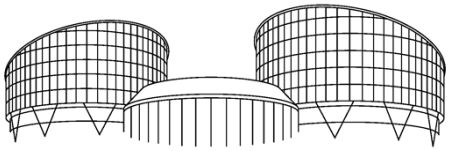

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF VALVERDE DIGON v. SPAIN

(Application no. 22386/19)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Refusal by domestic authorities to grant survivor's pension due to unforeseeable application of a new eligibility requirement impossible for the applicant to comply with • Excessive burden on applicant • Unjustified absence of transitionary period for legislative change • Fair balance between competing interests not struck

STRASBOURG

26 January 2023

FINAL

22/05/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

In the case of Valverde Digon 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 application (no. 22386/19) 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 a Spanish national, Ms Sofia Valverde Digon ("the applicant"), on 16 April 2019;

the decision to give notice of the application to the Spanish Government ("the Government");

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 applicant. She complains under Article 1 of Protocol No. 1 that the authorities failed to have regard to the objective impossibility for her to comply with a formal registration requirement which did not apply to her case prior to a 2014 judgment of the Constitutional Court. She further stated that the impugned refusal amounted to discrimination, under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1, in respect of surviving members of partnerships whose partners had died before the Constitutional Court judgment or more than two years after the delivery of that judgment.

THE FACTS

2. The applicant was born in 1978 and lives in Valdepeñas. The applicant was represented by Mr A.F. Holgado Torquemada, a lawyer practising in Ciudad Real.

3. The Government were represented by their Agent, Mrs H.E. Nicolás Martínez, Co-Agent of the Kingdom of Spain to the European Court of Human Rights.

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

I. RELEVANT BACKGROUND

5. The applicant and her partner had been living together in Santa Coloma de Gramanet, Catalonia, since 10 February 2006, and they had been registered as resident in the municipality ever since their arrival. They had already bought an apartment together in December 2004. On 18 November 2008 they had a daughter. On 22 July 2014, the applicant and her partner formalised their stable civil partnership by means of a notarial deed. In the deed, they declared that they had formed a stable civil partnership (albeit not registered at that time) in 2005.

6. The applicant's partner died on 25 July 2014, three days after the formal registration of their civil partnership. The applicant was designated as her partner's heir in his will.

7. The applicant lodged an application for a survivor's pension on 12 September 2014, asserting that she met both the relevant economic requirements and the status civil partnership requirements.

8. The applicant moved from Santa Coloma de Gramanet, Catalonia, to Ciudad Real, in Castilla La Mancha, on 17 September 2014.

II. THE ADMINISTRATIVE PROCEEDINGS

9. On 16 September 2014, the National Institute of Social Security (hereinafter, "INSS") issued a decision dismissing the applicant's application on the grounds that she had failed to meet the requirement of having registered her civil partnership with the deceased at least two years prior to his or her death under the fourth sub-paragraph of section 174(3) of the General Act on the Social Security (hereinafter, "LGSS") in the wording given by Law 40/2007 (see paragraphs 21 and 25 below). The INSS also stated that the applicant had not demonstrated that she met the relevant economic requirements to be eligible for the pension, and that neither she nor her partner had demonstrated that they had not previously been married to anybody else.

10. The applicant appealed against the decision; the appeal was dismissed on 21 October 2014 by a decision of the INSS's Provincial Director in Barcelona. The Director's decision deemed that Constitutional Court judgment STC 40/2014 was already applicable to the case and that as a result she did not meet the formal requirement of having registered her civil partnership two years before her partner's death in order to be eligible to receive a survivor's pension. It reiterated that the applicant had not demonstrated that she had met all the eligibility requirements.

III. THE DOMESTIC JUDICIAL PROCEEDINGS

11. On 6 November 2014, the applicant lodged a judicial appeal against the INSS's decisions with Labour Court no. 2 of Ciudad Real, reiterating that she had unequivocally demonstrated that she had cohabited with her deceased partner for five uninterrupted years, and that the fifth sub-paragraph of section 174(3) of the LGSS and Article 234-1 of the Catalan Civil Code had not stipulated that there was any need for her partnership to be registered. She asserted that ultimately, the existence of a civil partnership could be considered to have been formally proved by other means.

