SUMMARY

2016/18 Legislation that increased the statutory retirement age violates ECHR (NL)

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Facts

Until 2013, the statutory retirement age in The Netherlands was 65. It had been that way since 1947. The law provided that each resident begins to accrue the right to State-paid retirement benefits ('AOW benefits') at age 15 and continues to accrue this right annually for forty years as long as he is a resident (or is otherwise insured), at a rate of 2% per year, until retirement at age 65, at which point he receives AOW benefits for the remainder of his life. In 2013 the

statutory retirement age was raised from 65 to (at least) 67, with transitional provisions in favour of those who were already close to retirement. In 2015, these transitional provisions were amen|ded. Under the law as it now stands, the retirement age is:

in 2016: 65 and 6 months;
in 2017: 65 and 9 months;
in 2018: 66;
in 2019: 66 and 4 months;
in 2020: 66 and 8 months;
from 2012: 67;
from 20122: over 67, depending on average life expectancy.

The AOW benefits are paid by a government agency known as the SVB (an abbreviation of Social Insurance Bank).

The plaintiff in this case is a widow born on 21 February 1956. Under the old law, she would have started to accrue AOW benefits on 21 February 1971 (at age 15) and would have become eligible to receive AOW benefits from 21 February 2021, at age 65. Under the new law, she is deemed to have started accruing benefits at age 17 and will not start receiving benefits until 21 February 2023 at age 67.

Her circumstances were that she was in poor health (she suffers from a progressive chronic ailment) that prevents her from working in gainful employment. Her sole income consists of widow's benefits. Her former husband purchased additional widow's benefits that will cease at age 65 and although she will then be entitled to welfare, a condition for receiving welfare is that she sells her house. She would therefore be faced with two years without any income other than a small bridging allowance of € 500 to € 600 per month.

The plaintiff therefore filed an objection against a statement issued by the SVB confirming her rights under the new law. Her complaint was rejected, following which she appealed to the local administrative court. She based her appeal on Article 1 of the First Protocol to the Convention for the protection of Human Rights and Fundamental Freedoms, commonly referred to as the European Convention on Human Rights (ECHR), which reads:

"Every natural or legal person in 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".

The SVB argued that the increase of the statutory qualification age for state pension benefits, i.e. the statutory retirement age, satisfied the requirements formulated in this 'Article 1 FP'. The plaintiff allowed that, on a literal reading of Article 1 FP, this was the case, but denied that there was a 'fair balance' between the public interest and the protection of her fundamental right not to be deprived of her possessions, within the meaning of the ECtHR's case law on Article 1 FP, given that she is being deprived of two years of AOW benefits.

Judgment

The court began by examining the SCB's contention that the plaintiff does not have an 'existing right' to AOW benefits. This argument rested on the ECtHR's ruling in the Bladh case (10 November 2009, appl. 46125/06). In that case, the applicant, Peter Bladh, had worked in Sweden as a trainee. At the time he started his traineeship, Swedish law provided that a person who had worked for at least a certain length of time, either as a regular employee or as a trainee, was eligible for unemployment benefits. The day before Mr Bladh's traineeship ended, the law was amended in such a way that periods of employment as a trainee no longer coun|t-ed for the purpose of qualifying for unemployment benefits. The ECtHR, referencing its previous case law, held that "claims, in respect of which the applicant can argue that he or she has at least a legitimate expectation of obtaining effective enjoyment of a property right" constitute "possessions" within the meaning of Article 1 FP. However, the ECtHR found that, under the circumstan|ces of the case, Mr Bladh did not have a legitimate expectation within this meaning.

The court agreed with the SVB that at present the plaintiff does not (yet) have a right. She will not have a right until she reaches retirement age, which is an uncertain future event. However, the ECtHR has consistently held that a conditional future right can constitute a 'possession'. It referred to the ECtHR's ruling in the Jantner case (4 March 2003, appl. 39050/97) in which the court held more or less as in Bladh, quoted above. Literally, the ruling states: "The Court recalls that the Convention institutions have consistently held that 'possessions' within the meaning of Article 1 of Protocol No. 1 can be either 'existing possessions' or assets, including claims, in respect of which an applicant can argue that he has at least a 'legitimate expectation' that they will be realised". Based on this ECtHR precedent, the court found that the plaintiff had a legitimate expectation that she would start receiving AOW benefits from age 65.

