AB 2019/21

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
26 april 2018, nr. 48921/13
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Art. 1 Protocol 1 EVRM. Terugvordering ten onrechte uitgekeerde arbeidsongeschiktheidsuitkering. Inmenging in eigendomsrecht. Fout van de overheid. Good governance. Geen rekening gehouden met de situatie van klaagster. Excessieve en individuele last. Schending eigendomsrecht.

In december 1995 verloor klaagster haar baan en in november 1996 werd een arbeidsongeschiktheidsuitkering toegekend. Deze werd in december 1997 bij besluit verlengd in verband met haar gezondheidstoestand. In maart 2001 werd de uitkering van klaagster stopgezet, waarbij tevens de vanaf juni 1998 ontvangen gelden werden teruggevorderd. Volgens het Bureau Werkgelegenheid had klaagster namelijk slechts twaalf maanden recht gehad op de uitkering. Zodoende moest klaagster het ten onrechte verkregen bedrag van in totaal ongeveer € 2.600 terugbetalen. Klaagster weigerde een betaling in 60 termijnen, zoals werd aangeboden, vanwege haar slechte gezondheidstoestand en het gebrek aan werk en inkomen. Voor de burgerlijke rechter werd zij beschuldigd van ongerechtvaardigde verrijking en werd terugbetaling van de uitkeringssom inclusief rente gevorderd. De staat werd in het gelijk gesteld. Ook in beroep kreeg klaagster geen gelijk.

Op 9 juli 2013 diende klaagster een klacht in bij het EHRM. Zij deed hier een beroep op hetgeen in art. 1 Protocol 1 EVRM is bepaald (hierna: art. 1 EP) in verband met het terugbetalen van de onterecht verkregen arbeidsongeschiktheidsuitkering.

Allereerst gaat het Hof in op de vraag of klaagster een legitieme verwachting had en erop mocht vertrouwen dat de uitkeringsgelden haar daadwerkelijk toekwamen. Volgens het Hof is dit het geval aangezien klaagster niet zelf had bijgedragen aan de situatie en te goeder trouw was. Bovendien stond in het besluit waarbij de uitkering was toegekend niet vermeld dat de aanspraak op een gegeven moment zou komen te vervallen. Daarnaast is van belang dat er daarna drie jaren zijn verstreken alvorens (terugvorderings)actie werd ondernomen door de overheid.

Vervolgens behandelt het Hof de vraag of de beperking van het eigendomsrecht van klaagster kan worden gerechtvaardigd. Volgens het Hof diende de uitspraak van de nationale rechter een legitiem doel, namelijk het tegengaan van ongerechtvaardigde verrijking en het corrigeren van een gemaakte fout. Met betrekking tot de proportionaliteit van de maatregel, merkt het Hof op dat de margin of appreciation bij het implementeren van sociaal beleid in beginsel ruim is. Dit kan echter anders zijn in een geval als het onderhavige waarin de gemaakte fout alleen aan de staat te wijten is. Autoriteiten mogen gemaakte fouten in beginsel herstellen. Klaagster had echter vertrouwd op het besluit dat zij had gekregen en hier geldt dan ook dat bij het herstellen van de fout rekening moet worden gehouden met haar belangen. In dit kader acht het Hof van belang dat zij de autoriteiten niet had misleid met betrekking tot haar omstandigheden en dat zij nooit op de hoogte was gesteld van het feit dat de uitkering maar maximaal een jaar kon worden uitgekeerd. Daarnaast hadden de autoriteiten de uitkering jarenlang doorbetaald, waardoor klaagster een legitieme verwachting had dat die uitbetaling rechtens was. Tegelijkertijd hadden de autoriteiten nagelaten om tijdig en op een adequate en consistente manier te handelen. Hoewel de fout volledig bij het Bureau Werkgelegenheid lag, werd klaagster geacht de volledige som aan uitkeringsgelden terug te betalen. Hierbij was geen rekening gehouden met haar slechte gezondheidstoestand, haar financiële situatie en het feit dat de uitkering haar bestaansminimum garandeerde.

Het Hof concludeert dan ook dat sprake was van een excessieve, individuele last, in strijd met art. 1 EP en dat het niet nodig is de klacht over art. 8 EVRM te onderzoeken. Het kent een vergoeding van immateriële schade toe van € 2.600, evenals een vergoeding van € 2.130 voor de gemaakte kosten.

