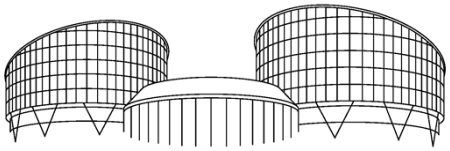

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

# CASE OF DOMENECH ARADILLA AND RODRÍGUEZ GONZÁLEZ v. SPAIN

*(Applications nos. 32667/19 and 30807/20)*

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Refusal by domestic authorities to grant survivor's pension to applicants due to unforeseeable retrospective application of a new eligibility requirement • Impugned measures placing excessive burden on applicants • Unjustified absence of transitionary period for legislative change • Fair balance between competing interests not struck

STRASBOURG

19 January 2023

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

**In the case of Domenech Aradilla and Rodríguez González v. Spain,**

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

Georges Ravarani*, President*,
Carlo Ranzoni,
Mārtiņš Mits,
María Elósegui,
Mattias Guyomar,
Kateřina Šimáčková,
Mykola Gnatovskyy*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the applications (nos. 32667/19 and 30807/20) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Spanish nationals, Ms Mercè Domenech Aradilla and Ms Encarnación Rodríguez González ("the applicants"), on the dates indicated in the appended table;

the decision to give notice to the respondent Government of application no. 32667/19 and part of application no. 30807/20 and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 6 December 2022,

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

# INTRODUCTION

1. The application concerns the refusal by the authorities to grant a survivor's pension to the two applicants. They complain under Article 1 of Protocol No. 1 taken together with Article 6 § 1 of the Convention that the authorities failed to have regard to the fact that when they initially applied for the survivor's pension there was still no requirement for them to register their respective partnerships, as the 2014 Constitutional Court's judgment which introduced this requirement was not yet in force. The applicants considered that the retroactive application of such formal requirement to them amounted to a violation of their right to legal certainty as well as of their right of property.

# THE FACTS

2. The applicants were born in 1986 and 1960 respectively and live in Caldes de Montbui and Salt, respectively. The first applicant was represented by Mr A. de Ribot Saurina, a lawyer practising in Salt, Girona. The second

applicant was represented by Mr X. Asensio Castro, a lawyer practising in Martorelles.

3. The Government were represented by their Agent, Ms H.E. Nicolás Martínez, co-Agent of Spain before the European Court of Human Rights.

4. The facts of the case may be summarised as follows.

## I. FIRST APPLICANT

### A. Relevant background

5. The first applicant and her partner claim to have lived together from early 2007. They opened a common bank account on 8 September 2005, bought a car together on 5 March 2008, signed a lease contract on 1 March 2012, and were registered in the local municipality as living together since 16 June 2012.

6. The first applicant's partner died in a work-related accident on 5 November 2013. The fact that the applicant and her partner lived together for at least five years before that is undisputed. At the time when he died, the applicant was pregnant with a child from her partner, who was born in 2014.

### B. The administrative proceedings

7. On, 21 January 2014, the first applicant made a request for a survivor's pension to the National Institute of the Social Security (hereinafter, "INSS"). On 24 January 2014, the INSS sent the application to the insurance company with which the Spanish Social Security system collaborates, and with which her partner had insurance to cover work-related accidents.

8. On 30 July 2014, the insurance company issued a decision which rejected the applicant's request for the survivor's pension (although their daughter was awarded an orphan's pension amounting to 432.06 euros (EUR) per month and a one-time payment of EUR 2,160.34). The rejection was based on the applicant's alleged failure to meet one of the legal requirements to be eligible for the survivor's pension: the formalisation of the partnership in a register or notarial deed at least two years prior to the death of one of them.

### C. The domestic judicial proceedings

9. The first applicant then lodged a judicial appeal against the said decision to reject her application. On 19 January 2015, the Labour Court No. 33 of Barcelona upheld the applicant's appeal against the INSS, the Treasury of the Social Security, and the insurance company, and recognised the applicant's right to be granted a survivor's pension (which amounted to nearly EUR 27,000 per year) to be paid by the insurance company. The INSS

and the General Treasury of the Social Security were held to their respective legally established responsibilities.

10. The Labour Court considered that since the death of the applicant's partner, the application for the survivor's pension, and the first decision from the INSS all had taken place before the Constitutional Court's judgment 40/2014 had been adopted, the new requirement could not be imposed on the applicant. The opposite would, in the Labour Court's view, violate the applicant's right to legal certainty, since the effects of the Constitutional Court's judgment could only be applicable for future cases. It considered that, at the moment in which the applicant's partner died, the couple had been together for six years, and the applicant was pregnant with a daughter that was born shortly after her father's death. Since the applicant also met all the economic requirements to be eligible for the survivor's pension, she should be granted it.

11. Both the INSS and the private insurance company appealed the above judgment. The first applicant opposed both appeals.

12. On 20 November 2015, the High Court of Justice of Catalonia upheld the appeals made by the INSS and the private insurance company, overturning the judgment issued by the Labour Court, and refusing to award the first applicant the survivor's pension. The High Court of Justice of Catalonia considered that according to the Constitutional Court's judgment 40/2014, its effects would also be applicable to those situations where an administrative decision is not final yet. Hence, in this case, the applicant's situation was affected by the formal requirement to have had the partnership registered two years prior to the death of one of the partners. The High Court of Justice of Catalonia did not question the fact that the applicant and her partner had been living together for over five years and had had a daughter in common, or that they had met the economic requirements.

13. The first applicant lodged an appeal on points of law (*casación*) with the Labour Chamber of the Supreme Court, insisting on the fact that the formal requirement to have had the partnership registered two years prior to the death of one of the partners was simply not applicable to her situation, having regard to the moment at which her partner died and she had made the application for the pension. The Supreme Court declared the appeal inadmissible on 30 November 2016 because the appeal did not meet the requirements for the Supreme Court to declare her appeal on points of law admissible. The applicant then lodged a motion for annulment with the Supreme Court, in which she invoked both her right to legal certainty in the recognition of her right to the pension and her right not to be discriminated against (compared to the people who had been granted the survivor's pension directly in administrative proceedings and not following an appeal in judicial proceedings), which was also declared inadmissible.

14. She subsequently lodged an *amparo* appeal with the Constitutional Court. She claimed that the High Court of Justice of Catalonia's judgment

infringed the principle of legal certainty (because the criteria were not applicable to her retroactively and no transitionary period was established by the Constitutional Court judgment) as well as the principle of equality before the law and the right not to be discriminated against based on gender (indirect discrimination against women because they were statistically the main beneficiaries of survivor's pensions) and social circumstances (essentially having had a partnership in Catalonia and losing the partner between 10 April 2012 and 10 April 2016). Thus, she requested that the said judgment be declared void and, consequently, that the survivor's pension which had been awarded to her by the Labour Court no. 33 of Barcelona be reinstated.

15. On 10 December 2018 the Constitutional Court declared the applicant's *amparo* appeal inadmissible on the grounds of the lack of special constitutional relevance.

## II. SECOND APPLICANT

### A. Relevant background

16. The second applicant and her partner started living together on 10 June 2008 in an apartment in Girona (Catalonia), and remained living there until the end of their lease contract on 9 June 2013, when they moved to Portbou – also in the province of Girona, Catalonia.

17. On 2 March 2009, the applicant officially divorced her former husband.

18. The second applicant's partner died on 7 January 2014.

19. The applicant lodged an application for a "survivor's pension" (a benefit aimed at surviving partners who had been economically dependent on their deceased partner) on 2 April 2014, asserting that she met both the economic requirements and civil-partnership requirements (namely, the status of the relationship between her and her deceased partner had been that of a civil partnership).

20. The Catalan Civil Partnerships' Public Register was not created until 1 April 2017. However, the formal registration of partnerships could take place at any time before that by means of a notarial deed.

### B. The administrative proceedings

21. On 2 April 2014, three months after the death of her partner, the second applicant lodged an application for a survivor's pension with the INSS. In her application, she submitted that they had lived together since 10 June 2008 until his death on 7 January 2014, and that their relationship had constituted a civil partnership without their having had any need to formalise their situation.

22. On 4 April 2014, the applicant's request was dismissed for her failure to prove (as provided by the fourth paragraph of section 174(3) of the General Social Security Act (hereinafter, "LGSS") - see paragraph 41 below) that she had maintained an uninterrupted cohabitation of at least five years immediately prior to the death as a registered civil partnership with the deceased.

23. The Constitutional Court published its judgment STC 40/2014 introducing a new formal requirement to apply for a survivor's pension on 10 April 2014.

24. On 15 May 2014, the second applicant lodged an administrative complaint against the INSS's decision, submitting that (i) she had demonstrated a period of cohabitation of at least five years; and (ii) the registration of her partnership with the deceased had not been necessary under the fifth paragraph of section 174(3) of the LGSS, which provided that those Autonomous Communities (such as Catalonia) that have their own body of civil law shall apply their own specific provisions concerning the method of proving the existence of civil partnerships; and (iii) she had complied with the Catalan-law requirements for her union with her deceased partner to be considered to be a civil partnership by the time of his death.

25. On 3 June 2014, the INSS Provincial Director in Girona dismissed the applicant's complaint, stating that under Constitutional Court judgment STC 40/2014, proving the existence of a civil partnership for the purpose of accessing a survivor's pensions was only possible if the partnership had been formalised by means of an entry in a register or by notarial deed at least two years prior to the death of the partner (see paragraphs 41 and 45 below).

### C. The domestic judicial proceedings

26. On 11 July 2014, the second applicant lodged a judicial appeal against the INSS's decisions with Labour Court no. 2 of Girona, reiterating that she had demonstrated that she had cohabited with her deceased partner for more than the minimum requirement of five uninterrupted years, and that – under the fifth paragraph of section 174(3) of the LGSS and Article 234-1 of the Catalan Civil Code – she had not needed to register that partnership.

27. The parties were summoned to the hearing, which took place on 20 January 2016. On 4 March 2016, Labour Court no. 2 of Girona acknowledged that the applicant and her deceased partner had been living together for over five years, but nevertheless dismissed the applicant's complaint on two grounds: firstly, that the regulatory basis on which the applicant relied (namely, the fifth paragraph of section 173(4) of the LGSS) had been declared unconstitutional and, as a result, null and void by Constitutional Court judgment STC 40/2014; secondly, that the LGSS's aim was to limit the granting of pension rights to people in civil partnerships that had been formalised (either by entry in a specific public register or by means

of attestation in a notarial deed) – but the applicant had not complied with that requirement. The judgment did not refer to the fact that the applicant had applied for a survivor's pension before Constitutional Court judgment STC 40/2014 had been published.

