

SUMMARY

2011/47 Supreme Court upholds law reducing retirement benefits of former communist secret service members (PL)

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Facts

The plaintiff was a police officer when she retired in 1999. From 1979 until 1990, i.e. for a total of 11 years, she had worked in the secret service of the communist regime. In 1990, shortly after the overturn of that regime the secret service was abolished and the plaintiff joined the police force, where she worked for nine more years before retiring in 1999. Under the law in effect at that time, a person who had worked in the police force (in the broad sense, including, for example, members of the secret service and the fire brigade) for no less than 15 years was eligible to retirement benefits of a minimum of 40% of final salary. Accordingly, the plaintiff was awarded lifelong retirement benefits equaling 40% of her final salary for the 11 years she spent in the secret service plus 2.6% for each year spent in the police force, plus 15% for the fact that she was disabled, making a total 68% of her final salary. This was very high by Polish

standards.

In 2009 Parliament enacted a law amending the pension rules, not retroactively but with effect from 1 January 2010. Pursuant to this amendment, each year of service with the secret service yielded no more than 0.7% of final salary.¹ Accordingly, the plaintiff's retirement benefits were reduced from 68% to: $(11 \times 0.7) + (9 \times 2.6) + 15 = 46.1\%$ of her final salary.

In 2010 the Constitutional Court held that the 2009 law was not in breach of the Constitution, which prohibits the arbitrary removal of acquired rights, as well as any form of 'collective punishment'. Although acquired rights deserve to be protected, the Constitutional Court reasoned that this does not apply to rights that were acquired dishonourably. In the court's view, privileged rights acquired in the secret service were acquired dishonourably, given that such service was performed for the benefit of a totalitarian regime that disregarded human rights and the rule of law. In a democratic society it is not reasonable that such dishonestly-acquired privileges should be retained. The Constitutional Court did not see the removal of unjustly awarded privileges as constituting the collective punishment of all former secret service members for dishonourable acts that they did not individually commit. The court added that the amendment of the law was a proportionate means of achieving a legitimate aim.

Undeterred by the Constitutional Court's ruling, the plaintiff challenged the reduction of her retirement benefits in the civil court system. She alleged that it deprived her of an acquired right. The court of first instance dismissed her application, whereupon she appealed. The Court of Appeal asked the Supreme Court for guidance.

Judgment

The Supreme Court noted that the aim of the 2009 amendment was not to deprive former officials of the communist regime of their pensions, merely to adjust the level of their benefits to that of the general public. This adjustment related only to the period during which these former officials had acted against the principles of Polish independence, freedom and democracy (i.e. only up until 1990) and the adjustment was only for the future (i.e. from 2010 onwards). Moreover, even following the adjustment, the pensions of these former officials of the communist regime remained more generous than those of most of the victims of that regime². Given these circumstances, the adjustment was not only permissible but actually required by the constitutional principle of social justice and ordinary decency. Further, the Constitutional Court had already ruled on the constitutionality of the 2009 amendment.

Commentary

This case must be assessed against the background of recent Polish history. In 1944 the communists created the secret services. In June 1989, not long before the fall of the Berlin Wall (in November 1989), semi-free elections were held for the first time. Those elections marked the beginning of a transformation of Polish society from a totalitarian system to a democratic one. In 1990 the secret services were dissolved and replaced by a newly created Office for State Protection. In 1991 entirely free elections were held.

The crucial concept in this case is that of proportionality. Besides the arguments made by the Supreme Court, it should be noted that the 2009 amendment was not made until 19 years after the change to the political system. Although the Supreme Court did not mention the First Protocol to the ECHR, the Constitutional Court did. That court cited the ECtHR's ruling in *Rasmussen v. Poland* (28 April 2009, application no. 38886/05) regarding a former judge who had made a false declaration that she had not been a collaborator of the communist secret police.³ In that case, the Polish courts found that the plaintiff had not satisfied the conditions which domestic law attached to the acquisition of her pension. Accordingly, the ECtHR found that there had been no violation of the First Protocol.

Personally, I find the reasoning of the Supreme Court to be surprisingly emotional. It stressed that the former secret service, for which the plaintiff had worked, had acted 'unjustly' and 'dishonourably'. This fact alone was found sufficient to override the principle that legally acquired rights can be set aside provided this is done in a 'proportional' manner.