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The law

I. Alleged violation of Article 1 of protocol 1 to the Convention

44. The applicant complained that the Rijeka County Court's judgment of 25 February 2009 ordering her to repay HRK 19,451.69 with interest to the Rijeka Employment Bureau had resulted in her being deprived of her possessions. She relied on Article 1 of Protocol 1 to the Convention, which reads:

> "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."

A. Scope of the case

45. As to the scope of the case, the Court considers it appropriate to point out at the outset that the applicant's communicated complaint does not concern the Employment Bureau's decision to terminate her entitlement to unemployment benefits and administrative proceedings related to that decision. Rather, it refers to the domestic civil courts' judgments which characterized the amounts she had received after her right to employment benefits ceased as unjust enrichment and obliged her to repay that money together with interests to the State.

46. The Court notes, however, that the administrative proceedings concerning the applicant's right to unemployment benefits ran in part concurrently with the civil proceedings for unjust enrichment instituted against her by the State. The administrative proceedings were terminated by the Constitutional Court's decision of 19 December 2012. At that point, the civil proceedings were still ongoing and were finally concluded by the Constitutional Court's decision of 14 March 2013, served on the applicant on 27 March 2013. The two proceedings were to a certain extent interrelated. In the administrative proceedings, her right to receive the employment benefits was terminated retroactively. However, no final court decision as to whether the applicant was obliged to return the payments made to her after the date when her right to unemployment benefits ceased was adopted in these proceedings since the issue of unjust enrichment falls under the jurisdiction of civil courts (see paragraph 18 above). Only after the civil proceedings were finally concluded was the applicant's position as to her obligation to repay the money she had received finally decided at national level.

47. Thus, in order to assess whether the applicant's obligation to repay the State the money she should not have received satisfied the requirements of Article 1 of Protocol 1 the Court must look at all circumstances surrounding that issue.

B. Admissibility

1. The parties' submissions

48. The Government argued that the applicant had not had a 'possession' within the meaning of Article 1 of Protocol 1 to the Convention, because the amount she had been ordered to pay back had been the possession of the State. Further to this, section 25(1)(2) of the Employment Act had been publicly available, clear and precise, and the applicant should have been aware that, upon the expiry of the twelve-month period, her right to unemployment benefits would end. In addition, the applicant could not have had 'legitimate expectations' of keeping those amounts.

49. The applicant argued that she had received the unemployment benefits on the basis of the Rijeka Employment Bureau's final decision of 27 June 1997.

2. The Court's assessment

(a) General principles

50. The Court reiterates at the outset that the concept of 'possessions' referred to in the first part of Article 1 of Protocol 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision (see, among many authorities, *Iatridis/Greece* [GC], 31107/96, § 54, *ECHR* 1999-II, and *Depalle/France* [GC], 34044/02, § 62, *ECHR* 2010).

51. Although Article 1 of Protocol 1 applies only to a person's existing possessions and does not create a right to acquire property in certain circumstances a 'legitimate expectation' of obtaining an asset may also enjoy the protection of Article 1 of Protocol 1 (see, among many authorities, *Anheuser-Busch Inc./Portugal* [GC], 73049/01, § 65, *ECHR* 2007-I; and *Béláné Nagy/Hungary* [GC], 53080/13, § 74, *ECHR* 2016).

52. 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. The hope that a long-extinguished property right may be revived cannot be regarded as a 'possession'; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition. Further, 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. The mere fact that a property right is subject to revocation in certain circumstances does not

prevent it from being a 'possession' within the meaning of Article 1 of Protocol 1, at least until it is revoked (see *Béláné Nagy*, cited above, § 75; *Beyeler/Italy* [GC], 33202/96, § 105, *ECHR* 2000-I; and *Krstić/Serbia*, 45394/06, § 83, 10 December 2013).

53. The Court recalls that in each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol 1 (see *Depalle*, cited above, § 62, with further references).