12. On 11 April 2016, the Labour Court dismissed the appeal, holding that the requirement to have been registered two years prior to the death of the deceased partner was applicable. Constitutional Court judgment STC 40/2014 had been published on 11 April 2014 and had a *pro futuro* effect (that is, it concerned new cases or administrative proceedings), and the applicant had lodged her application for a survivor's pension on 12 September 2014. As a consequence, her case was affected by the new regulation, which required all civil partners not only to have cohabitated uninterruptedly for at least five years, but also to have formally registered their partnership at least two years before the death of one of the partners in order for the other partner (subject to meeting all other economic requirements) to be eligible for a survivor's pension. The judicial decision did not rule on the compliance or lack of compliance of the applicant with the economic requirements for qualifying for a survivor's pension or on the question of whether or not the partners had been previously married, which had also been questioned by the INSS.

13. The applicant lodged another appeal, which was also dismissed by the High Court of Justice of Castilla La Mancha (hereinafter "the HCJ") on 18 May 2017 on the grounds that at that point there was well-established case-law according to which a civil partnership could only be formally established by registering the partnership in a specific register or by means of a notarial deed, and that this should have been done at least two years prior to the death of one of the partners. The judgment insisted that the legislature had had the clear intention of not automatically recognising the eligibility for a survivor's pension of all members of a stable couple, but only the eligibility of those who (i) had willingly formalised their respective partnerships through one of the available methods (namely, entry in a register or by means of a notarial deed), and (ii) had done so at least two years prior to the death of one of the partners. The applicant simply had not met those requirements.

14. She then lodged an appeal on points of law with the Labour Chamber of the Supreme Court, which declared it inadmissible on 25 April 2018 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 an *amparo* appeal with the Constitutional Court complaining of a violation of

her right not to be discriminated against, given the fact that a survivor of an unregistered civil partnership in Catalonia would be treated differently depending on whether the death of his/her partner had taken place before the date on which Constitutional Court judgment STC 40/2014 had been adopted, in the two years following it, or two or more years after that date. She also alleged that there had been a violation of her right to effective judicial protection, because registering her partnership with the deceased two years before the latter's death had been impossible in view of the date of that death. On 16 October 2018 the Constitutional Court declared the *amparo* appeal inadmissible owing to the case's lack of any particular constitutional relevance.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

15. 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."

16. 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.

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

18. The Constitutional Court has held that there is no general constitutional parity between married and unmarried partners, and that the legislature has discretion to treat married and unmarried partners differently 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).

19. 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.

20. 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.

21. 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] ..."

22. 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.

23. 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 he or she was economically eligible.

24. 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.

25. 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 disparity of the 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."

26. According to the Constitutional Court, those applications for survivor's pensions which were underway at the time of the entry into force of the judgment would be impacted by the declaration of unconstitutionality as long as a final administrative decision had not been handed down yet. The declaration of unconstitutionality also applied to all new applications received after the entry into force of the judgment.

27. Shortly after the entry into force of 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.

28. Some case-law of the Spanish Supreme Court concerning the means of proving the existence of a civil partnership after Law 40/2007 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) ..."

THE LAW

I. THE APPLICANT'S COMPLAINT AND ITS LEGAL CLASSIFICATION

29. The applicant complained of the refusal of the authorities to grant her a survivor's pension. She considered that the authorities failed to have regard to the objective impossibility for her to comply with a formal registration requirement which did not apply to her case prior to a 2014 judgment of the Constitutional Court. She further stated that the impugned refusal amounted to discrimination in respect of surviving members of partnerships whose partners had died before the Constitutional Court judgment or more than two years after the delivery of that judgment. She invoked Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 to the Convention.

30. The Court, being the master of characterisation to be given in law to the facts of the case, considers that this complaint falls to be examined under Article 1 of Protocol No. 1 to the Convention taken alone. That provision reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

II. ADMISSIBILITY

A. The parties' submissions

1. The Government

31. According to the Government, the applicant's 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.

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

33. As to the first part of their objection, the Government held that the applicant had lodged an appeal against the INNS's decision to dismiss her application for a pension (and further appeals after that), when she should have known that the decision had been based on the new requirement provided by Constitutional Court judgment STC 40/2014, which she 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 she 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 her right to a pension.

34. Concerning the second part of their objection, the Government considered that the complaint made by the applicant in her application was one about alleged discrimination under Article 14 in conjunction with Article 1 of Protocol No. 1 and noted that at no point in the domestic proceedings, save the proceedings before the Constitutional Court, had the applicant complained of a breach of the principle of equality and non-discrimination.

2. The applicant

35. The applicant held that she had had a legitimate expectation of receiving a survivor's pension and that, as a result, Article 1 of Protocol No. 1 to the Convention was applicable to her complaint.

36. The applicant contested the Government's objections about an alleged non-exhaustion of domestic remedies. First, she held that the appeals that she had lodged against the decision to reject her application for a pension had constituted the only logical administrative and judicial course of action open to her. She also pointed to other cases where a similar remedy had led to the overturning of an initial refusal by the INSS to grant a pension; therefore, it constituted an effective remedy.