28. On 26 April 2016, the applicant lodged an appeal with the High Court of Justice of Catalonia, asserting that:

i. The fifth paragraph of section 174(3) of the LGSS had been in force at the time of the death of the applicant's partner and Constitutional Court judgment STC 40/2014 should not have been applied retroactively as this had violated the principle of legal certainty, the prohibition on the retroactive application of unfavourable legal provisions, and the right to effective judicial protection;

ii. alternatively, the applicant and her partner had signed a lease agreement and made a deposit under a notarial deed in 2008 – that public document should have been considered to constitute sufficient formalisation of their civil partnership for the purposes of the fourth sub-paragraph of section 174(3) of the LGSS;

iii. the decision not to grant her a survivor's pension amounted to a violation of the principle of legal certainty, the right to effective legal protection under Articles 9 § 3 and 24 of the Spanish Constitution, the right to a fair trial under Article 6 of the Convention, and the right to social security under Articles 22 of the Universal Declaration on Human Rights and Article 9 of the International Covenant on Economic, Social and Cultural Rights.

29. The second applicant provided documentary evidence that attested to her state of economic precariousness and vulnerability, which was another requirement for accessing the survivor's pension.

30. On 3 October 2016, the High Court of Justice of Catalonia dismissed the appeal, upholding the decision of the first-instance court, and responding to the applicant's assertions as follows:

i. Constitutional Court judgment STC 40/2014 stipulated that its provisions applied to "future cases or administrative or judicial proceedings in which a final judgment has not yet been pronounced" – that applied to the instant case, as a final administrative decision had not been granted until 3 June 2014;

ii. the applicant did not have an acquired right to the pension – all that could be said was that her application for a survivor's pension was still ongoing;

iii. the fourth sub-paragraph of section 174(3) of the LGSS required the signing of a public document whose specific function was specifically the constitution (*constitución*) of a civil partnership – that was not the function of a lease contract, which was therefore not suitable as a means of proving the concurrence

of the wills of the two members of a couple to constitute a civil partnership.

31. On 25 October 2016, the second applicant lodged an appeal on points of law (*casación*) with the Spanish Supreme Court, seeking the unification of case-law; she cited a series of judgements that she claimed contradicted the decision of the High Court of Justice of Catalonia, and asked the Supreme Court to lodge a request with the Court of Justice of the European Union (CJEU) for a preliminary ruling on the non-retroactivity of the declaration of unconstitutionality in respect of the fifth sub-paragraph of section 174(3) of the LGSS.

32. On 12 February 2019, the Spanish Supreme Court ruled the appeal inadmissible, finding no contradiction between the cited judgments, confirming the findings of the High Court of Justice of Catalonia, and asserting that a request for a preliminary ruling from the CJEU was not appropriate at that stage of the proceedings (when only formal and material requirements were being analysed – not the merits of the case). The Supreme Court considered that the applicant had not been placed in a position whereby it had been impossible for her to comply with the requirements because of death of her partner earlier than two years following a formalisation of their civil partnerships by means of an entry in a register or by means of a notarial deed; rather, she had not formalised the partnership at any time.

33. On 7 May 2019, the second applicant lodged an *amparo* appeal with the Spanish Constitutional Court, submitting that her right to effective protection and legal certainty had been violated by the retroactive application of Constitutional Court judgment STC 40/2014; she further asserted that the principle of equality and the prohibition of discrimination had also been violated because the refusal to grant her a survivor's pension had amounted to indirect discrimination against all civil partners living in those Autonomous Communities which had their own civil-law regulations and which had fallen under the application of the fifth sub-paragraph of section 174(3) of the LGSS prior to the application of Constitutional Court judgment STC 40/2014.

34. On 12 November 2019, the Constitutional Court ruled the *amparo* appeal inadmissible for lack of any particular constitutional relevance.

## RELEVANT LEGAL FRAMEWORK AND PRACTICE

35. The relevant provisions of the Spanish Constitution read as follows:

**Article 9 § 3 (The principle of legal certainty)**

"3. The Constitution guarantees [i] the principle of legality, [ii] the hierarchy of guiding principles,[iii] the publicity of rules (*la publicidad de las normas*), [iv] the non-retroactivity of punitive provisions that are not favourable towards or restrictive of individual rights, [v] legal certainty, and [iv] the responsibility for and the prohibition of arbitrariness on the part of the public authorities."

**Article 14 (The prohibition of discrimination)**

"Spaniards are equal before the law, and no discrimination may prevail on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance."

**Article 24 (The right to an effective remedy and to a fair trial)**

"1. Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended.

2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent.

The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences."

**Article 33 (The right to private property)**

"1. The right to private property and the right to inheritance are recognised."

2. The social function of these rights shall define their content, in accordance with the law.

3. No one may be deprived of his property and rights except for justifiable reasons of public ... or social interest, for the corresponding compensation, and in accordance with the provisions of the law."

**Article 41 (The social security system)**

"The public authorities shall maintain a public social security system for all citizens, guaranteeing adequate social assistance and benefits in situations of need (particularly in the event of unemployment). Assistance and supplementary benefits shall be free."

36. The recognition of the right to a contributory survivor's pension under the Spanish system traditionally required that the person applying for the pension have previously undergone a marriage ceremony with the deceased person. Under the original wording of the relevant legislation, if the couple had been married, the date on which the marriage had taken place was irrelevant for the purposes of becoming eligible to receive a pension, provided that the economic requirements had been met. Subsequent reforms aimed at preventing fraud introduced a requirement that, in the event that death had resulted from an illness pre-dating the date of a couple's wedding, then their marriage had to have taken place at least one year prior to the date of the deceased spouse's death (or alternatively, prior to the birth of any shared biological children), unless proof of cohabitation for two years prior to the death could be provided.

37. Although religious marriage is possible, marriage under Spanish law may be strictly civil.

38. The Constitutional Court has held that there is no general constitutional parity between married and unmarried partners, and that the legislature has discretion to establish differences in treatment between married and unmarried partners without violating the principle of equality. In particular, the Constitutional Court has stated that although the legislature may extend the right to a survivor's pension to stable common-law partners, failure to do so does not violate Article 14 of the Spanish Constitution (principle of equality and the prohibition of discrimination – see, *inter alia*, judgments of the plenary Constitutional Court no. 184/1990 of 15 November 1990 and no. 41/2013 of 14 February 2013).

39. In Spain, certain Autonomous Communities have their own civil legislation, and all of them have the authority to regulate several aspects of civil law. The recognition of civil partnerships (and hence, the requirements for constituting one) is not nationally uniform; it may be regulated by each Autonomous Community.

40. In 2007, in order to adapt existing legislation to the new social and family reality in Spain, an amendment to the General Social Security Act was introduced in order to recognise civil partners' eligibility to opt for a survivor's pension (which until then had been reserved for surviving marriage spouses), provided that certain economic and other requirements were met.

41. The LGSS, which was approved by Royal Legislative Decree 1/1994, as amended by Law 40/2007, reads in its relevant parts as follows:

**Section 174 (Survivor's pension)**

"1. The surviving spouse shall be entitled to a survivor's pension for life ...

In exceptional cases in which the death of the deceased is the result of a common illness [*enfermedad común*] [that existed before the commencement of the marital relationship], it is also required that the marriage have been entered into at least one year before the date of death or, alternatively, that there are children [whose biological parents are] both spouses. This [minimum] duration of the marriage shall not be required if, as at the date of the contracting of the marriage, there is proof of a period of cohabitation with the deceased (in the terms set out in the fourth sub-paragraph of section 3, which – when added to the duration of the marriage – exceeds two years.

...

3. Once the registration and contribution requirements set out in the first paragraph of this section have been met, anyone who [i] was united with the deceased at the time of [the deceased's] death, forming a civil partnership, and [ii] who can prove that his [or her] income during the previous calendar year [amounted to] less than 50% of the sum of his [or her] own income plus that of the deceased during the same period, shall ... be entitled to a survivor's pension. This percentage shall [amount to] 25% if there are no common children entitled to an orphan's pension.

However, entitlement to a survivor's pension shall also be recognised when the survivor's income amounts to less than 1.5 times the amount of the minimum inter-professional wage [the legal minimum wage that applies to all occupations unless otherwise established] ... at the time of the trigger event (*hecho causante*) [the death of the partner]; [this is] a requirement that must be met both at the time of the trigger event

and during the period during which the benefit is received. The above-mentioned limit shall be increased by 0.5 times the amount of the current minimum inter-professional wage for each common child living with the survivor who is entitled to an orphan's pension.

Income from investments and assets – as well as from work – shall be considered to constitute income for the purposes of the calculation of [extra amounts to be awarded over and above] the minimum pension.

For the purposes of the provisions of this section, a civil partnership shall be considered to be [a partnership] – analogous to that of marriage – formed by those who, not being prevented from getting married, [nevertheless] do not have a marital relationship with any other person and can prove, by means of the corresponding census registration certificate, a stable and generally-known [period of] cohabitation immediately prior to the death of the deceased ... [for] an uninterrupted duration of no less than five years. The existence of a civil partnership shall be recognised by means of a certificate of registration in one of the specific registers existing in the Autonomous Communities or town councils of the [couple's] place of residence or by means of a public document recording the constitution of the said partnership. Both the above-mentioned registration and the formalisation of the corresponding public document must have taken place at least two years before the date of death of the deceased.

In Autonomous Communities with their own body of civil law, if the requirement of cohabitation referred to in the previous paragraph is met, an assessment of the domestic partnership in question and its recognition as a civil partnership shall be carried out in accordance with the provisions of the respective legislation of [those Autonomous Communities] ..."

42. Therefore, under the fourth sub-paragraph of section 174(3) of the LGSS, the general regime was such that, in order to establish a civil partnership for the purposes of being eligible to receive a survivor's pension, the two following requirements had to be cumulatively fulfilled:

(i) A *substantive* requirement that the partners have cohabited for at least five years prior to the death of the deceased person;

(ii) A *formal* requirement that – at least two years prior to the death of the deceased person – the couple have been formally constituted as a civil partnership through its registration in a public register set up for this purpose or a notarial deed.