(b) Application of these principles in the present case

54. The question whether the circumstances of the present case come within the scope of application of Article 1 of Protocol 1, i.e. whether the applicant's right to peaceful enjoyment of her possessions is engaged, must be assessed with a view to the fact that between 10 June 1998 and 27 March 2001 the applicant had received payments on the basis of an administrative decision granting her unemployment benefits (see paragraph 10 above). In other words, the competent administrative authority had made regular disbursements of money (cash), which the applicant had obtained the effective enjoyment of in reliance on the underlying administrative decision in her favour. Subsequently, however, the domestic courts made a finding to the effect that the payments had taken place without a legal basis and ordered the applicant to refund the respective amounts as unjust enrichment (see paragraph 27 above). The Court therefore finds that the issue of whether Article 1 of Protocol 1 is applicable ratione materiae should be analysed by considering whether, under those specific circumstances, the applicant can be said to have had a legitimate expectation, within the autonomous meaning of the Convention, of being able to retain the funds already received as unemployment benefits without her entitlement to those past disbursements being called into question retrospectively.

55. The Court notes that the grant of the benefit in question depended on various statutory conditions, the assessment of which was the sole responsibility of the social security authority. In the present case, the competent authority had taken a decision to extend the applicant's entitlement to unemployment benefits (see paragraph 10 above) and subsequently continued to make the respective payments beyond the date on which such an entitlement was, according to the applicable statutory limit, due to expire.

56. In this respect, the Court considers that an individual should in principle be entitled to rely on the validity of a final (or otherwise enforceable) administrative decision in his or her favour, and on the implementing measures already taken pursuant to it, provided that neither the beneficiary nor anyone on his or her behalf has contributed to such a decision having been wrongly made or wrongly implemented. Thus, while an administrative decision may be subject to revocation for the future (*ex nunc),* an expectation that it should not be called into question retrospectively (*ex tunc)* should usually be recognised as being legitimate, at least unless there are weighty reasons to the contrary in the general interest or in the interest of third parties (compare *Kopecký/Slovakia* [GC], 44912/98, § 47, *ECHR* 2004-IX; *Pressos Compania Naviera S.A. and Others/Belgium*, 20 November 1995, §§ 34 and 39, Series A 332).

57. The Court has held that, as a rule, a legitimate expectation of being able to continue having peaceful enjoyment of a possession must have a 'sufficient basis in national law' (see ibid., § 52; see also *Depalle*, cited above, § 63). It has, however, also held that the fact that the domestic laws of a State do not recognise a particular interest as a 'right' is not always decisive, in particular in circumstances where the lapse of time justifies concluding that the individual's interest in the 'status quo' had become vested in a sufficiently established manner for being recognised as capable of engaging the application of Article 1 of Protocol 1 (see, *mutatis mutandis, Depalle*, cited above, § 68).

58. In the present case, the Court considers that although the domestic courts found that as a matter of domestic law, the applicant had no protection against the authorities' reclaim of the funds already received, which according to them constituted unjust enrichment (see paragraph 27 above), several circumstances speak in favour of recognising the applicant's legal position as protected by a 'legitimate expectation' for the purposes of the application of Article 1 of Protocol 1.

59. Firstly, there is no indication or even allegation that the applicant had in any way contributed to the impugned situation, namely that the disbursement of the benefits had been continued beyond the applicable statutory time-limit. The Government accepted that payment of the unemployment benefits beyond the prescribed time-limit was the sole responsibility of the authorities (see paragraph 70 below).

60. Secondly, the applicant's good faith in receiving the contested unemployment benefits is not contested.

61. Thirdly, the administrative decision in reliance on which the applicant had received the payments had not contained any express mention of the fact that under the relevant

statutory provisions the entitlement would expire on a certain date, i.e. after twelve months.

62. Fourthly, there was a long lapse of time, amounting to over three years, after the expiry of the statutory time-limit during which the authorities failed to react while continuing to make the monthly payments.

63. The Court finds that these circumstances were capable of inducing in the applicant a belief that she was entitled to receive those payments (compare *Chroust/the Czech Republic* (dec.), 4295/03, 20 November 2006).