37. As to the second part of the Government's objection, the applicant claimed that she had indeed at the various domestic instances raised the issue of discrimination.

B. The Court's assessment

1. Inadmissibility ratione materiae

38. The Court notes that the question of whether or not the applicant 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 merits of the case; consequently, it should be joined to the merits.

2. Non-exhaustion of domestic remedies

39. 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, §§ 110-111, 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 applicant sought the remedies that were available to her by means of lodging ordinary appeals at the domestic instances. She 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 her the pension.

40. The Court further notes that the Government's second objection concerns Article 14 of the Convention whereas it already found that the applicant's complaints fell to be examined under Article 1 of Protocol No. 1 taken alone (see paragraphs 29-30 above). It does not appear disputed that the applicant invoked, before the domestic courts, the alleged breach of her property rights that she now brings before the Court. 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 applicant did not explicitly mention the right to the peaceful enjoyment of one's possessions in the proceedings at all domestic instances, she did argue that she had been subject to unfair treatment during her efforts to gain access to a pension to which she was entitled, considering that that treatment had violated the principle of legal certainty as well. The Court considers, therefore, that the applicant raised her 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.

41. 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.

III. MERITS

A. The parties' submissions

42. The applicant submitted that Article 1 of Protocol No. 1 to the Convention was applicable in her case because she had had a legitimate expectation of receiving a survivor's pension. The applicant considered that she and her deceased partner had together constituted, under Catalan civil law, a civil partnership. This had been enough to render her eligible (provided that the other requirements were also met) for a survivor's pension should her

partner die. When Constitutional Court judgment STC 40/2014 had introduced a new requirement that partnerships should be formalised, the applicant and her partner had done so: the partnership had been registered. However, her partner had died only a few months after the new legislative regime had come into force, without any prior transitional period. As a result, even if they had in practice deployed all reasonable efforts to comply with the legal criteria, it would still have been impossible for them to comply with the requirement to have their partnership registered two years prior to the death of one of the partners in order for the other partner to become eligible for a survivor's pension. She insisted that she and her partner had been willing to comply with the requirements (and they had complied with most of them), but time had not allowed them to meet them all because her partner had died only four months after the publication of Constitutional Court judgment STC 40/2014.

43. The applicant also pointed out that, in practice, Catalonia's specific register of civil partnerships had not become operational until 1 April 2017 – a significant length of time after the legislative reform enacted by virtue of Constitutional Court judgment STC 40/2014. Hence, it had been *de facto* impossible for the applicant and her partner to formalise their partnership.

44. The applicant held that the legislative regime needed to be interpreted teleologically (that is, bearing in mind the purpose of the law, as it had been envisaged by the legislature). In this regard, it was clear that she and her partner had formed a stable couple, had constituted a civil partnership under Catalan civil law, and had been willing to be recognised as such. The formal requirement to register the partnership by means of a notarial deed had to be interpreted flexibly, given that it was impossible to comply with the two-year waiting period in cases such as her own, where the partnership had not needed to be registered for most of their time together (when it had become necessary, the partners had proceeded to register it, but one of them had died shortly thereafter.) The domestic courts' application of the new requisite had been, under the applicant's view, disproportionate and, to some extent, discriminatory (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 after 11 April 2016 -two years after that date-.)

45. The Government considered, firstly, that Article 1 of Protocol No. 1 to the Convention was not applicable to the present case. In their view, the fact that the applicant's partner's death had taken place after the Constitutional Court had amended the rules governing access to a survivor's pension had had a clear and undisputable consequence: she had not met the eligibility criteria in respect of obtaining a survivor's pension. As a result, she could not have had, as she had asserted, a "legitimate expectation" of

obtaining a possession in the sense in which the Court had repeatedly defined this concept under Article 1 of Protocol No. 1. The Government submitted that Constitutional Court judgment STC 40/2014 had brought about a regulatory change, and that the Court had consistently stated that future income was not part of the concept of a "possession" (they cited, *inter alia*, *J.B. and others v. Hungary*, no. 45434/12 45438/12 375/13, 20 December 2018; *Ral v. Poland*, no. 41178/12, 10 January 2019; and *Bladh v. Sweden*, no. 46125/06, 10 November 2009).