The fifth sub-paragraph of section 174(3) of the LGSS set out an exception to the *formal* requirement established by general rule in the fourth sub-paragraph of the same section – namely, that in Autonomous Communities with their own civil law, "recognition [of a couple] as a civil partnership and the recording thereof shall be carried out in accordance with the provisions of [the relevant] regulation", provided that the five-year cohabitation requirement has been fulfilled.

43. Catalonia is one of those Autonomous Communities that have their own civil-law regulations. Law 25/2010 concerning the person and the family, of Book I of the Civil Code of Catalonia, provides as follows:

**Article 234-1 (Stable partnership)**

"Two persons living together in a commonly-shared life analogous to marriage are considered to be a stable couple in any of the following cases:

(a) If the cohabitation lasts for more than two uninterrupted years.

b) If, during the cohabitation, they have a common child.

c) If they formalise the relationship in a notarial deed."

Therefore, following the entry into force of Law 40/2007 (which amended the LGSS), Catalonian couples could be considered to have formed a stable partnership without having to register it formally (provided that one of the above-noted requirements was met); moreover, were one member of such a couple to die, the surviving partner would have access to a survivor's pension if her or she was economically eligible.

44. In the light of the different requirements for the constitution of a civil partnership in the different Autonomous Communities, eligibility for a survivor's pension also became subject to different criteria. Questions were raised about (i) compliance with the principle that all Spanish citizens are equal in the exercise of their rights and duties in the area of social security, and (ii) the public authorities' constitutional mandate to maintain a unitary social security system guaranteeing all citizens uniform access to social benefits throughout the country. On 15 February 2014, the Labour Chamber of the Supreme Court lodged an appeal against the alleged unconstitutionality of the fifth sub-paragraph of section 174(3) of the LGSS. In particular, it considered that the fact that some Autonomous Communities had different criteria for recognising the existence of a civil partnership had the effect of also imposing different requirements that survivors had to meet in order to become eligible for a survivor's pension, which could amount to discrimination on the grounds of the place of residence of the survivor.

45. By a judgment of the Constitutional Court (STC 40/2014) of 11 March 2014, published on 10 April 2014, the Constitutional Court ruled that the fifth sub-paragraph of section 174(3) of the LGSS was indeed unconstitutional, and it accordingly declared that provision null and void. The relevant excerpts of the said judgment stated as follows:

"3. ... In effect, Law 40/2007 amended section 174 of the LGSS, and specifically, in its third sub-section, established those requirements that unmarried partners must meet in order to be eligible for a widow's or widower's pension. Thus, in addition to the requirements of registration, contribution and economic dependency, two simultaneous requirements are demanded of the surviving partner in order that [he or she] be able to obtain a survivor's pension:

a) on the one hand, stable and generally-known cohabitation immediately after the death of the deceased and with an uninterrupted duration of not less than five years (to be proved by means of the corresponding census registration certificate); and,

b) on the other hand, the publicising of the cohabitation [of the couple in question] *more uxorio*, which requires (with a constitutive character and at least two years prior to the death) registration in a register of unmarried couples ([that is to say] in one of the

specific registers existing in the Autonomous Communities or town councils of the place of residence) or in a notarial deed.

As the Supreme Court has pointed out, the solution chosen by the legislature does not consist of a duplicated evidentiary requirement regarding the same point (the existence of [a stable union with the] unmarried partner); rather, section 174(3) of the LGSS refers to two different requirements: the material one (that is, cohabitation as a stable unmarried partner for a minimum period of five years immediately prior to the date of death of [his or her] deceased [partner]); and the formal one, *ad solemnitatem* (that is, verification that the partnership was constituted as such before the law and was in "an affectionate relationship that was analogous to a conjugal [relationship]" for [at least] two years prior to the trigger event. Thus, the widow's/widower's pension that the rule establishes does not benefit all unmarried couples with five years of [officially recognised] cohabitation, but only those couples who registered themselves as partners at least two years prior to the death of the deceased (or who formalised their relationship within the same time frame by means of a notarial deed) and who also met the above-mentioned requirement of cohabitation.

On the other hand, the fifth sub-paragraph of section 174(3) of the LGSS refers to the legislation of those Autonomous Communities that have their own body of civil law concerning all matters relating to the "consideration" and "proof of existence" of unmarried partners, except for the "cohabitation requirement". Thus, section 174(3) of the LGSS differentiates between two different regimes; which regime will apply shall depend on whether the unmarried partner resides in an Autonomous Community with its own body of civil law or not.

Section 174(3) of the LGSS, as can be deduced from a literal interpretation [thereof], does not refer to the rules on civil partnerships approved by the vast majority of the Autonomous Communities; rather, it refers exclusively to the legislation on civil partnerships of those Autonomous Communities that have "their own [body of] civil law". Thus, it may be the case that the specific legislation of Autonomous Communities with their own body of civil law establishes a definition of a civil partnership that differs from that provided in the fourth sub-paragraph of section 174 (3) of the LGSS, or that no registration or public document is required for the constitution of a civil partnership. If the concept of civil partnership and the proof of its existence in those Autonomous Communities with their own body of civil law was the same as that provided in the fourth sub-paragraph of section 174(3) of the LGSS, there would be no peculiarity; however, a problem arises in practice owing to the difference in criteria.

...

4. ... For the Supreme Court, the fifth sub-paragraph of section 174(3) of the LGSS may infringe the principle of equality before the law set out in Article 14 of the Spanish Constitution, as it may happen that, in the case of unmarried couples in identical factual situations [*en idéntica situación fáctica*], the right to a widow's or widower's (a survivor's) pension may be recognised or denied solely [at the discretion of] the Autonomous Community in which they have their residence or neighbourhood, and more specifically, on the basis of whether or not that Community has its own body of civil law. Referral by the State legislature would also contravene Article 149 § 1 (17) [of the Spanish Constitution]....

5. ...

In fact, section 174 of the LGSS (under its wording following its amendment by Law 40/2007) has established two types of prior legal relationship between a deceased partner and his or her surviving partner that afford possible means of access to a

widow's or widower's (survivor's) pension: marriage, or a duly legalised civil partnership. As the explanatory memorandum to Law 40/2007 points out, the absence of a general legal regulation in respect of civil partnerships makes it essential to define (albeit exclusively for the purposes of social security [payments] the identifying characteristics of this situation. And this is precisely what section 174(3) of the LGSS does: it establishes the means of recognising the requirements for unmarried couples to access a [survivor's] pension, a matter characterised by ... 'a legal system whose limits include, among others, respect for the principle of equality' and 'the prohibition of arbitrariness' ([Constitutional Court judgment] STC 134/1987, 21 July, FJ 4).

Lastly, we must point out that, in addition to lacking sufficient justification, the application of the sub-paragraph in question could also lead to a disproportionate result, since – depending on the Autonomous Community of residence – the surviving partner may or may not have access to the corresponding pension.

Consequently, we must conclude that it is not possible to deduce an objective, reasonable and proportionate purpose that would justify the establishment of differential treatment of applicants for the widow's or widower's pension on the basis of whether or not they reside in an Autonomous Community, with its own body of civil law, that has adopted specific legislation in respect of civil partnerships.

6. In order to eliminate the inequality arising from the fifth sub-paragraph of section 174(3) of the LGSS with regard to the means of proving the existence of civil partnerships, in relation to the fourth sub-paragraph of the same section, the Chamber (regarding the question of the unconstitutionality [of the fifth sub-paragraph of section 174(3) of the LGSS]) proposes as an alternative that the reference in the fifth sub-paragraph to the specific legislation of those Autonomous Communities with their own [respective bodies of] civil law be understood as being made to the laws concerning civil partnerships of [all] Autonomous Communities – whether or not they [in fact] have their own civil law. However, [even] if this solution were to be accepted, the inequality arising from the very diversity of those Autonomous Community laws concerning civil partnerships would persist, because the basic problem that the provision in question raises is not the limitation of the reference to those Autonomous Communities with their own [body of] civil law, but the reference to the Autonomous Community legislation itself when it comes to determining the requirements for access to a social security benefit. Consequently, the conclusions reached in the examination of the constitutionality of the sub-paragraph of the section in question must be extended by way of connection or consequence (by virtue of section 39(1) of the Organic Law of the Constitutional Court) to the whole of the fifth sub-paragraph of section 174(3) of the LGSS.

For all of the above reasons, we must uphold the question raised in respect of the unconstitutionality of [the fifth sub-paragraph of section 174(3) of the LGSS], and declare [that provision] unconstitutional and null and void owing to its violation of Article 14 of the Spanish Constitution in conjunction with Article 149 § 1 (17) of the Spanish Constitution.

At this point, it is necessary to rule on ... the effects of our declaration of unconstitutionality and nullity, which – in accordance with the doctrine contained in, among many others, [ Constitutional Court judgment] STC 45/1989, of 20 February, paragraph 11; 180/2000, of 29 June, paragraph 7; 365/2006, of 21 December, paragraph 8, and 161/2012, of 20 September, paragraph 7 – will not only have to [maintain the principle of] *res judicata* (section 40(1) of the Organic Law of the Supreme Court), but also, by virtue of the constitutional principle of legal certainty (Article 9 § 3 of the Spanish Constitution), extend in this case to possible final

administrative situations, such that this declaration of unconstitutionality will only be effective *pro futuro* – that is, in relation to new cases or to administrative proceedings and judicial proceedings where a final decision has not yet been handed down."

46. Under Constitutional Court judgment STC 40/2014, the LGSS was repealed and replaced by a new General Social Security Act, approved by Royal Legislative Decree 8/2015.

47. Some case-law of the Spanish Supreme Court concerning the means of proving the existence of a civil partnership after Law 40/20107 came into force may be relevant to the case at hand:

**Judgment of the Supreme Court (Social Chamber) no. 5121/2014 of 4 November 2014:**

"... The legally correct doctrine is that contained in the Supreme Court judgment of 28 November 2011, invoked in contrast ...; this doctrine establishes, in short, the application of the essential general principle of law of *ad impossibilia nemo tenetur* (no one may be obliged to do the impossible), exempting [the claimant] not from the requirement of formalisation as a civil partnership, but from the additional requirement that this formalisation must have taken place [at least] two years prior to the death of the deceased, because such a requirement is impossible in cases where death occurs prior to the expiry of this period, calculated ... from 01-01-2008 (the date of the entry into force of the rule providing this additional requirement) ...