64. Moreover, the Court considers that, taking into account in particular the nature of the benefits as current support for basic subsistence needs, the question of whether the situation was capable of giving rise to a legitimate expectation that the entitlement was duly in place must be assessed with a view to the situation prevailing at the time when the applicant was in receipt of the payments and consumed the proceeds. The fact that the administrative courts subsequently established that the payments had taken place without a legal basis in domestic law is under these circumstances not decisive from the point of view of determining whether at the time when the payments were received for the purpose of covering the applicant's living costs she could entertain a legitimate expectation that her presumed entitlement to those funds would not be capable of being called into question retrospectively (see, *mutatis mutandis, Pine Valley Developments Ltd and Others/ Ireland*, 29 November 1991, § 51, Series A 222; and *Stretch/the United Kingdom*, 44277/98, § 35, 24 June 2003).

65. The Court therefore concludes that in the circumstances of the present case, the applicant had a legitimate expectation of being able to rely on the payments she had received as rightful entitlements and that Article 1 of Protocol 1 is applicable *ratione materiae* to her complaint.

3. Conclusion as to the admissibility

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

C. Merits

1. The parties' submissions

(a) The applicant's submissions

67. The applicant alleged that the Rijeka Employment Bureau had adopted a decision granting her unemployment benefits 'until further notice'. Moreover, on 26 May 1999, that is one year after her right to unemployment benefits had allegedly ceased, the Rijeka Employment Bureau had provided her with an 'unemployment benefit card', which had stated that she was entitled to unemployment benefits until 31 December 2010. She alleged that she had had no reason to doubt that the payments were legitimate. In her opinion, she had received the unemployment benefits legally, and there was no legal basis for repaying the amount at issue, as had been established by the Rijeka Municipal Court. Moreover, section 211 of the Civil Obligations Act had been totally disregarded by the courts (see paragraph 43 above). The Rijeka Employment Bureau had known that she would not be entitled to the unemployment benefits after 10 June 1998, because it had stated that in its decision of 27 March 2001. Therefore, the Rijeka Employment Bureau had not retained its right to seek reimbursement.

68. As to the Government's allegations that she had failed to respond to the Rijeka Employment Bureau's proposals regarding repayment of the amount due in sixty instalments, the applicant argued that this was not true, because it could be seen from the documents she had submitted to the Court that she had replied and informed the Rijeka Employment Bureau about her difficult economic and health situation. In this connection, the applicant maintained that dividing the burden between the Rijeka Employment Bureau, whose negligence and misconduct had created the situation, and herself, an unemployed person with no income and in poor health, would not be fair, and would impose a burden on her as a result of the State organ's error.

(b) The Government's submissions

69. The Government argued, were the Court to find that the applicant had possession, that the interference with the applicant's rights under Article 1 of Protocol 1 was lawful. The judgment ordering the applicant to repay the unemployment benefits had had its legal basis in section 210 of the Civil Obligation Act, which had been clear, foreseeable and publicly available. Further to this, it had been in the general interest for the unduly received benefits to be paid back.

70. In conclusion, the Government stated that depriving the applicant of the amount at issue had been necessary for the protection of State's finances and the principle of rule of law, and had not imposed an excessive individual burden on her because she had been not entitled to this amount. They pointed out that, just as it could not be expected that the mistakes of the State would be remedied at the expense of

citizens, it was not fair to allow the unlawful acquisition of property by citizens as a result of those mistakes. In this context, the Government pointed out that the Rijeka Employment Bureau had been fully aware of its own mistake. That is why the Rijeka Employment Bureau had proposed an agreement whereby the applicant would repay the amount due in sixty individual instalments, in order to share the burden of the situation. However, the applicant had failed to respond to this proposal. In view of the foregoing, the Government were of the opinion that there had been no violation of the applicant's rights protected by Article 1 of Protocol 1 to the Convention.

2. The Court's assessment

(a) As regards the issue of the existence of an interference

71. The Government does not contest that the impugned judgment adopted in the civil proceedings against the applicant amounted to an interference with her rights under Article 1 of Protocol 1, and the Court sees no reason to hold otherwise.

72. In the circumstances of the present case, the Court considers that the applicant's complaint should be examined under the general rule enunciated in the first sentence of the first paragraph of Article 1 of Protocol 1, especially as the situations envisaged in the second sentence of the first paragraph and in the second paragraph are only particular instances of interference with the right to peaceful enjoyment of property as guaranteed by the general rule set forth in the first sentence (see *Beyeler*, cited above, § 106; and *Perdigão/Portugal* [GC], 24768/06, § 62, 16 November 2010). The Court will now assess whether that interference was prescribed by law, whether it pursued a legitimate aim, and whether there was a reasonable relationship of proportionality between the means employed and the aim pursued (see *Broniowski/Poland* [GC], 31443/96, §§ 147–151, ECHR 2004-V).