46. The Government also stated that, should the Court consider that the applicant's mere hope of obtaining a survivor's pension had amounted to a "legitimate expectation" of obtaining a possession, the deprivation of such a possession would have been justified by reasons of general interest. In particular, they insisted that the legislative amendment prompted by Constitutional Court judgment STC 40/2014 had been introduced in order to render void a previous provision that had been discriminatory and unconstitutional. Therefore, the applicant had not been deprived of a right; rather, she had been prevented from gaining an unfair advantage over the rest of the population, who (following the entry of Law 40/2007 into force) had been under the requirement to formally register their partnership two years prior to the death of one of the partners in order for the surviving partner to be eligible to receive a survivor's pension.

47. Lastly, the Government pointed out that having to formally register a partnership two years prior to the death of one of the partners in order for the surviving partner to obtain social benefits could not be considered to constitute an "excessive burden" for the purposes of Article 1 of Protocol No. 1. This requirement had been in place for years in respect of all other unmarried couples in Spain; before that, it had been required to enter the state of wedlock in order subsequently to become eligible for a survivor's pension. The Government also noted that marriage had always been a possibility for the applicant and her partner, but that they had chosen not to take that option either. Moreover, the Government held that there had not been any discriminatory treatment.

B. The Court's assessment

1. General principles

48. The Court reiterates that although Article 1 of Protocol No. 1 does not create a right to acquire property (see *Béláné Nagy v. Hungary* [GC], no. 53080/13, § 74, 13 December 2016, *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).

49. 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).

50. 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; *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).

51. 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 *Richardson v. the United Kingdom (dec.),* no. 26252/08 , § 17, 10 April 2012, and *Béláné Nagy*, cited above, § 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).

52. 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).

53. 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 and *Beeler*, cited above, § 57). Such are the demands of legal certainty and the rule of law, which belong to the core values imbuing the Convention (ibid., § 89).

54. 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.), nos. 45312/11, 45581/11, 45583/11, 45587/1 and 45588/11, § 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).

55. 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).

56. 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).

57. 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*, 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).

2. Application of the above principles to the present case

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

58. The Court acknowledges that the moment at which the legislation should be assessed in order to verify whether the applicant complied with the requirements to become eligible for a survivor's pension was, in principle, the date on which her partner died – 25 July 2014 (the trigger event). Under the relevant legislation, as in force at that specific moment, she needed to

have been formally registered as being in a civil partnership in a specific register or by means of a notarial deed for two years. However, she and her partner only formalised their partnership three days before he died.

59. Notwithstanding the above, the Court considers that, in the present case, the crux of the applicant's claim is that, in the case of her partner's death, she met the requirements of eligibility for the survivor's pension before the Constitutional Court's judgment, when her partner still lived; and that the imposition of a more stringent formal requirement by the Constitutional Court without any adequate transitional provisions was disproportionate in the light of all the circumstances of the case.

60. The Court observes, in this regard, that the survivor's pensions in Spain have a contributory nature; they are not based on social solidarity. They are awarded, under certain criteria, to the surviving spouses or civil partners of workers who have contributed for a minimum number of years to the Social Security system and who die before they get to receive a retirement pension (also of a contributory nature) or while they are already entitled to it. The amount of the pension is calculated based on the income of the deceased person who had been a worker. The percentage is calculated on the basis of the beneficiaries' economic situation (taking into account their overall annual income, whether they have dependent children or disabled adults under their care, whether the pension is the primary or sole source of income, etc.).

61. For the Court, the fact that the applicant and her partner met the other legal requirements – namely, uninterrupted cohabitation of more than five years prior to the death of the partner (they also had a child in common) – and the economic criteria before the Constitutional Court's judgment of 11 March 2014 came into force is relevant in the case at hand. The requirement to formalise their civil partnership was only introduced three months before the death of her partner, and they did proceed to register the partnership within a reasonable time. Despite that, when her partner died, two years had not yet elapsed. The question whether the applicant had a legitimate expectation, satisfying the criteria in the Court's case-law, at the time of the entry into force of the new legislation in March 2014 cannot be answered solely on the basis of that legislation. As the Court has already stated, the underlying reason for such an assertion is that the principles which exclude the finding of an interference where the person concerned ceases to satisfy the legal conditions laid down in domestic law cannot be mechanically applied to situations where the complaint specifically concerns the very change in the legal conditions that is at issue (see *Béláné Nagy*, cited above, § 98).

62. On the basis of the above, it can be said that prior to the change operated by the Constitutional Court's judgment, the applicant was entitled to a survivor's pension and, moreover, could legitimately rely on her obtaining such a pension, in the event of her partner's death. Until April 2014, the registration of the couple in a public registry or in a notarial deed was not mandatory to be considered a civil partnership and therefore, she was

fulfilling both the Catalan civil law concerning civil partnerships and the Spanish law concerning the eligibility for survivors of civil partnerships to a survivor's pension. And even after the entry into force of the new requirement in April 2014, she and her partner did try to fulfil it: they registered their partnership (first step) but simply could not entirely meet the two year period requirement (second step) because her partner died in July 2014.

