employed (see paragraphs 48-49 of the judgment). However, this issue is

irrelevant for the purposes of the applicability of Article 1 of Protocol No. 1 in the context of the present case. In any event, the applicant has not argued, nor demonstrated in any way before this Court, that the contributory scheme in question was in the form of compulsory contributions, for example to a pension fund or a social insurance scheme, that created a *direct link between the level of contributions and the benefits awarded.* Therefore, the applicant did not, at any given moment, have an identifiable and claimable share in a particular fund for the purposes of Article 1 of Protocol No. 1, or so-called "purchased rights" within the meaning of the Convention (see, for example, *Müller v. Austria*, no. 5849/72, Commission decision of 1 October 1975, Decisions and Reports (DR) 3, p. 25; *G v. Austria*, no. 10094/82, Commission decision of 14 May 1984, DR 38, p. 84; and *De Kleine Staarman v. the Netherlands*, no. 10503/83, Commission decision of 16 May 1985, DR 42, p. 162).

13. Therefore, the question whether or not the applicant contributed to some extent to the public pension scheme in question, and had her contributory record taken into account when assessing whether she had a right to the disability pension in 2001, has no bearing on the issue of the applicability of Article 1 of Protocol No. 1 when, in 2012, she clearly had no right to such a pension under the new domestic scheme introduced by Act no. CXCI (see paragraph 10 of the judgment). This understanding of the applicability of the right to property under the Convention follows directly from *Stec and Others* (cited above), which made redundant, in principle, the distinction between contributory or non-contributory pension schemes in the member States for the purposes of Article 1 of Protocol No. 1. In both situations, the applicant must demonstrate that he or she had an assertable right under domestic law for Article 1 of Protocol No. 1 to apply. That is simply not the case for the present applicant.

IV.

14. In conclusion, the applicant might have had an arguable claim under Article 1 of Protocol No. 1 to the Convention when her disability pension was withdrawn in 2010, as finally decided by the Hungarian courts in 2011. However, the Court is not competent to decide that issue as the applicant's complaint in this regard was not lodged with the Court within six months of the final decision in those proceedings (see paragraph 7 above). The majority cannot remedy this situation by inventing a substantive right to a disability pension under the Convention, where none exists, with unforeseen consequences for the social security and welfare systems of the 47 member States of the Council of Europe.