(b) Whether the interference was based in law

73. The Court reiterates that any interference by a public authority with the peaceful enjoyment of possessions must be lawful. In particular, the second paragraph of Article 1 of Protocol 1, while recognising that States have the right to control the use of property, subjects their right to the condition that it be exercised by enforcing 'laws'. Moreover, the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see, *Konstantin Stefanov/Bulgaria*, 35399/05, § 54, 27 October 2015).

74. The parties' views differed as to whether the interference with the applicant's property right was lawful (see paragraphs 49 and 68 above).

75. The Court notes that the Rijeka County Court's judgment relied on section 210 of the Civil Obligations Act related to unjust enrichment (see paragraphs 28 and 44 above). However, it did not give any explanation as to why section 55 of the Employment Mediation and Unemployment Rights Act was not to be applied in the applicant's case since that rule appears to be a more specific one as regards the applicant's situation. That provision obliged an unemployed person granted an allowance to which he or she had not been entitled to pay this back if it had been granted on the basis of false or inaccurate data which he or she had known to be false or inaccurate, or if it had been granted in some other unlawful manner (see paragraph 41 above). This question can nevertheless be left open, as in the present case it is more essential to decide on the proportionality of the interference.

(c) Whether the interference pursued a legitimate aim

76. The Court reiterates that the domestic Court's judgment in this case was based on the general rules of civil law governing unjust enrichment and not on the legislation governing unemployment benefits. The Court considers therefore that the interference pursued a legitimate aim since it is in the public interest that property received on a basis which does not exist or which has ceased to exist should be returned to the State. In particular, the interference was aimed at correcting a mistake of the social security authority.

(d) Whether the interference was proportionate

77. The Court must examine whether the interference struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the applicant's right to the peaceful enjoyment of her possessions, and whether it imposed a disproportionate and excessive burden on the applicant (see, among other authorities, *Béláné Nagy*, cited above, § 115).

78. 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 (ibid., § 113). However, that margin may be narrower in cases

such as the present one, where the mistake is attributable solely to the State authorities.

79. The Court has held, in the context of the discontinuation of a social benefit, that bearing in mind the importance of social justice, public authorities should not be prevented from correcting their mistakes, even those resulting from their own negligence. Holding otherwise would be contrary to the doctrine of unjust enrichment. It would also be unfair to other individuals contributing to the social security fund, in particular those denied a benefit because they failed to meet the statutory requirements. Lastly, it would amount to sanctioning an inappropriate allocation of scarce public resources, which in itself would be contrary to the public interest (see *Moskal/Poland*, 10373/05, § 73, 15 September 2009).

80. The present case, however, stands to be distinguished from the situation prevailing in *Moskal*, because unlike the latter case, what is at issue now is not the discontinuation of the applicant's unemployment benefit but an obligation imposed on her to repay benefits already received in reliance on an administrative decision. In the present context, it is therefore more pertinent to recall the Court's case-law to the effect that mistakes solely attributable to State authorities should in principle not be remedied at the expense of the individual concerned, especially where no other conflicting private interest is at stake (see, *mutatis mutandis, Platakou/Greece*, 38460/97, § 39, *ECHR* 2001-I; *Radchikov/Russia*, 65582/01, § 50, 24 May 2007; *Freitag/Germany*, 71440/01, §§ 37–42, 19 July 2007; *Gashi*, cited above, § 40; and *Šimecki/Croatia*, 15253/10, § 46, 30 April 2014). The Court has also held that where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see *Tunnel Report Limited/France*, 27940/07, § 39, 18 November 2010, and *Zolotas/Greece (2)*, 66610/09, § 42, ECHR 2013 (extracts)).