63. Therefore, this change effectively imposed on a certain category of persons, including the applicant, 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 requirement entered into force – a combination of elements ultimately difficult to reconcile with the rule of law (ibid., § 99). The removal of the entitlement to a survivor's pension as a consequence of the absence of a transitory period following the Constitutional Court's judgment is the interference complained of in the present case and cannot serve to exclude the very applicability of the guarantees of Article 1 of Protocol No. 1. The Court points out at this juncture that the Convention is intended to guarantee rights that are "practical and effective" rather than theoretical and illusory (see *Perdigão v. Portugal* [GC], no. 24768/06, § 68, 16 November 2010).

64. The Court therefore concludes that, in this particular case, the applicant could have entertained a "legitimate expectation" that she was eligible for a survivor's pension.

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

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

66. The refusal of the applicant's application for a survivor's pension must be regarded as an interference with her right to the peaceful enjoyment of her 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).

67. 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 applicant's case (where the pension was applied for before the entry into force of this legislation but was not granted by any final decision). Those measures fall to be examined under the "control of property" rule of Article 1 of Protocol No. 1.

68. 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 applicant 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.

69. 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.

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

71. In the case 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 eligibility for a survivor's pension for unmarried couples; that change introduced a new legal requirement that objectively could not be met by the applicant: although she and her partner promptly formalised their partnership (as required by the new legislation), he died before two years had elapsed, and neither the Constitutional Court nor the legislature provided for any transitional period for such cases.

72. The Court is not satisfied that the legal reform had been foreseeable for persons in the same situation as the applicant. The fact that a question of constitutionality was presented by the Supreme Court to the Constitutional Court in 2012 cannot be considered a warning that the legislation would change, and more specifically, that it would change in this regard (eliminating the previous differences between Autonomous Communities) and especially, that it would not establish a transitional period to introduce that change. The press does not generally publicise the questions of constitutionality that are presented by other courts to the Constitutional Court, and in any event, the outcome of the question could not be anticipated in 2012, or at any point before 10 April 2014.

73. The Court recognises that the requirements for having access to a survivor's pension changed before the applicant became eligible for that benefit (see the above-cited cases of *Richardson*, § 17, and *Béláné Nagy*, § 86). However, as noted above, prior to this change in April 2014 the applicant was eligible in case of death of her partner. The Court also observes that, according to Constitutional Court judgment STC 40/2014 (see paragraph 25 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". The declaration of unconstitutionality prompted by Constitutional Court judgment STC 40/2014 stated that the new requirement that couples subject to Catalan civil law should formalise their respective partnerships

would pertain only to new applications or to those in respect of which a final decision had not yet been handed down; the applicant's case fell among such cases. 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.

74. What is more, the authorities did not establish the necessary measures to avoid that people who had until 10 April 2014 complied with the necessary requirement became, unforeseeably, prevented from being eligible to the pension. The Court observes that some Spanish courts did apply the essential general legal principle of *ad impossibilia nemo tenetur* (no one may be obliged to do the impossible), exempting other applicants who were affected by the legal reform of 2007 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 was considered impossible in cases where death had occurred prior to the expiry of this two-year period (see various examples in paragraph 28 above). Following the entry into force of the Constitutional Court's judgment published on 10 April 2014, the applicant was placed in a comparable situation. However, the courts did not follow the above interpretation in her case and did not uphold her arguments that the condition was impossible for her to meet and she should have therefore been exempted from it. For the Court, this element undermined further the applicant's ability to foresee how the new requirement would impact her case in practice.

75. 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 applicant's argument that survivor pensions are significantly more often awarded to women, who are 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.

76. The Court reiterates that, in assessing compliance with Article 1 of Protocol No. 1, it must carry out an overall examination of the various interests in issue (see *Perdigão v. Portugal* [GC], no. 24768/06, § 68, 16 November 2010), bearing in mind 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 encompass the conduct of the parties, including the means employed by the State and their implementation.