The above-mentioned doctrine being applied to the case at hand – in which, as has already been mentioned, the plaintiff and the deceased lived together at the same address for more than ten years, having two daughters in common and having requested [that their partnership] be constituted as a civil partnership after the entry into force of Law 40/2007 (a request that was granted on 4 March 2008, the deceased subsequently dying on 10 April 2009) – the appeal must be upheld, in accordance with the information provided by the Public Prosecutor's Office. ... Law 40/2007 does not contain any temporary provision in respect of cases such as this one; [therefore,] provided that the rest of the legal provisions are met, literal compliance with the above-mentioned time requirement that the registration must have taken place 'at least two years before the date of death of the deceased' cannot be required in the event that such compliance is impossible. In the present case, there is evidence that the couple carried out their public registration with adequate diligence, given that the registration took place two months and a few days after the entry into force of the above-mentioned Law (a reasonable [period of] time and one that indicates adequate diligence on the part of [the couple], who registered themselves as a common-law couple in the register ... ."

**Judgment of the Supreme Court (Social Chamber) regarding appeal no. 286/2011 of 28 November 2011:**

"... The contradiction between the two judgments lies in the fact that the judgment of the High Court of the Balearic Islands states that, with or without registration, in cases such as those examined (in which death occurred only a few months after the entry into force of Law 40/2007), the required registration or public documentation of the unmarried couple two years in advance 'was impossible unless it had been fulfilled before the enactment of the law establishing it' ...

As stated above, the death occurred on 17 February 2009 (i.e. one year and forty-eight days after the above-mentioned legal requirement came into force); thus, as rightly reasoned in the lower-court judgement that was overturned by the judgement under

appeal today, given that Law 40/2007 does not set out any temporary provision for cases such as this (unlike the benefits arising in respect of deaths that occurred before its entry into force), it is not possible to request, when the rest of the legal provisions are met, literal compliance with the above-mentioned time requirement in cases in which such compliance is impossible and there is evidence that the couple carried out their public registration with adequate diligence (given that [that registration] took place two months and a few days after the entry into force of the Law – a reasonable [period of time [that] indicates an adequate level of diligence on the part of [the couple], who registered as unmarried partners in the register after gathering the documentation required by section 5 of the above-mentioned regulation of the Autonomous Community [in question]).”

**Judgment of the High Court of Catalonia (Social Chamber), appeal no. 2122/2021 of 15 April 2021:**

“... The applicability of a Constitutional Court judgment declaring a provision unconstitutional, and the effects thereof, are determined by section 40(1) of the Law on the Constitutional Court; but even if this is the case, it should not be applied in a generalised manner when there are circumstances that, if not addressed, would place the person in an unjust [or] even an arbitrary situation, which our legal and constitutional law cannot and should not allow.

[T]he present case, unlike others that this Court has heard, [is] clearly [exceptional], and it should be treated as such. The obligation to formalise a domestic partnership by means of a notarial deed or registration in the register created by the Autonomous Community [in question] was established by Law 40/2007 and [was] required as of 1 January 2008 – that is, more than twelve years after the deceased was no longer able to act for herself owing to the serious neurological condition from which she suffered, and thus after she was unable to assume the obligations and rights arising from the constitution of a civil partnership of her own free will. This incapacity remained unchanged after the above-mentioned Constitutional Court judgment of 2014 until her death in 2018.

In the case at hand, the plaintiff was not able to demonstrate the formal “constitution” of the civil partnership in question in the manner required by the relevant rule, for reasons beyond his control – either because ... he had no need or obligation to do so, or because when he could and should have registered [the partnership], his partner was absolutely incapable of giving her consent. In this case, the failure to [meet] the formal requirement cannot, despite the INSS’s assertions, receive the same legal treatment as those other situations involving couples who have never proven the existence of any [issue, problem, matter] limiting their capacity to give their consent to the constitution of a civil partnership of their own free will. Moreover, in these proceedings it was established that the couple had been living together uninterruptedly since 1987, and they met the rest of the requirements, so the plaintiff would be entitled to a survivor’s pension. This Court recognises that the argument made by the INSS is formally correct, and that if it were not for the exceptional nature of this case, we would have to agree with it. [However], our obligation goes beyond the simple general application of the [relevant] rule – we must resolve the specific case; ... if the [relevant] rule or case-law does not offer any answer in this respect, the obligation of this Chamber is to [develop and bring to completion] the rule and to do so with absolute respect for the constitutional dimension of the right of every citizen to obtain adequate protection provided for in our social security system (Article 41 of the Spanish Constitution) ...”

48. The Catalan Civil Partnerships' Public Register was not created until 1 April 2017. However, the formal registration of partnerships could take place at any time before that by means of a notarial deed.

# THE LAW

## I. JOINDER OF THE APPLICATIONS

49. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

## II. THE APPLICANTS' COMPLAINTS AND THEIR LEGAL CLASSIFICATION

50. The applicants complained of the refusal of the authorities to grant them a survivor's pension. They considered that the fact that the requirement to formalise the existence of a civil partnership at least two years prior to the death of one partner in order to render the other partner eligible for a survivor's pension had been introduced with immediate effect (without any transitional period of two years from the moment of its introduction) had violated both their right to enjoyment of property under Article 1 of Protocol No. 1 to the Convention and their right to legal certainty under Article 6 § 1 of the Convention. They invoked both provisions taken together.

51. The applicants complained as well that the immediate application of the formal requirement after its entry into force had constituted discriminatory treatment compared with those persons living in Catalonia (or other Autonomous Communities with a similar regulation) whose partners had died either before 11 April 2014 (when Constitutional Court judgment STC 40/2014 had been published) or from 11 April 2016 (two years after that). The applicants therefore considered that there had been a violation of their right not to be discriminated against in respect of their right to the peaceful enjoyment of their possessions, as provided in Article 14 of the Convention taken together with Article 1 of Protocol No. 1 to the Convention.

52. The Court, being the master of characterisation to be given in law to the facts of the case, considers that those complaints fall to be examined under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

**Article 1 of Protocol No. 1**

"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."

# III. ADMISSIBILITY

## A. The parties' submissions

### *1. The Government*

53. According to the Government, the applicants' complaint was incompatible *ratione materiae* with the provisions of the Convention. However, they considered that this ground of inadmissibility was directly related to the merits of the case, which the Government examined jointly.

54. The Government held as well that the applicants had failed to exhaust the available domestic remedies, as required under Article 35 § 1 of the Convention, on two grounds: (i) they had pursued an ineffective remedy in appealing against the decision not to grant them a survivor's pension, when an effective remedy had been available to them; and (ii) they had not raised their complaints with the Court previously with the domestic authorities (to whom they raised the issue from a different perspective, citing different legal provisions).

55. As to the first part of the objection concerning non-exhaustion of domestic remedies, the Government held that the applicants had lodged their respective appeals against the INNS's decision to dismiss their application for a pension, and had lodged further appeals after that, when they should have known that the administrative decisions had been based on the new requirement provided by Constitutional Court judgment STC 40/2014, which they had not met. The Government argued that, given the binding nature of the Constitutional Court's judgments on all public authorities, neither the INSS nor the domestic courts could disregard the requirement that civil partnerships be formalised; hence, a judicial appeal against the decision could not be considered to constitute an effective remedy. However, the Government considered that they could have sought another type of remedy: a request for the State to be held liable on the grounds of the damage caused by a regulation that had later been declared unconstitutional – that is, to claim a pension by way of compensation for damage caused by the legislative reform resulting from the declaration of the unconstitutionality of the provision that had recognised their right to a pension.

56. As to the second part of the objection, the Government noted that at no point in the domestic proceedings had the applicants complained of a breach of the principle of legal certainty or of a violation of their right to the peaceful enjoyment of their property.

### *2. The applicants*

57. Concerning whether Article 1 of Protocol No. 1 was applicable, the applicants held that it was because they had had a legitimate expectation of receiving a survivor's pension.

58. The applicants contested the Government's objection about an alleged non-exhaustion of domestic remedies. First, they held that a request for the State to be held liable would not have constituted an effective remedy capable of protecting their interests, for two reasons: firstly, they were seeking the recognition of a right, not mere compensation; secondly, the provision declared unconstitutional had not been the cause of the damage – on the contrary, it had benefitted the applicants. It had been the retroactive application of a judicial decision (namely, the judgment delivered by the Constitutional Court) that had deprived the applicants of their right to a pension. Although domestic courts were bound by the decisions of the Constitutional Court, the applicants held that they had the capacity not to apply them or to lodge a request for a preliminary ruling with the CJEU if they considered that they contravened European Union Law. Indeed, the applicants stated that they had asked the domestic courts to lodge a request with the Court of Justice of the European Union (CJEU) for a preliminary ruling on the question of whether the absence of a transitional period before the new requirement became applicable infringed the general principles of the European Union (the principles of effectiveness, legal certainty, legitimate expectation, non-retroactivity, and effective judicial protection).

59. As to the second part of the Government's objection, the applicants claimed that they had indeed invoked the right to the peaceful enjoyment of one's property from a substantive point of view at all domestic instances. They had explained to the domestic courts that they had complied with the legal requirements applicable at the time of the death of their respective partners, and that they had had a legitimate expectation that had been arbitrarily and unjustifiably frustrated, rendering them defenceless and causing them serious harm. They alleged that the courts had failed to analyse the incorrect application of the law made by the INSS in its first decision (of 4 April 2014), when the formal requirement had not yet been applicable, as the declaration of unconstitutionality would not be published until 10 April 2014. They had clearly invoked the violation of the right to effective legal protection (or "fair proceedings", in the Convention's wording) and the principle of legal certainty. The reason why they had not invoked the right to the peaceful enjoyment of one's property explicitly before the Constitutional Court was that it was not included in the catalogue of fundamental rights that can be appealed against in *amparo* proceedings; however, they had complained of not having been allowed to exercise their right to the peaceful enjoyment of their property (since they had an acquired right to a pension, which should have already been considered to constitute a possession).

## B. The Court's assessment

### *1. Inadmissibility ratione materiae*

60. The Court notes that the question of whether or not the applicants had a legitimate expectation of being awarded a survivor's pension (and, as a consequence, whether Article 1 of Protocol No. 1 applied) is inextricably linked to an assessment of the facts and merits of the case; consequently, it should be joined to the merits and examined at a later stage.