81. In assessing compliance with Article 1 of Protocol 1, the Court must carry out an overall examination of the various interests in issue (see *Perdigão*, cited above, § 68), bearing in mind that the Convention is intended to safeguard rights that are 'practical and effective' (see, for example, *Chassagnou and Others/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 *Broniowski*, cited above, § 151; *Hutten-Czapska/Poland* [GC], 35014/97, § 168, ECHR 2006-VIII; and *Zammit and Attard Cassar/Malta*, 1046/12, § 57, 30 July 2015). That assessment may involve the conduct of the parties, including the means employed by the State and their implementation. In that context, it should be stressed that uncertainty — be it legislative, administrative or arising from practices applied by the authorities — is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see *Tunnel Report Limited/France*, 27940/07, § 39, 18 November 2010, and *Zolotas/Greece (2)*, 66610/09, § 42, ECHR 2013 (extracts)).

82. As to the applicant's conduct, the Court notes that the applicant has not been alleged to have contributed to the receipt of benefits beyond her legal entitlement by false submissions or other acts which would not have been in good faith.

83. As the competent authority had taken a decision in the applicant's favour and continued to make the respective payments, the applicant had a legitimate basis for assuming that the payments received were legally correct. While it is true that section 25 of the Employment Act clearly provides that a woman employed for less than twenty-five years has the right to unemployment benefits in respect of a temporary incapacity to work, for a maximum period of twelve months (see paragraph 41 above), the decision issued to the applicant had not contained any express mention of that time-limit, and the applicant was thus not put on notice of it. Moreover, given that two additional years of service had been entered into the applicant's employment book (see paragraph 11 above), it appears that she, as an unqualified worker, was not without grounds for believing that she met the requirements set out in section 23(3) of the Employment Act (see paragraph 40 above). Under these circumstances, the Court does not find it reasonable to conclude that the applicant was required to realise that she was in receipt of unemployment benefits beyond the statutory maximum period.

84. As to the conduct of the authorities, the Court notes at the outset that, in the context of property rights, particular importance must be attached to the principle of good governance. In the instant case, the Court considers that the authorities failed in their duty to act in good time and in an appropriate and consistent manner (see *Moskal*, cited above, § 72).

85. It is established that the Rijeka Employment Bureau made a mistake when it did not define the period during which the applicant was entitled to further unemployment benefits in its decision of 27 June 1997. That mistake was

further perpetuated when unemployment benefits were paid to the applicant for a period of almost three years following the expiry of the maximum period set out in section 25(2)(1) of the Employment Act.

86. The Court also notes that, even though the unemployment benefit payments which the applicant should not have received were entirely the result of an error of the State, the applicant was ordered to repay the overpaid amount in full, together with statutory interest. Therefore, no responsibility of the State for creating the situation at issue was established, and the State avoided any consequences of its own error. The whole burden was placed on the applicant only.

87. The Court acknowledges that the applicant was offered to repay her debt in sixty instalments. However, the fact remains that the sum the applicant was ordered to repay to the State which included the statutory interests as well represented a significant amount of money for her given that she was deprived of her only source of income at the same time as well as her overall financial situation (see paragraphs 15, 24 and 31 above).

88. As to the applicant's personal situation, the Court notes that the sum she received on account of unemployment benefits is a very modest one and as such has been consumed for satisfying the applicant's necessary basic living expenses, that is to say for her subsistence.

89. The national courts in deciding on unjust enrichment did not take into consideration the applicant's health and economic situation. She has been suffering from a psychiatric condition since 1993 and has become incapable of working. She has been unemployed for a long period of time, since 1995. At the time her employment was terminated as a result of her employer becoming insolvent she was only two months short of qualifying for unemployment benefits until next employment or retirement under Section 23 of the Employment Act (see paragraphs 6 and 40, see also *mutatis mutandis Béláné Nagy*, cited above, § 123). The information from the enforcement proceedings suggests that she has no bank accounts, no income of any sort, and no property of any significance. In these circumstances paying her debt even in sixty instalments would put at risk her subsistence.

90. In view of the above considerations, the Court finds that under the circumstances of the present case, the requirement imposed on the applicant to reimburse the amount of the unemployment benefits paid to her in error by the competent authority beyond the statutory maximum period entails an excessive individual burden on her.

91. It follows that there has been a violation of Article 1 of Protocol 1 to the Convention.

II. Alleged violation of Article 8 of the Convention

92. The applicant complained that the national authorities had violated her right to respect for her private life as provided for in Article 8 of the Convention, which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

93. The Government contested that argument.

94. The Court notes that this complaint is linked to the one examined above, and must therefore likewise be declared admissible.