77. The requirement to formalise a partnership at least two years before the death of one of the partners in order for the other partner to be eligible for a survivor's pension is in reality an additional safeguard that enables the public authorities to prevent fraud and to ensure that survivor's pensions are only allocated in accordance with their intended purpose – namely, to protect the vulnerable member of a stable couple, who was economically dependent on the person who has died. The Court already noted that, prior to the Constitutional Court's judgment, the applicant and her partner had been living together uninterruptedly for more than eight years, they had a child in common, and in the light of their economic situation, the applicant had a legitimate basis for assuming that she would be eligible for a survivor's pension in the event of her partner's death. It has not been alleged that the fact that they formalised their relationship only three days before her partner died could be taken as an indication of fraud. The three months that it took the applicant and her partner to comply with the new legal requirement cannot be seen as unreasonable.

78. Moreover, the Court does not find a basis to consider that the applicant and her partner were required to pre-emptively formalise their partnership by means of a public document from the moment when the admissibility of the question of unconstitutionality was published on 21 May 2012, as that 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 (only three months before the applicant's partner died) that the new requirement came into force. The Government's argument that the applicant and her partner 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 applicant could legitimately rely on that legal regime. Therefore, the relevant test is whether the application of the formal requirement that registration must pre-date death by two years without providing for a two-year transitory period to allow interested persons to comply was justified by compelling reasons of general interest and whether it imposed an excessive burden on the applicant.

79. 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 for unmarried couples to make adequate arrangements to respond to the impending change to their eligibility for a potential survivor's pension 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 applicant. 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 applicant and people in the same category of persons to be able to comply with the requirements within a reasonable period and not become immediately prevented from being eligible for the pension.

80. As for the second step of the test, the lack of any transitional period in which to comply with the new requirements resulted in practice in the applicant being prevented, once and for all, from obtaining a survivor's pension (see *Kjartan Ásmundsson*, cited above, § 45) which she could have legitimately expected to benefit from. The applicant was not given the possibility to comply with the new requirement, since it was not known in advance. The requirement to formalise the partnership at least two years before the death of one of the partners simply turned out to be, in the applicant's case, one of impossible observance.

81. 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. The Court considers that the applicant should not have been obliged to "do the impossible" to be eligible for the survivor's pension, or alternatively, to be altogether prevented from obtaining it. While Contracting States enjoy a wide margin of appreciation in the choice of measures governing pensions and in correcting previous unequal treatment in such matters, it is important to note that no particular urgency justifying a refusal to envisage a transitional regime, taking due account of existing legitimate expectations, appears to have existed in the particular circumstances of the present case. Therefore, the otherwise legitimate aim of the impugned measures cannot, in the Court's view, justify the absence of transitional arrangements corresponding to the particular situation in cases such as that of the applicant (see the above-cited cases of *Moskal*, §§ 74 and 76, and *Béláné Nagy*, § 124), such absence entailing as it did the consequence of depriving the applicant of her legitimate expectation that she would receive survivor's benefits. Such a fundamental interference with the applicant's rights is disproportionate and inconsistent with preserving a fair balance between the interests at stake (see, *mutatis mutandis*, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 43, Series A no. 332).

82. There has been therefore a violation of Article 1 of Protocol No. 1 to the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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."

84. The applicant did not make any claims in respect of just satisfaction regarding pecuniary and/or non-pecuniary damage or costs and expenses.

85. The Court accordingly does not make any award in respect of just satisfaction.

86. The Court considers in any event that the most appropriate form of redress for a violation of Article 1 of Protocol No. 1 in a case such as the present one, where the decision-making process by the administrative authorities and the domestic courts is liable to result in the refusal to grant the applicant a survivor's pension, would be to ensure that the applicant, as far as possible, is put in the position in which he 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".

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;

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

Done in English, and notified in writing on 26 January 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Elósegui and Šimáčková;
(b) joint dissenting opinion of Judges Ravarani, Ranzoni and Guyomar.

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 applicant's 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 applicant's argument that there has been a violation of the prohibition of discrimination (Article 14 of the Convention) in respect of her 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. According to data from 2017, it is likely that within about twenty 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 applicant had met the substantive requirements for a grant of a survivor's pension before those requirements changed. She had been cohabitating with her partner for at least five years, had children with him and was economically dependent on him. Most importantly, the applicant was not given an opportunity to comply with the new requirements, since she 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 applicant's 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 where 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 applicant 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. Moreover, the application of Article 14 in conjunction with Article 1 of Protocol No. 1 may be persuasive to those who do not find that Article itself to be applicable in this case in the light of our previous case-law. Indeed, it is precisely the conjunction with Article 14 that extends the applicability of the law in question. The application of Article 14 does not necessarily presuppose a violation of one of the substantive rights guaranteed by the Convention. It is necessary, but it is also sufficient, for the facts of the case to fall within the ambit of one or more Convention Articles. Likewise, the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to secure. It applies also to those additional rights,

falling within the ambit of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see, among many other authorities, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 39, ECHR 2005-X; *Andrejeva v. Latvia* [GC], no. 55707/00, § 80, ECHR 2009; and *Beeler v. Switzerland* [GC], no. 78630/12, § 48, 20 October 2020). Article 14 of the Convention is pertinent if "the subject matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed ..." or if the contested measures are "linked to the exercise of a right guaranteed ..." (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 129, ECHR 2012 (extracts)).