### *2. Non-exhaustion of domestic remedies*

61. The Court has repeatedly stated that when more than one potentially effective remedy is available, the applicant is only required to have used one of them (see *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII (extracts); *Karakó v. Hungary*, no. 39311/05, § 14, 28 April 2009; and *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III) and can select that which is most appropriate in his or her case (see *Fabris and Parziale v. Italy*, no. 41603/13, §§ 49-59, 19 March 2020; *O'Keeffe v. Ireland* [GC], no. 35810/09, §§ 110-11, ECHR 2014 (extracts); and *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 176, 25 June 2019). In the present case, it observes that the applicants sought the remedies that were available to them by means of lodging ordinary appeals at the domestic instances. They could not have been expected to lodge an extraordinary claim seeking for the State to be held liable without first having contested the refusal to grant them the pension.

62. As to the Government's argument that the applicant did not raise the complaint about the alleged breach of her property rights before the domestic courts, the Court notes that, while the applicant did not refer to Article 1 of Protocol No. 1 specifically, the Court has held that it is not necessary for a Convention provision to be explicitly raised in domestic proceedings, provided that the complaint is raised "at least in substance" (see *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236; *Ahmet Sadık v. Greece*, 15 November 1996, § 33, *Reports of Judgments and Decisions* 1996-V; *Fressoz and Roire v. France* [GC], no. 29183/95, § 38, ECHR 1999-I; *Azinas v. Cyprus* [GC], no. 56679/00, §§ 40-41, ECHR 2004-III; and *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 72, 79, 81-82, 25 March 2014). Although the applicants did not explicitly mention the right to the peaceful enjoyment of one's property in the proceedings at all domestic instances, they did argue that they had been subject to unfair treatment during their efforts to gain access to a pension to which they were entitled; that treatment had violated the principle of legal certainty as well. The Court considers that the applicants raised their complaints at least in substance before the domestic courts, affording them the opportunity to provide an effective remedy for the alleged violations of

the Convention. Therefore, the Government's objections regarding non-exhaustion of domestic remedies must be dismissed.

63. The Court further notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

## IV. MERITS

### A. The parties' submissions

#### *1. The applicants*

64. The applicants argued that they had had a "legitimate expectation" of being recognised as qualifying for a survivor's pension because they had complied with all the legal requirements applicable at the time of the death of their respective partners, which had taken place before the Constitutional Court had adopted and published its judgment STC 40/2014 by which the requirements had been modified. They argued that, according to the Court's well-established case-law, the right to receive a pension from the social security system, as long as it was provided for by law, constituted a property right and fell under the scope of Article 1 of Protocol No. 1 (see *Béláné Nagy v. Hungary* [GC], no. 53080/13, § 116, 13 December 2016; *Baczúr v. Hungary*, no. 8263/15, 7 March 2017; *Wessels-Bergervoet v. the Netherlands*, no. 34462/97, ECHR 2002-IV*;* and *Willis v. the United Kingdom*, no. 36042/97, ECHR 2002-IV).

65. They held that the retroactive application of a new legislative regime had constituted a violation of their right to the peaceful enjoyment of their property under Article 1 of Protocol No. 1. The applicants maintained that they should not have been required to register their civil partnerships because it had not been compulsory at the time of the death of their respective partners.

66. Moreover, the applicants pointed out that, in practice, the specific register for Catalonia for the registration of civil partnerships had not become operative until 1 April 2017 – a significant length of time following the legislative reform introduced by Constitutional Court judgment STC 40/2014. Hence, it had been in practice impossible to formalise the partnership.

67. For the applicants, the application in their cases of the legislative amendment with retroactive effect had imposed an excessive burden and it had not pursued a legitimate aim. They argued that the refusal to grant them a survivor's pension had not been directly linked to the general interest and had been completely disproportionate. Both their partners had complied with the contributory requirements over the mandatory period, the first applicant did not have any other source of income and the second had very reduced income, and they had both constituted, respectively, civil partnerships under

Catalan law, in accordance with the rules set out under the fifth sub-paragraph of section 174(3) of the LGSS at the time of their partners' death.

68. It had been impossible for the applicants to formalise the civil partnerships. In the case of the first one, her partner had died on 5 November 2013. The second applicant's partner had died on 7 January 2014. In both cases, this was prior to the publication of Constitutional Court judgment STC 40/2014 on 10 April 2014. A transitional period should have been observed in the light of the obvious principle of law "*ad impossibilia nemo tenetur*" (no one can be forced to do the impossible).

69. The first applicant submitted that she had met all the requirements in order to be eligible for the survivor's pension at the time of her partner's death, which had taken place on 5 November 2013. She continued to meet the requirements when she made her application for the pension on 21 January 2014, several months before the Constitutional Court's judgment was published (and the new formal requirement came into force). The INSS responded, also in January 2014, that the application had to be dealt with by the applicant's partner's private insurance. The private insurance rejected the applicant's application for the survivor's pension on the grounds that she had not formally registered her partnership two years prior to her partner's death on 30 July 2014. She claimed that, although at that specific moment the new requirement – introduced on 10 April 2014 – was already applicable to pending cases, applying it to her would make her survivor's pension dependent on the moment in which the administrative authorities or the private insurance decided to deal with her application. This was, for the first applicant, a retroactive application of a less favourable requisite which had amounted to a violation of her right to the enjoyment of her possessions and of the principle of legal certainty.

70. The second applicant's situation was very similar: when her partner had died, at the time that she had applied for the pension, and at the time that her application for a pension had been denied, she had met the requirements to be eligible for it. It had been only a few days after her request had been unfairly rejected that the Constitutional Court had declared the fifth sub-paragraph of section 174(3) of the LGSS unconstitutional (thus changing the law). Although the effects of that declaration of unconstitutionality had applied to those proceedings where there had still been no final administrative or judicial decision, the wording of the Constitutional Court's judgment had also stated that it would not take away the pension in those cases where it had already been granted. Hence, had the INSS granted her the right to a pension on 4 April 2014 – as it should have done in the light of the legislation in force at that time – she would have been a beneficiary of the said pension thereafter. This had amounted, in her view, to a violation of her right to the enjoyment of her possessions and of the principle of legal certainty, as the requirement to formalise a domestic partnership (in order to qualify for pension rights)

introduced on 10 April 2014 had been applied to her when it had not yet been in force.

71. Moreover, both applicants pointed out that when the requirement to formalise domestic partnerships had initially been introduced under the "general regime" in Spain (for those Autonomous Communities that did not have their own civil-law regime) the enactment of Law 40/2007, the Supreme Court had subsequently held in respect of several cases (see paragraph 47 above) that where civil partnerships had been formalised following the introduction of the requirement after Law 40/2007 had come into force, but one of the partners had died before two years had elapsed, the requirement needed to be considered impossible to observe. What is more, the Supreme Court had recognised the eligibility of the survivor for the pension in those cases. The applicants complained of the fact that, in their cases, no flexibility had been observed in the light of the fact that it had been impossible for them and their respective partners to formalise their partnerships following the delivery of Constitutional Court judgment STC 40/2014, because both of their partners had already died by the time that had entered into effect.

72. The applicants also submitted that, even if they had registered their respective partnership at the time that the Constitutional Court's judgment that the question of the unconstitutionality of the fifth sub-paragraph of section 174(3) of the LGSS was admissible had been published in the Official State Gazette on 21 May 2012 in anticipation of a potential declaration of unconstitutionality, they still would not have been able to comply with the requirement to register the partnerships two years before the death of their respective partners. Therefore, an impossible requirement had been imposed on them.

73. In sum, the applicants held that it had been their wish for their respective relationships with the deceased to be considered civil partnerships and that in practice, they both had been in a situation similar to married couples.

*2. The Government*

74. The Government reiterated that, under a reservation made by the Kingdom of Spain in respect of Protocol No. 1 to the Convention, Spain considered the scope of Article 1 of Protocol No. 1 to be limited to the protection of the right to the peaceful enjoyment of one's property granted by Article 33 of the Spanish Constitution (see paragraph 35 above). They also noted that the States enjoyed a wide margin of appreciation – particularly when establishing and regulating their respective national social security systems (see *Béláné Nagy*, cited above, § 113, and *Markovics and other v. Hungary,* nos. 77575/11 and 2 others, §32 et seq., § 22, 24 June 2014); they further noted that Article 1 of Protocol No. 1 in no manner prevented regulatory changes to the amount of, or to the conditions for accessing

benefits at any given time (see *Richardson v. the United Kingdom* (dec.), no. 26252/08, § 24, 10 April 2012).

75. The Government submitted that the Court's consistent case-law made a distinction between future income and existing possessions, and deemed that there was no right to the future acquisition of property under Article 1 of Protocol No. 1. In the light of the above, they considered that the applicants had merely had a hope of receiving a survivor's pension upon the death of their partners, but had not acquired a right to it. The applicants' "mere hope", in their view, could not have prevented the legislature from introducing reforms to the relevant legislation that could affect her eligibility to receive a pension. The wording of Constitutional Court judgment STC 40/2014 had already clearly indicated the temporal scope of its declaration of unconstitutionality, covering as it had done cases that had arisen prior to the issuance of the judgement but in respect of which no final administrative or judicial decision had been handed down, as in the case of the applicants. Notwithstanding the fact that the applicants' partners had died before the legislative reform, they insisted that given that they had not been granted the pension before that time, they did not have a legitimate expectation protected by the right to the peaceful enjoyment of one's property (contrast *Apostolakis v. Greece*, no. 39574/07, 22 October 2009, where the applicant had been deprived of a retirement pension that he had already been entitled to and had been receiving for more than ten years). The Government asserted that it was irrelevant that the applicable legislation had previously allowed persons in an identical situation to have access to the pension.

76. In any event, in the Government's opinion, even if it could be understood that the applicants had had a "legitimate expectation" protected by Article 1 of Protocol No.1, the deprivation of that right would have been justified by the general interest – in particular, by the purpose of eliminating a pre-existing discriminatory situation that had existed in the Spanish social security system since the entry into force of Law 40/2017. The Government argued that the applicants were actually seeking to extend in time the unlawful situation by continuing to apply a rule that has been declared unconstitutional and which has unfairly benefited part of the population.

77. Lastly, the Government pointed out that having to formally register a partnership in order to obtain social benefits could not be considered an "excessive burden" for the purposes of Article 1 of Protocol No. 1. This requirement had been in place for years for all other unmarried couples in Spain; before that, entry into marriage had been required in order for a partner to become eligible for a survivor's pension. They also noted that marriage had always been an option for the applicants and their partners but they had chosen not to take that option.