Academic comments

Prof. A.M. Świątkowski, Jagiellonian University: In the modern world, arguments in favour of retaining acquired rights to benefits have ceased to be valid and this applies not only to the political changes that took place in the former East European countries, but also to West European countries, as economic and demographic changes could also serve as valid reasons for a decision to strip beneficiaries of their 'acquired' rights. In the current state of affairs in Europe the social security system is no longer secure. The most recent decision of the Polish Supreme Court tells us that for reasons of maintaining social justice and the need to oppose external deficiencies, we will need to learn how to cope with these new challenges.

Comments from other jurisdictions

Germany (Simona Markert): The German Courts have also dealt with litigation regarding the reduction of retirement benefits for former members of the secret service. In Germany, the political history is similar to that of Poland. Since the fall of the Berlin wall in November 1989, former officers of the government department of national security have received reduced

retirement benefits. Even generals have been given the average retirement benefit of former GDR employees pursuant to a statutory provision that states that the acquired pension rights of members of the secret service are only partially taken into account partially.

Some former members of the secret service claimed that this regulation was unconstitutional, as they were being treated unequally. In 1999 (1 BvL 34/95) and 2004 (1 BvR 1070/02) the German Federal Constitutional Court upheld the reduction to their retirement benefits. The Federal Constitutional Court decided that former members of the secret service had received excessively high payments not based on their work. It was therefore permissible to exclude these payments from the pensions calculations.

In 2008 the Social Court of Berlin (S 35 R 6322/08) mentioned the decision of the German Federal Constitutional Court and concluded that the law amending the pension rules was not unconstitutional. The Court noted that that section did not violate human rights.

United Kingdom (Carla Feakins): Poland's recent history gives this case a very specific political context, which the UK does not share. However, there has been a recent UK case examining when economic and demographic changes could serve as reason for reducing 'acquired' rights to benefits.

Last year the UK's newly elected coalition government prioritised cutting public spending in order to bring down the growing budget deficit. It wanted to shrink the size of the civil service and to reduce civil service redundancy and early retirement payments, which it considered to be excessive compared to the rest of the public sector and the private sector generally. The government passed a law removing a pre-existing requirement to seek agreement from affected trade unions before making changes to the existing scheme and introducing new caps on payments. As a result, two trade unions started judicial review proceedings to challenge these changes.

In *Public and Commercial Services Union and another – v – Minister for the Civil Service* [2011] EWHC 2041, the trade unions' argument focused on whether the change amounted to an unlawful interference with the peaceful enjoyment of 'possessions' contrary to Article 1 of the first Protocol to the European Convention on Human Rights. This argument was not raised in the Supreme Court in Poland, although it was apparently discussed by the Polish Constitutional Court.

In both cases, the central issue was whether the change was proportionate. In the Polish case,

the adjustment only related to the period when the employee worked for the secret service and even following the adjustment the scheme remained more beneficial than pensions received by victims of the communist regime. The Polish Supreme Court held that not only was the adjustment proportionate, but also required by the constitutional principle of social justice. The UK High Court reasoned that the adjustment did not remove entitlement to the benefits altogether, but adjusted the burden fairly among all civil servants. This was largely based on evidence that the new scheme was accepted by the majority of the other unions consulted. The aim of reducing the budget deficit was legitimate and not challenged, but questions might remain as to how extreme benefit reduction can be in a harsh economic climate before the changes are deemed to go beyond what is reasonably necessary.

Footnotes

¹ Until 1999, 0.7% was the percentage of salary that Polish workers accrued by way of retirement benefits for each year during which they did not earn salary, for example because they were in receipt of sickness benefits and therefore did not contribute to the pension system.

² Inhabitants born before 1950 are eligible to retire at age 65 (men) or 60 (women) at 24% of the national average salary plus 1.3% or 0.7% of their average salary in any 10 of the last 20 years for each year of employment with or without salary. Inhabitants born in or after 1950 participate in a defined contribution scheme.

³ After the overturn of the communist regime individuals in higher positions had a duty to declare whether they had collaborated with the secret police. If they replied truthfully there were no consequences; if they lied that they had not collaborated, they were barred from exercising public functions for ten years and could be deprived of certain privileges.

Subject: Acquired rights

Parties: Ewa C - v - Ministry of the Interior

Court: Sąd Najwyższy (Supreme Court)

Date: 3 March 2011

Case Number: UZP 2/11

Hardcopy publication: OSNP 2011, no. 15-16, item 20

Internet publication: http://www.sn.pl/orzecznictwo/uzasadnienia/ipusisp/II-UZP-0002_11.pdf

Creator: Sąd Najwyższy (Supreme Court)

Verdict at: 2011-03-03

Case number: UZP 2/11