The court proceeded to investigate whether the new law satisfied the condition of "public interest and subject to the conditions provided for by law". In particular, it investigated

whether there was proportionality between the public interest (budgetary constraints and the need to safeguard the continued existence of AOW benefits for future generations), which the court found to be legitimate, and the plaintiff's fundamental right to the enjoyment of her possessions. The ECtHR has held that the requirement of proportionality has not been satisfied where a State's interference with an individual's possessions constitutes an "individual and excessive burden".

The court found that in the situation of the plaintiff there was an individual and excessive burden, given (i) that her age and poor health (she suffers from a progressive chronic ailment) prevent her from working in gainful employment, (ii) that her sole income consists of widow's benefits, (iii) that her former husband purchased additional widow's benefits that will cease at age 65, (iv) that although she will then be entitled to welfare, a condition for receiving welfare is that she sells her house and (v) that she will therefore be faced with two years without any income other than a small "bridging allowance" of € 500 to € 600 per month.

Based on the above, the court found that Article 1 FP has been breached and ordered the SVB to disapply the law inasmuch as it denies the plaintiff AOW benefits between the ages of 65 and 67. The SVB has appealed. The appeal procedure is anticipated to take about one year.

Commentary

Although this case turns upon a specific set of facts and circumstances (60-year old widow who would not pass a means test but has very little income), this judgment certainly raises eyebrows. By applying an international convention on human rights, a court has succeeded in eroding the legislator's power to determine the qualification age for what effectively are state benefits.

Seeing that The Netherlands is by no means the only European country where the statutory retirement age has been or is being raised, this judgment could inspire individuals or organisations elsewhere to challenge cuts in social benefits and is therefore one to be watched.

Comments from other jurisdictions

Greece (Harry Karampelis): This judgment is a commendable one, since it seems to take into consideration the ECtHR's jurisprudence regarding pension entitlements, as well as expectancies falling under the scope of the right to property according to Article 1 of Protocol 1 of the European Convention on Human Rights ("Protocol 1"). The following commentary refers to the already existing jurisprudence of the ECtHR as to the matter under discussion, trying thus to "predict" the future outcome of the case should it reach the ECtHR, as well as to the procedure a Greek Court would follow in this matter, since retirement ages have been

raised following the obligations of the Greek State arising out of the Memoranda signed with the Troika.

Pension entitlements fall within the scope of the right to property. Article 1 of Protocol 1 does not entail a right to receive a pension or other benefits, nor does it enshrine that a pension has to reach a certain amount. Contracting states enjoy a wide margin of appreciation with regard to the granting of social benefits. If, howev|er, pension entitlements have been conferred, they constitute a possession (Valkov v Bulgaria, para 84). Consequently, pension entitlements have to be treated in accordance with the requirements of Article 1 of Protocol 1 (Lakicevic and others v. Montenegro and Serbia). Accordingly, interferences have to be based on law, they must pursue a legitimate aim and strike a fair balance between the interests of the individual and those of the public. They must not impose a heavy and disproportionate burden on citizens.Moreover, claims or expectations, i.e. the prospect of a future gain, enjoy the protection of Article 1 to Protocol 1 if they are legitimate. Expectations are legitimate if they have a basis in national law (N.K.M v Hungary, para 35). In contrast, mere hopes or unfounded expectations without sufficient legal basis are not protected under Article 1 of Protocol 1, nor are conditional claims which lapse, because the condition is not fulfilled or the hope of revival of property rights which could not be exercised for a long time (Hans Adam v Czech Republic). Expectations are usually legitimate if they are in line with long-standing case-law of national courts.More specifically, the reduction or discontinuation of pension entitlements may constitute an interference with the right to peaceful enjoyment of possessions (Wieczorek v. Poland, para 57). The Court usually does not consider such interferences as deprivation of property or the control of use of property, but scrutinizes them in light of the first sentence of Article 1 of Protocol 1. When examining whether a fair balance has been struck between the interests of the public and the interests of the individual, the Court considers among other factors to what extent the interference diminishes the applicant's entitlement. It also attaches importance to the question of whether the forfeiture of pension entitlements was decided upon in a procedure, in which the affected person was heard, or whether the deprivation of pension rights leaves the affected person entirely without financial means (Azinas v Cyprus).In Apostolakis v. Greece (ECtHR case 39574/07), the applicant had been working for the Greek Artisan and Tradesmen's Insurance Fund since the age of eighteen, reaching the position of Pensions Director. In the end he was forced to resign on account of criminal proceedings instituted against him. In 1998 the Court of Appeal convicted him of aiding and abetting the falsification of pay books to the detriment of the Fund and sentenced him to eleven years' imprisonment. He was conditionally released that year, the period of pre-trial detention having been deducted from his sentence. Prior to that, in 1988, a right to a retirement pension had been conferred on the applicant after more than thirty years of service. In 1999 the Social Security Fund revoked the decision of 1988 and transferred part