78. As regards the alleged lack of foreseeability of the change in the law claimed by the applicants, the Government firstly pointed out that in this case there had not been a "change in the law" as such (decided upon voluntarily

by the legislature); rather, a previously existing provision had been removed after being declared unconstitutional. Secondly, they maintained that the declaration of the admissibility of the exception of unconstitutionality had been published in the Official State Gazette on 21 May 2012; therefore, in no case could it be said that the declaration of unconstitutionality had, strictly speaking, been unforeseeable.

79. Lastly, the Government submitted that the principle of legal certainty had already been taken into account by the Constitutional Court, as demonstrated by the fact that it had been decided to continue to pay those pensions that had already been granted prior to the Constitutional Court's declaration of unconstitutionality by a final administrative or judicial decision – even if they had ceased to meet the requirements after the judgment (but this was not so in the applicant's case).

## B. The Court's assessment

### *1. General principles*

80. The Court reiterates that although Article 1 of Protocol No. 1 does not create a right to acquire property (see *Béláné Nagy,* cited above, § 74, *Stummer v. Austria* [GC], no. 37452/02, § 82, ECHR 2011 and, more recently, *Beeler v. Switzerland* [GC], no. 78630/12, § 57, 11 October 2022), in certain circumstances a "legitimate expectation" of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1 (see, among many authorities, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, ECHR 2007-I).

81. A legitimate expectation must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. No "legitimate expectation" 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 *Béláné Nagy,* cited above, § 75, and *Kopecký v. Slovakia* [GC], no. 44912/98, § 50, ECHR 2004-IX). At the same time, a proprietary interest recognised under domestic law – even if revocable in certain circumstances - may constitute a "possession" for the purposes of Article 1 of Protocol No. 1 (see *Beyeler v. Italy* [GC], no. 33202/96, § 105, ECHR 2000-I).

82. The principles that apply generally in cases under Article 1 of Protocol No. 1 are equally relevant when it comes to social and welfare benefits (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 54, ECHR 2005-X). The Court has also stated that Article 1 of Protocol No. 1 does not create a right to receive social benefits or pensions. It places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme (see *Sukhanov and Ilchenko v. Ukraine*, nos. 68385/10 and 71378/10, § 36, 26 June 2014, nos. 68385/10 and 71378/10; *Kolesnyk v. Ukraine* (dec.), no. 57116/10,

§§ 89 and 91, 3 June 2014; *Fakas v. Ukraine* (dec.), no. 4519/11, §§ 34, 37-43, 48, 3 June 2014; and *Fedulov v. Russia*, no. 53068/08, § 66, 8 October 2019). 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, *mutatis mutandis*, *Stec and Others* (dec.) cited above, § 54).

83. Where the person concerned does not satisfy (see *Bellet, Huertas and Vialatte v. France* (dec.), no. 40832/98, § 5, 27 April 1999), 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 (see *Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009), as long as the conditions had changed before the applicant became eligible for a specific benefit (see the above-cited cases of *Richardson*, § 17, and *Béláné Nagy*, § 86). Nonetheless, a proprietary interest recognised under domestic law – even if revocable in certain circumstances - may constitute a "possession" for the purposes of Article 1 of Protocol No. 1 (see *Beyeler*, cited above, § 105). In following such an approach, the Court has declared Article 1 of Protocol No. 1 to be applicable in a number of cases where the applicants, by the time they lodged their application with the Court, no longer satisfied the conditions of entitlement to the benefit in question laid down in national law (see, for example, *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 40, ECHR 2004-IX).

84. The Court reiterates that the mere fact that new, less advantageous legislation deprives persons entitled to a pension benefit, by dint of retrospective amendments to the conditions attaching to the acquisition of pension rights does not, *per se*, suffice to find a violation. Statutory pension regulations are liable to change, and the legislature cannot be prevented from regulating, by means of new retrospective provisions, pension rights derived from the laws in force (see *Khoniakina v. Georgia*, no. 17767/08, §§ 74 and 75, 19 June 2012; *Arras and Others v. Italy*, no. 17972/07, § 42, 14 February 2012; *Sukhobokov v. Russia*, no. 75470/01, § 26, 13 April 2006; and *Bakradze and Others v. Georgia* (dec.), no. 1700/08, § 19, 8 January 2013). Indeed, the Court has accepted the possibility of amendments to social security legislation that 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 *Béláné Nagy*, cited above, § 88, and *Wieczorek v. Poland*, No. 18176/05, § 67, 8 December 2009).

85. Thus, as can be seen from the above-cited case-law**,** where the domestic legal conditions for the granting of any particular form of benefits or pension have changed and where the person concerned no longer fully satisfies them owing to a change in these conditions, a careful consideration of the individual circumstances of the case – in particular, the nature of the

change in the requirement – may be warranted in order to verify the existence of a sufficiently established, substantive proprietary interest under the national law (see *Béláné Nagy*, cited above, § 89). Such are the demands of legal certainty and the rule of law, which belong to the core values imbuing the Convention (ibid., § 89).

86. The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (ibid., § 112; and the case-law cited therein). An essential condition for an interference with a right protected by Article 1 of Protocol No. 1 to be deemed compatible with this provision 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 an 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. The notion of "public interest" is necessarily extensive. In particular, a decision to enact laws concerning social-insurance benefits will commonly involve consideration of economic and social issues. The Court finds it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see, *mutatis mutandis*, *The former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII; *Wieczorek*, cited above, § 59; *Frimu and Others v. Romania* (dec.), no. 45312/11 and 4 others, § 40, 7 February 2012; *Panfile v. Romania* (dec.), no. 13902/11, 20 March 2012, and *Gogitidze and Others v. Georgia*, no. 36862/05, § 96, 12 May 2015).

87. In addition, Article 1 of Protocol No. 1 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 *Béláné Nagy,* cited above, § 115, and the case-law cited therein).

88. In considering whether the interference imposed an excessive individual burden the Court will have regard to the particular context in which the issue arises – namely that of a social security scheme. Such schemes are an expression of a society's solidarity with its vulnerable members (ibid., § 116, and the case-law cited therein).

89. The case-law of the Court has established that the fair balance test cannot be assessed in the abstract, but needs to take into account all the relevant elements against the specific background (see *Stefanetti and Others*

*v. Italy*, nos. 21838/10 and 7 others, § 59, 15 April 2014, with examples and further references). In so doing, the Court has attached importance to such factors as the discriminatory nature of the loss of entitlement (see *Kjartan Ásmundsson v. Iceland*, cited above, § 43) or the absence of transitional measures (see *Moskal v. Poland*, no. 10373/05, § 74, 15 September 2009, where the applicant was faced, practically from one day to the next, with the total loss of her early-retirement pension, which constituted her sole source of income, and with poor prospects of being able to adapt to the change). An important consideration 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 or her pension rights (see *Domalewski v. Poland (dec.),* no. 34610/97, ECHR 1999-V; *Kjartan Ásmundsson*, cited above, § 39; and *Wieczorek*, § 57, 8 December 2009; among many others).

90. The Court has also stated, in its case-law concerning Article 6 of the Convention, that the requirement of legal certainty and the protection of legitimate expectations do not involve the right to an established jurisprudence (see *Unédic v. France*, no. 20153/04, § 74, 18 December 2008, 2008). Case-law development is not, in itself, contrary to the proper administration of justice (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 116, 29 November 2016), since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 58, 20 October 2011, and *Albu and Others v. Romania*, nos. 34796/09 and 63 others, § 34, 10 May 2012). However, the way in which the law developed and its foreseeability are to be taken into consideration (see *Unédic*, cited above, § 75; *Şen and Others v. Turkey* (dec.), no. 24537/10, 14 February 2012; *Hoare v. the United Kingdom* (dec.), no. 16261/08, § 55, 12 April 2011, and *Legrand v. France*, no. 23228/08, § 40, 26 May 2011).

91. In some cases, changes in domestic jurisprudence that affect pending civil proceedings may violate rights under the Convention. In particular, in *Petko Petkov v. Bulgaria*, no. 2834/06, § 33, 19 February 2013, the Court considered that the amendment of the interpretation of a legal term in respect of cases pending at the cassation level had not been foreseen. Even the higher domestic court found that the lower-instance courts had interpreted some formal requirements too strictly. The Court considered that in respect of the case of *Petko Petkov*, while the aim pursued by the requirement had been otherwise reasonable, it had been applied to the applicants without consideration of the specific consequences of the case, which had had the effect of depriving them of their right of access to a court in breach of Article 6 § 1 of the Convention.

*2. Application of the above-noted principles to the present case*

**(a) Whether Article 1 of Protocol No. 1 is applicable**

92. The Court considers that the moment at which the legislation should have been assessed in order to verify whether the applicants complied with the requirements to become eligible for a survivor's pension is, as a general rule, the date on which their respective partners died (the trigger event). The Court sees no reason to depart from the general rule in the light of the circumstances of the present two cases. The applicants' partners died on 5 November 2013 and 7 January 2014, respectively. Under the relevant legislation, as in force at that specific moment and applicable to the applicants, neither of them needed to have been formally registered in a specific register or by a public notary as being in a civil partnership in order to benefit from a survivor's pension. Neither was there a requirement, applicable to them, that such registration had to pre-date the respective partner's death by at least two years. Since they both met the other legal requirements (see paragraphs 5, 6, 10, 16, 17 and 29 above), it is undeniable that at the said moment, both applicants could have entertained a "legitimate expectation" that they were eligible to receive a survivor's pension.

93. As mentioned above, a proprietary interest recognised under domestic law – even if revocable in certain circumstances – may constitute a "possession" for the purposes of Article 1 of Protocol No. 1 (see *Beyeler*, cited above, § 105). In following such an approach, the Court has declared Article 1 of Protocol No. 1 to be applicable in a number of cases where the applicants, by the time they lodged their application with the Court, no longer satisfied the conditions of entitlement to the benefit in question laid down in national law (see, for example, *Kjartan Ásmundsson*, cited above, § 40).

94. It follows that Article 1 of Protocol No. 1 is applicable in the present cases. The Government's preliminary objection concerning incompatibility *ratione materiae* with the provisions of the Convention must thus be dismissed.

**(b) Compliance with Article 1 of Protocol No. 1**

95. The refusal of the applicants' application for a survivor's pension must be regarded as an interference with their right to the peaceful enjoyment of their possessions. Under the second paragraph of Article 1 of Protocol No. 1 to the Convention, any such interference must be justified under the "lawfulness", "general interest" and "proportionality" principles contained in Article 1 of Protocol No. 1 (see, for instance, *Khoniakina*, cited above, § 72).