95. Having regard to the fact that the arguments advanced by the parties are the same as those examined in the context of Article 1 of Protocol 1 to the Convention, the Court does not consider it necessary to examine this complaint separately.

III. Application of Article 41 of the Convention

96. Article 41 of the Convention provides:

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

A. Damage

97. The applicant claimed HRK 83,801.69 (about € 11,150) in respect of pecuniary damage. According to her, this figure was equivalent to the sum of HRK 19,451.69 (about € 2,600) with accrued default interest from 3 August 2005 until the date of payment, and the sum of HRK 64,350.00 (about € 8,560) in respect of lost employment benefits between April 2001 and December 2010, with accrued default interest on each instalment of HRK 550 (about € 75) from the month when compensation had to be paid until the date of payment. She also claimed HRK 435,650.00 (about € 57,700) in respect of non-pecuniary damage.

98. The Government contested these claims.
99. As regards pecuniary damage, it appears from the documents submitted by the parties that the applicant has not paid the amount she was ordered to pay to the Rijeka Employment Bureau, and that the enforcement proceedings are still ongoing (see paragraphs 32–39 above). As to the sum of HRK 64,350.00 in respect of lost employment benefits between April 2001 and December 2010, the Court finds no causal link between the amount claimed and the finding of a violation (see also paragraph 45 above). It therefore rejects the claim in respect of pecuniary damage.
100. In respect of non-pecuniary damage, having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant € 2,600 in respect of non-pecuniary damage, plus any tax that may be chargeable to her.

B. Costs and expenses
101. The applicant also claimed HRK 18,906.25 for costs and expenses incurred before the domestic courts and HRK 9,875 for those incurred before the Court.
102. The Government contested this claim.
103. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of € 830 for costs and expenses incurred in the proceedings before the Constitutional Court, and € 1,300 for those incurred in the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest
104. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court, unanimously,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 1 of Protocol 1 to the Convention;
3. *Holds* that there is no need to examine the complaint under Article 8 to the Convention;
4. *Holds*,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
(i) € 2,600 (two thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) € 2,130 (two thousand one hundred and thirty euros), plus any tax that may be chargeable, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Noot

1. Deze uitspraak laat zien dat onder zeer bijzondere omstandigheden een *terugvordering* van een langere tijd in strijd met de wet genoten uitkering in strijd kan komen met het eigendomsrecht van art. 1 Protocol 1 EVRM. Het Hof verwijst in zijn argumentatie terzake naar het vereiste van 'good governance'. Eerder nam het Hof al aan dat onder omstandigheden het *stopzetten* van een uitkering in strijd kan komen met (het rechtszekerheidsbeginsel uit) art. 1 Protocol 1 EVRM (EHRM 15 september 2009, *Moskal/Polen*, *EHRC* 2009/120, m.nt. Pennings; EHRM 2 oktober 2012, *Czaja/Polen*, *AB* 2013/29, m.nt. Barkhuysen en Van Emmerik, *EHRC* 2012/227, m.nt. Leijten). Uit deze uitspraken kan de algemene regel worden afgeleid dat bij herstel door de autoriteiten van geconstateerde (eigen) fouten bij begunstigende duurbeschikkingen er op hen een verplichting rust om snel, adequaat en consequent te handelen. Rechtszekerheid voor betrokkenen is daarbij belangrijk. De hier opgenomen uitspraak is — zij het in de context van een terugvordering — daarvan een toepassing. Daarbij valt op dat het Hof vermijdt algemene uitspraken te doen, maar zijn oordeel toesnijdt op de bijzondere omstandigheden van het geval.
2. In dat verband moet het Hof in casu als eerste de stap zetten om de toepasselijkheid van art. 1 Protocol 1 EVRM aan te nemen. Daarvan is sprake omdat er legitieme verwachtingen aan de zijde van klaagster aan de orde zijn. Zij had namelijk op geen enkele wijze bijgedragen aan de ontstane situatie, was te goeder trouw, het toekenningsbesluit vermeldde niet dat de uitkering zou

kunnen vervallen en de uitkering werd maar liefst drie jaar uitbetaald.