12. We are convinced that this case falls within the ambit of the right to protection of property and that the lack of protection of the rights of the woman concerned is due to her being a part of an under-represented group and to the fact that survivor's pension beneficiaries are overwhelmingly women.

13. It is certainly a good thing that the applicant will ultimately receive her pension. However, she also deserves recognition that she was affected not only in respect of her right to property but also in respect of her right to be treated equally. Not only did she suffer an interference with her property rights; she 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.

JOINT DISSENTING OPINION OF JUDGES RAVARANI, RANZONI AND GUYOMAR

(Translation)

1. We regret that we are unable to follow the majority in finding that there has been a violation of Article 1 of Protocol No. 1 to the Convention in the present case. First of all, we would stress that we are conscious of the difficult situation in which the applicant found herself. We would also point out that, in the judgment delivered on 19 January 2023 in the case of *Domenech Aradilla and Rodríguez González v. Spain* (nos. 32667/19 and 30807/20), we voted in favour of finding a violation of that provision. But in our view Article 1 of Protocol No. 1 is not applicable in the circumstances of the present case.

2. As regards the general principles deriving from the Court's case-law on Article 1 of Protocol No. 1, in particular regarding social benefits, we would refer to the arguments set out in the joint dissenting opinion annexed to the judgment in *Béláné Nagy v. Hungary* ([GC], no. 53080/13, 13 December 2016), with which we very largely agree. The issue at stake here is the notion of "legitimate expectation". It should be pointed out that in order to amount to an interest protected by Article 1 of Protocol No. 1, a "legitimate expectation" must constitute an "asset". According to the Court's settled case-law, an applicant cannot claim such a "legitimate expectation" unless he or she can be said to have a currently enforceable claim that is sufficiently established (see, to that effect, *Kopecký v. Slovakia* [GC], no. 44912/98, §§ 48-49, ECHR 2004-IX). While Article 1 of Protocol No. 1 places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social-security or pension scheme, any such legislation that is in place must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements. However, a conditional claim which lapses as a result of the non-fulfilment of one of the conditions laid down cannot be considered a possession within the meaning of that provision.

3. In the present case the applicant would have qualified for a survivor's pension had her partner died before the Constitutional Court judgment of 11 March 2014, which was published on 10 April 2014 and which introduced an additional condition for entitlement in the form of a requirement for the civil partnership to have been registered at least two years prior to the death of one of the partners. In the present case, the applicant and her partner decided to formalise their union after the adoption of the Constitutional Court judgment and just three days before her partner's death on 25 July 2014. The dispute centred on this new requirement, which not only did the applicant not satisfy but which, owing to the tragic circumstances of the case, could not possibly be satisfied.

4. In finding Article 1 of Protocol No. 1 to be applicable, contrary to the position of the respondent State, the judgment follows a line of reasoning comprising the following steps.

(i) First of all, the judgment acknowledges that, in principle, the date to be taken into account in order to verify whether or not the applicant complied with the requirements to become eligible for a survivor's pension was the date on which her partner died, and that on that date the requirement for the couple's civil partnership to have been registered at least two years before the death of one of the partners was not satisfied (see paragraph 58 of the judgment).

(ii) Next, the judgment notes that the crux of the applicant's claim is that she met the requirements of eligibility for the survivor's pension prior to the Constitutional Court's judgment which resulted in the imposition, without any transitional provisions, of a new, more stringent requirement which was thus to be regarded as disproportionate (see paragraph 59 of the judgment).

(iii) After emphasising the contributory nature of the survivor's pension scheme, the judgment goes on to observe that the applicant met all the other requirements for eligibility, before examining whether, as a result, she could be regarded as having a "legitimate expectation", within the meaning of the Court's case-law, on the date of entry into force of the new rule (paragraphs 60-61).