96. The Court notes that the measures complained of consisted of the manner in which the Constitutional Court judgment STC 40/2011 dealt with the effects of its declaration of unconstitutionality of the fifth sub-paragraph of section 174(3) of the LGSS on pending situations, and the subsequent

legislation, as applied in the applicants' cases, where the pension was applied for before the entry into force of this legislation but was not granted by any final decision.

97. The Court is satisfied that the interference complied with the requirement of lawfulness in that it was based on relevant legal provisions of the Constitution and other laws and resulted from legal acts adopted lawfully. In so far as the applicants may be understood as challenging the foreseeability of the relevant law, the Court considers that this issue is inseparable from the questions related to the justification for the impugned measures, to be examined below.

98. The Court further considers that the interference complained of pursued the general interest in eliminating a previous difference in treatment on the grounds of place of residence.

99. The main issue therefore remains that of whether the interference was proportionate.

100. In the cases at hand, there was a change in the relevant legal regime as a result of the Constitutional Court's judgment published on 10 April 2014 which affected the legislation governing the eligibility of civil partners for a survivor's pension during the period when proceedings concerning the applicants' efforts to secure such a pension were pending (see, *mutatis mutandis*, *Caligiuri and Others v. Italy*, nos. 657/10 and 3 others, § 33, 9 September 2014).

101. Although the reversal of a previous difference in treatment constitutes a compelling reason of general interest, the Court must, nonetheless, observe that the above general principle cannot prevail automatically in a situation where the individual concerned is required to bear an excessive burden as a result of a measure divesting him or her of a legitimate expectation. The Court also notes the applicants' argument that survivor pensions are statistically generally awarded to women, who are significantly more often placed in a disadvantageous or vulnerable situation of financial dependency from their partners and find themselves in need of social benefits following the partner's death (see paragraph 14 above), is relevant in the assessment of the burden they had to bear.

102. On the facts of the case, it should be observed that the applicants requested a survivor's pension shortly after their respective partners' death, and before the impugned judgment of the Constitutional Court and before the entry into force of the new provision requiring that a partnership must have been formalised at least two years before the death of one of the partners in order for the surviving partner to qualify to receive a survivor's pension.

103. The Court also observes that, under Constitutional Court's judgment STC 40/2014 (see paragraph 45 above), the effects of that judgment would "not only have to preserve *res judicata*, but also, by virtue of the constitutional principle of legal certainty, ... extend in this case to possible final administrative situations, such that this declaration of

unconstitutionality will only be effective *pro futuro*– that is, in relation to new cases or to administrative proceedings and judicial proceedings where a final decision has not yet been handed down".

104. However, neither the Constitutional Court, nor the legislation adopted after it took into account the specific situation of persons as the applicants who had become fully eligible for a survivor's pension, and had formally requested it, prior to the Constitutional Court's decision to proceed to uniformising the legal regime applicable in all parts of Spain. No transitional measures for such situations were provided for. Therefore, while the impugned measure was sufficiently foreseeable from a qualitative perspective, that is to say, its formulation was made with sufficient precision, it was unexpected in the context of the present case.

105. As regards the second applicant, it is noteworthy, in addition, that the only reason why the proceedings related to granting her pension requests were still pending at the time of publication of the Constitutional Court judgment STC 40/2014 on 10 April 2014 lied in the fact that the competent insurance body issued on 4 April 2014 a decision rejecting her request on the basis of what was afterwards proven to have been an erroneous assessment of her not having met the five-year cohabitation requirement (see paragraphs 22 and 27 above). As regards the first applicant, she obtained a judicial decision recognising her right to the pension (see paragraphs 9 and 10 above) but that decision was then set aside with reference to the new eligibility requirement that did not exist at the time when she applied for a survivor's pension (see paragraph 12 above).

106. The Court considers that the above constituted, in essence, a form of retroactive application of a new, more stringent, eligibility requirement to cases in which the person concerned had all reasons to consider that they had an acquired right to a pension.

107. The Court reiterates that, in assessing compliance with Article 1 of Protocol No. 1, the Court must carry out an overall examination of the various interests at issue (see *Perdigão v. Portugal* [GC], no. 24768/06, § 68, 16 November 2010), bearing in mind the fact that the Convention is intended to safeguard rights that are "practical and effective" (see, for example, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 100, ECHR 1999-III). It must look behind appearances and investigate the realities of the situation complained of (see *Čakarević v. Croatia*, no. 48921/13, § 81, 26 April 2018, and the case-law cited therein). That assessment may involve the conduct of the parties, including the means employed by the State and their implementation.

108. Within that context, the Court has stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities - is a factor to be taken into account in assessing the State's conduct (ibid., § 81). Indeed, where an issue that is of general interest is at stake, it is incumbent on the public authorities to act in good time, and in an appropriate

and consistent manner (see *Tunnel Report Limited v. France*, no. 27940/07, § 39, 18 November 2010, and *Zolotas v. Greece (no. 2)*, no. 66610/09, § 42, ECHR 2013 (extracts)).

109. The requirement that a partnership be formalised at least two years before the death of one of the partners in order that the other partner be eligible for a survivor's pension is in reality an additional safeguard that helps the public authorities to prevent fraud and to ensure that survivor's pensions are only allocated for their intended purpose – namely, to protect a vulnerable surviving member of a stable partnership who had been economically dependent on the deceased partner. In the present case, the Court finds it highly relevant that, since the applicants' partners were already deceased by the time that the Constitutional Court introduced a new eligibility requirement, there was no way that they could have met the new requirement. The Court does not find a basis to consider that the applicants and their respective partners were required to pre-emptively formalise their partnerships in a public document from the moment when the admissibility of the question of unconstitutionality was published on 21 May 2012, as this decision did not create a legal requirement at the time in question. It was not until the declaration of unconstitutionality was published on 10 April 2014 (five months after the death of the first applicant's partner, and three months after the death of the second applicant's partner) that the new requirement came into force. The Government's argument that the applicants and their respective partners had always been free to marry is beside the point, it being undisputed that the law provided for survivor pensions for civil partners and that the applicants could legitimately rely on that legal regime. Therefore, the relevant test is whether the introduction of the formal requirement of registration without providing for transitory measures in respect of persons who had already become eligible before its introduction was justified by compelling reasons of general interest and whether it imposed an excessive burden on the applicants.

110. As to the first step of the above test, the Court considers that it is noteworthy that, in the instant case, the absence of any transitionary period to allow a reasonable solution for those surviving partners who saw the legislative change enter into force when their application for a survivor's pension was already underway was not alleviated by any positive measures on the part of the legislature. The Government did not explain before the Court why the general interest in putting an end to a situation where residents of other parts of Spain were treated less favourably, as the formal registration requirement applied to them already, could not have been achieved without imposing such a serious consequence on the applicants. It is relevant in this respect that the difference in treatment that the Constitutional Court decided to correct was attributable to the public authorities. The Court is therefore not satisfied that there were compelling reasons of general interest which justified not establishing a transitionary period for the applicants and people in the

same category of persons to be considered in compliance with the requirements and not become immediately prevented from being eligible for the pension.

111. As to the second step of the test, the lack of any transitional period in which to comply with the new requirements – and, in particular, the retroactive application of the new requirement to the applicants – resulted in practice in them being prevented, once and for all, from obtaining a survivor's pension (see *Kjartan Ásmundsson*, cited above, § 45) which they could have legitimately expected to benefit from. Moreover, the first applicant had very limited income and the second applicant did not have any other significant income on which to subsist. Therefore, this legislative change effectively imposed on a certain category of persons, including the applicants, a new condition for entitlement to the survivor's pension, whose advent had not been foreseeable and which, without a transitionary period, they could not possibly satisfy once the new legislation entered into force – a combination of elements ultimately difficult to reconcile with the rule of law (see *Béláné Nagy*, cited above, § 99). The Court considers that the lack of any transitionary period, which made it impossible for the applicants in this case to fulfil the conditions for entitlement, was therefore a key element impacting on the individual burden placed on the applicants.

112. In the light of the above considerations, the Court is of the view that the disputed measure, albeit aimed at eliminating a previous difference in treatment that needed to be tackled by the legislature, failed to strike a fair balance between the interests at stake. Therefore, the otherwise legitimate aim of the impugned measures cannot, in the Court's view, justify their retrospective effect, affecting adversely legal certainty, and the absence of transitional measures ensuring a fair balance between the interests at stake. The impugned measures entailed the consequence of depriving the applicants of their legitimate expectation that they would receive survivor's benefits. Such a fundamental interference imposed an excessive burden on the applicants (see, *mutatis mutandis*, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 43, Series A no. 332).

113. There has therefore been a violation of their rights under Article 1 of Protocol No. 1 to the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

## A. Damage

### *1. The parties' submissions*

#### (a) First applicant

115. The first applicant claimed 139,835.38 euros (EUR) as the amount equivalent to 10 years of the survivor's pension that she considered she should have been awarded.

116. The Government contested the applicant's claim. They considered that the said amount was not justified and that there is no evidence that the first applicant would have been entitled to a life-long pension in any case, considering that the economic criteria have to be maintained over the years in order for the right to the survivor's pension to be renovated, as well as other personal criteria (such as not entering into a new partnership or wedlock).

#### (b) Second applicant

117. The second applicant claimed EUR 1,395.58 per month from the date of her husband's death until an award was made to her by way of just satisfaction, as this was the survivor's pension that she argued that she was entitled to. She also claimed EUR 35,000 in respect of non-pecuniary damage in the form of the suffering, distress and frustration that she had suffered as a result of the violations.

118. The Government contested the second applicant's claim. On the one hand, when calculating the amount of the pension, she had equated the concept of the "regulatory basis of the benefit" established in the above-mentioned judgment of Labour Court No. 2 of Girona with that of the "amount of the pension", without explaining how that amount had been calculated. On the other hand, the second applicant had assumed that she was entitled to the award of a pension that would be permanent and lifelong; that had conflicted with the rules governing the award of the type of pension in question, the maintenance of which was dependent on a number of factors. In particular, the Government noted that the applicant had not provided any information by way of demonstrating that the remainder of the requirements had been met – not only at the outset but also subsequently, over time.