of the pension to his wife and daughter, on the basis of the criminal conviction and in accordance with the Pensions Code. The withdrawal of Mr Apostolakis' pension also caused him to lose his personal social-security rights. The applicant unsuccessfully appealed against those measures. The ECtHR ruled that on joining the Greek civil service the applicant had acquired a right that constituted a "possession" within the meaning of Article 1 of Protocol 1. The withdrawal of the applicant's pension had amounted to an infringement of his right of property that was neither an expropriation nor a control of the use of property. Following his conviction the applicant had been automatically deprived of his retirement pension for the rest of his life. Aged sixty-nine, and unable to start a new professional occupation, he was personally deprived of any means of subsistence. Whilst the applicant's conduct had been criminally culpable, it had had no causal link with his retirement rights as a socially insured person. Moreover, the fact that the pension had been transferred to the applicant's family – the applicant being married and having children – did not suffice to offset that loss. In that connection it should be noted that the transfer had been effected in the same way as if the applicant had died, which meant that the pension amount had been reduced: seven-tenths of the initial sum, according to the applicant. Above all, there was nothing to rule out the possibility of the situation continuing in the future, as the applicant might become a widower or get divorced, for example, which would result in the loss of all means of subsistence. To that was added the fact that the withdrawal of the applicant's pension resulted in the loss of his social-security rights. Such an effect was compatible neither with the principle of re-socialisation governing the criminal law of the Contracting States nor with the spirit of the Convention. Accordingly, the applicant had been obliged to bear an excessive and disproportionate burden which, even if account was taken of the wide margin of appreciation to be afforded to States in the area of social legislation, was not justified on the grounds relied on by the Government, namely, the proper functioning of the administration or the credibility and integrity of the public service.Following the above, the writer is of the opinion that the case under discussion shall be ruled according to the aforementioned case-law. Should a similar case reach a Greek Court, following the continuous amendment of the social security legislative context and taking into consideration that the principle of proportionality is a principle protected and defined by the Greek Constitution (Article 25), any court of any jurisdiction, irrespective of degree, may exercise its judicial power to perform the so called "constitutional control" of the law (Greece lacks a Constitutional Court for the time being). Constitutional control of a law in Greece has a declaratory nature. This means that the diagnosis of unconstitutionality does not lead to the annulment of the relevant norm (whose unconstitutionality has been ascertained), whereas it is just being set aside and is not being implemented only for the purposes of this specific case.Last but not least, one should note that the Higher Administrative Courts in Greece have already ruled on the unconstitutionality of

decreasing retroactively the amount of pensions and very recently the First Instance Administrative Court of Athens ruled on the unconstitutionality of the obligatory registration of trainee lawyers to the Lawyers' Health Fund before their official registration to the Bar Association as its Members, which was imposed on them by Law 3996/2011, accepting thus the recourse of a former trainee lawyer who was summoned to retroactively pay social contributions covering his traineeship period.

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