(iv) The judgment then sets out the core of the majority's reasoning. Firstly, it states, on the basis of all the foregoing considerations, that "it can be said that prior to the change operated by the Constitutional Court's judgment, the applicant was entitled to a survivor's pension and, moreover, could legitimately rely on her obtaining such a pension, in the event of her partner's death" (paragraph 62). After noting, secondly, that "after the entry into force of the new requirement in April 2014, she and her partner did try to fulfil it" (ibid.), the judgment states, thirdly, that "this change effectively imposed on a certain category of persons, including the applicant, 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 requirement entered into force". The judgment infers from this that "in this particular case, the applicant could have entertained a 'legitimate expectation' that she was eligible for a survivor's pension" (paragraph 64), and that Article 1 of Protocol No. 1 is therefore applicable (paragraph 65).

5. In our view, this conclusion is based on a false premise. A distinction needs to be made between the present case and that of *Domenech Aradilla and Rodríguez González* (cited above), in which the applicants' partners had died before the change in the rules resulting from the Constitutional Court judgment. Accordingly, it appears that on that date, and indeed on the date on which the applications for a survivor's pension were submitted, the applicants had a "legitimate expectation" of obtaining the pension, as all the conditions

for eligibility were met, such that the claim could be regarded as currently enforceable. In the present case, by contrast, the applicant's partner died after the new requirement had been introduced. We cannot therefore subscribe to the majority's argument, leading to the finding that Article 1 of Protocol No. 1 is applicable, that the applicant could have entertained a "legitimate expectation" of obtaining the survivor's pension, both before and after the Constitutional Court's judgment. In our view, while the applicant's partner was still alive her hope of qualifying for a survivor's pension in the event of his death did not amount to a currently enforceable claim falling within the ambit of Article 1 of Protocol No. 1. Even though the applicant satisfied all the other requirements, it merely amounted to a prospect of eligibility whose materialisation presupposed the occurrence of the event triggering the claim, namely her partner's death. In other words, at the time of the Constitutional Court's judgment, the applicant simply entertained a hope corresponding to this prospective eligibility for the survivor's pension, and not a "legitimate expectation" of obtaining an asset, which must be more concrete. Furthermore, that judgment, by establishing a new condition of eligibility for a survivor's pension in addition to those that already existed, meant that the applicant's partner's death was not sufficient to crystallise a "legitimate expectation" amounting to a possession within the meaning of Article 1 of Protocol No. 1 in the case of the applicant, who did not satisfy the new condition requiring the civil partnership to have been registered at least two years before the date of death. However strong, seen from the applicant's viewpoint – which we can quite understand – the hope she entertained prior to the Constitutional Court judgment and her feeling of injustice caused by the immediate application of a new, more stringent rule without any transitional arrangements (an injustice which, in a number of countries, could have been remedied on the basis of the authorities' strict liability), we are of the view that the applicant did not at any time have a "legitimate expectation", amounting to an asset, of being eligible for a survivor's pension, either before the judgment of 11 March 2014, when her partner was still alive, or after his death, which occurred after that judgment. What she had was purely and simply a hypothetical claim. While the criteria employed in paragraph 63 of the judgment in order to conclude that a possession existed, and which are echoed in part in the examination of the merits of the complaint (see paragraph 81 of the judgment in particular), seem to us to be relevant in assessing whether or not the interference with the right to the peaceful enjoyment of possessions was proportionate, we believe that they cannot be applied in order to establish the existence of such a possession for the purposes of Article 1 of Protocol No. 1.

6. The situation in the present case cannot be likened to that under consideration in the *Béláné Nagy* judgment (cited above), which already, in our view, defined the scope of application of Article 1 of Protocol No. 1 very broadly. It is more akin to the situation at issue in *Richardson v. the United*

Kingdom ((dec.), no. 26252/08, 10 April 2012), in which the Court held as follows : "Where, however, the person concerned does not satisfy, or ceases to satisfy, the legal conditions laid down in domestic law for the grant of any particular form of benefits or pension, there is no interference with the rights under Article 1 of Protocol No. 1" (§ 17). In those circumstances, finding Article 1 of Protocol No. 1 to be applicable in the present case goes further still and marks a fresh step, which we find regrettable, in the ongoing expansion of the notion of a possession for the purposes of that provision.

7. To conclude, we would point out that the Court has consistently acknowledged the possibility for States to amend social-security legislation in response to societal changes and evolving views on the categories of persons who need social assistance, and also to the evolution of individual situations (see *Wieczorek v. Poland*, no. 18176/05, 8 December 2009), especially as regards the conditions of eligibility for a benefit or pension and the amount thereof. We fear that the approach taken by the majority entails a risk, going beyond the very specific circumstances of the present case, that the protection afforded by Article 1 of Protocol No. 1 may ultimately, through an excessively broad interpretation of its substantive scope, hamper the ability of the competent authorities to reform their social-security systems or amend pensions legislation.