### *2. The Court's assessment*

119. The Court considers that the most appropriate form of redress for a violation of Article 1 of Protocol No. 1 in cases such as the present ones, where the decision-making process by the administrative authorities and the domestic courts is liable to result in the refusal to grant the applicants a survivor's pension, would be to ensure that the applicants, as far as possible, are put in the position in which they would have been had this provision not been disregarded (see *Haddad v. Spain*, no. 16572/17, § 80, 18 June 2019; and *Omorefe v. Spain*, no. 69339/16, § 71, 23 June 2020). It notes that

domestic law provides for the possibility of reviewing final decisions which have been declared in breach of Convention rights by a judgment of the Court, under Section 236 of the Social Jurisdiction Act and Articles 510 and 511 of the Code of Civil Procedure, provided that "the violation, by its nature and seriousness, has effects that persist and cannot be ceased in any other way than by judicial review".

120. The Court considers that, in the absence of determination by the domestic authorities that the applicants must receive a pension of a certain amount, it is not in a position to determine the pecuniary damage suffered by them as a result of the violation of their rights under Article 1 of Protocol No. 1. It therefore makes no award under this head.

121. The Court awards each applicant EUR 8,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

## B. Costs and expenses

### *1. Regarding the first applicant*

122. The first applicant did not request the reimbursement of any costs or expenses incurred before the domestic courts or before the Court.

123. Accordingly, the Court does not award any sum in this regard to the applicant.

### *2. Regarding the second applicant*

124. The second applicant claimed EUR 8,264.57 for the costs and expenses incurred before the domestic courts and EUR 6,933 for those incurred before the Court. This included the lawyer's fees and solicitor's fees incurred before the Spanish Supreme Court, the Spanish Constitutional Court and the Strasbourg Court.

125. The Government argued that the claim could not be granted, as no documentation had been provided to show that any specific payment had been made by the applicant (except for the EUR 35.90 paid to send the application to the Court by post and the EUR 300 paid to a solicitor by way of an advance deposit of funds). The other documents are the estimates of fees (*minutas*) issued by the applicant's lawyer, who assisted the applicant at various stages of the proceedings, both domestically and before the Court; none of those fees are recorded as having been actually paid by the applicant.

126. 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 were 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-noted criteria, the Court considers it reasonable to award the second applicant the sum of EUR 335.90 for the demonstrated costs

and expenses incurred during the domestic proceedings and the proceedings before the Court, plus any tax that may be chargeable to the second applicant.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides*, to join the applications;

2. *Decides*, to join to the merits the Government's preliminary objection concerning the incompatibility *ratione materiae* of the complaints under Article 1 of Protocol No. 1 and, having examined it, *dismisses* it;

3. *Declares*, the applications admissible;

4. *Holds*, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

5. *Holds*,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts at the rate applicable at the date of settlement:
      (i) EUR 8,000, plus any tax that may be chargeable, in respect of non-pecuniary damage, to each of the applicants;
      (ii) EUR 335.90 to the second applicant, plus any tax that may be chargeable to her, 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;

6. *Dismisses*, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 19 January 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Victor Soloveytchik<br>Registrar | Georges Ravarani<br>President |

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

G.R.
V.S.

# JOINT CONCURRING OPINION OF JUDGES ELÓSEGUI AND ŠIMÁČKOVÁ

1. We fully agree with the Chamber's decision to find a violation of the applicants' legitimate expectations, and we concur with the finding of a violation of Article 1 of Protocol No. 1 to the Convention.

2. We regret, however, that the Chamber has overlooked the applicants' argument that there has been a violation of the prohibition of discrimination (Article 14 of the Convention) in respect of their property rights. In our view, this case represents a typical example of an androcentric perception of law and lack of sensitivity to the life trajectories of persons in weaker social and societal positions, who are much more likely to be women.

3. The Spanish Constitutional Court found unconstitutional the situation in Catalonia, where, unlike in other parts of Spain, no formal partnership had previously been required to obtain a survivor's pension. Before that ruling, it had sufficed to fulfil the substantive requirements of cohabitation, economic dependence and childcare. The Constitutional Court further decided that applications for survivor's pensions in respect of which a final administrative decision had not yet been handed down at the time the judgment took effect would be impacted by the declaration of unconstitutionality. That declaration would also apply to all new applications received after the judgment took effect. Persons who had relied on the original regulation and whose partners had died within the relevant period found themselves in an impasse. As the Chamber points out in the reasoning of this judgment, the lack of any transitional provisions, combined with insensitive interpretation of the Constitutional Court's decision by the relevant authorities in individual cases, meant that some applicants for a survivor's pension simply could not fulfil the newly established formal requirements.

4. The Constitutional Court ruled without taking into account the importance of the pension for the lives of the persons concerned. According to statistics provided by the *Instituto Nacional de la Seguridad Social* at the Court's request, more than 90% of the beneficiaries of this pension in Spain are women. After the death of a partner, those women are also very likely to be in a vulnerable position, not only economically but also socially. Neither the legislator, nor the administrative authorities, nor the courts deciding this and other similar cases have paid sufficient attention to this vulnerability.

5. Survivor's pensions constitute a fundamental pillar of the Spanish welfare state in that they prevent situations of poverty during old age for a large number of women. Indeed, 92% of survivor's pensions are received by women, 40% of whom are not entitled to a retirement pension because they have not contributed enough. For men, on the other hand, survivor's pensions do not play an important role. The main reason is that men have a lower life expectancy than women, but also that, unlike women, most men are entitled to a retirement pension. In fact, there is significant gender inequality in

contributory pensions in Spain. The survivor's pension reduces the gender gap in pensions which is attributable to men and women's unequal participation in the labour force. As subsequent generations of Spanish women have joined the global workforce in greater numbers, the gap in social security contributions has narrowed. It is likely that within a few years the vast majority of Spain's retired women will receive a retirement pension, and the survivor's pension will no longer play the essential role it plays today in avoiding poverty for women in their old age (see Fuster L., "Las pensiones de viudedad en España" in Fundación de Estudios de Economía Aplicada, *Estudios sobre la Economía Española* (2021) no. 06, abstract).

6. We emphasise that no one has disputed that the applicants had met the substantive requirements for a grant of a survivor's pension before those requirements changed. They had been cohabitating with their partners for at least five years, had children with them and were economically dependent on them. Most importantly, the applicants were not given an opportunity to comply with the new requirements, since they did not know them in advance. The new requirement to formalise the partnership at least two years before the death of the other partner simply turned out to be, in the applicants' case, impossible to fulfil. It was entirely because of the lack of fair transitional provisions or conditions that the persons affected were unable to meet the newly imposed requirement of formal constitution of a civil partnership at least two years before the death of the partner on whom they were economically dependent. This requirement could not be met if the other partner had died before the partnership could be formalised or before the newly set time-limit expired.

7. We understand the reasons behind the decision of the Constitutional Court and are aware that it is not for this Court to interfere with national policy concerning social and economic rights in the member States. That being said, we must point out that the national authorities failed to take into account the individual life stories of a certain group of persons – unprivileged, unmarried, economically dependent women with children – and did not consider the details of their lives. Because of their different life trajectories, the only group hit hard by the change in regulation was unmarried and dependent (and thus unprivileged) women, as evidenced by the gender and life stories of the applicants and other persons in similar circumstances. We are confident that regulation could have been enacted in a way that was fair and did not create an unattainable and seemingly discriminatory threshold for certain people in vulnerable positions.

8. A general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and even if there is no discriminatory intent. This is only the case, however, if such policy or measure has no "objective and reasonable" justification (see, among other authorities, *Biao v. Denmark* [GC], no. 38590/10, § 91, 24 May 2016; *S.A.S. v. France* [GC],

no. 43835/11, § 161, ECHR 2014 (extracts); and *D.H. and Others v. the Czech Republic*, no. 57325/00, §§ 175 and 184-85, ECHR 2007-IV). The absence of transitional provisions or conditions in the case of the introduction of a new formal requirement for obtaining a pension does not, in our view, have a fair explanation.

9. The State authorities that introduced (the Constitutional Court) and applied (the administrative authorities and administrative courts) the new requirement must have been aware of the situation in which some persons - predominantly women – found themselves. First, they had fulfilled the requirements in the past, but that did not suffice. Second, if they wanted to fulfil the new requirements, time worked against them. Not only were they left with an emotional void after having lost their loved ones; they also found themselves in a legal void, not being able to fulfil the pension requirements, and in an economic void, having no income and not qualifying to receive the survivor's pension.

10. In cases of domestic violence, where the victims are most often women, the Court has not hesitated to find violations not only of Articles 2 and 3, but also of Article 14 (see, for example, *Opuz v. Turkey*, no. 33401/02, ECHR 2009; *Talpis v. Italy*, no. 41237/14, 2 March 2017; *Tunikova and Others v. Russia*, nos. 55974/16 and 3 others, 14 December 2021; *Eremia v. the Republic of Moldova*, no. 3564/11, 28 May 2013; and *Tkhelidze v. Georgia*, no. 33056/17, 8 July 2021). In the present case, we also witness a situation where a seemingly neutral problem is, in fact, not neutral at all. Let us not remain blind to the fact that the respective national authorities - the Constitutional Court, the legislature, the administrative authorities and the national courts that ruled in individual cases – did not take into account the fact that the change in requirements disproportionately affected unprivileged and vulnerable women, much more than anyone else. Where a national policy that hits someone very hard financially cannot be foreseen or prevented, an issue may arise in relation to the right to property. Where such a policy negatively impacts a group which largely overlaps with a vulnerable segment of the population, there also arises an issue of (indirect) discrimination. We are thus led to conclude that this case also engages Article 14.

11. It is certainly a good thing that the applicants will ultimately receive their pensions. However, they also deserve recognition that they were affected not only in respect of their right to property but also in respect of their right to be treated equally. Not only did they suffer an interference with their property rights; they also, once again, realised that being a woman means belonging to a gender to which more injustice is generally done and whose interests are often overlooked.

# APPENDIX

List of cases:

| No. | Application no. | Case name | Lodged on | Applicant<br>Year of Birth<br>Place of Residence<br>Nationality | Represented by |
|---|---|---|---|---|---|
| 1. | 32667/19 | Domenech Aradilla v. Spain | 12/06/2019 | **Mercè DOMENECH ARADILLA**<br>1986<br>Caldes de Montbui<br>Spanish | Xavier ASENSIO CASTRO |
| 2. | 30807/20 | Rodríguez González v. Spain | 20/07/2020 | **Encarnación RODRÍGUEZ GONZÁLEZ**<br>1960<br>Salt Girona<br>Spanish | Assumpció DE RIBOT SAURINA |