3. De tweede stap is de vaststelling dat met de terugvordering niet proportioneel is gehandeld. Opvallend is dat het Hof er daarbij op wijst dat de beoordelingsvrijheid van de staat op dit punt beperkter is wanneer fouten aan de orde zijn die geheel voor rekening van de staat komen. Onder verwijzing naar dezelfde omstandigheden als die een rol speelden om legitieme verwachtingen aan te nemen, stelt het Hof vast dat de staat niet tijdig en evenmin op een adequate en consistente wijze heeft gehandeld en — impliciet — dat geen sprake was van behoorlijk bestuur. Door het hele bedrag terug te vorderen en geen rekening te houden met de bijzondere omstandigheden van klaagster is sprake van een individuele, excessieve last.

4. De onderhavige uitspraak kan ook worden gezien als een toepassing van *principle* 5 van de *Principles of administrative law concerning the relations between individuals and public authorities* van de Raad van Europa (met toelichting te vinden in *The administration and you, A handbook*, Council of Europe, 2018). Dit betreft het rechtszekerheidsbeginsel en is als volgt geformuleerd:

> "Administrative decisions taken by public authorities shall be foreseeable so as to enable individuals to act accordingly. They shall not have retroactive effect unless required by law or if they are for the benefit of persons. There shall be no interference with rights acquired by individuals or interference with legitimate expectations as to future decisions the public authority might take, except in accordance with the law."

Deze beginselen vormen een weerslag van hetgeen in de verschillende verdragsstaten als rechtens wordt gezien en zijn mede gebaseerd op aanbevelingen van de Raad van Europa (voor dit beginsel: CM/Rec(2007)7 *on good administration* (art. 6 en 21)) en jurisprudentie van het EHRM. In de toelichting hierbij staat bij intrekking/terugvordering van een initieel *onrechtmatig* toegekend bedrag (zoals hier aan de orde) vermeld dat deze alleen is toegestaan wanneer a. er geen legitieme verwachting in het geding is of b. het algemeen belang bij terugvordering zwaarder weegt dan dat van de persoon in kwestie bij het behoud van betaalde bedragen. Precies de regel die het Hof in casu toepast. Gaat het overigens om *rechtmatig* toegekende bedragen dan is intrekking/terugvordering slechts toegestaan wanneer er a. geen legitieme verwachtingen zijn gewekt dat betrokkene het bedrag mocht houden of b. er een relevante wijziging van feiten en omstandigheden is en het algemeen belang bij intrekking/terugvordering zwaarder weegt dan het belang van betrokkene op behoud van betaalde bedragen. Terzijde: het is aan te raden van deze beginselen met toelichting kennis te nemen om zo een eerste algemene indruk te krijgen van de Europese minimumstandaarden voor behoorlijk bestuur op de naleving waarvan het EHRM via het EVRM toezicht houdt.

5. De Afdeling bestuursrechtspraak is bij terugvordering van voorlopig bij wijze van voorschot toegekende kinderopvangtoeslagen streng, nu de wet voorschrijft dat onterecht toegekende bedragen moeten worden teruggevorderd en door belanghebbende moeten worden terugbetaald (vgl. ABRvS 19 november 2014, ECLI:NLRVS:2014:4179). Dat lijkt in lijn met art. 1 Protocol 1 EVRM nu het hier voor betrokkenen in beginsel wel duidelijk kan zijn dat er nog geen definitieve toekenning heeft plaatsgevonden (in de hier opgenomen zaak werd dat voorbehoud niet gemaakt). Toch kan het voor (juridisch meestal niet geschoolde) betrokkenen nog heel wrang uitpakken wanneer pas na vele jaren een terugvordering plaatsvindt. De Afdeling erkent dan ook terecht dat er in zeer bijzondere omstandigheden op deze terugvorderingsplicht uitzonderingen moeten worden aangenomen. Deze baseert de Afdeling op art. 8 EVRM en daaruit voortvloeiende positieve verplichtingen om het familieleven te beschermen (ABRvS 25 juli 2018, ECLI:NL:RVS:2018:2491; ABRvS 10 oktober 2018, *AB* 2018/429, m.nt. Damen). Toepassing van het evenredigheidsvereiste van art. 3:4 lid 2 Awb biedt immers geen soelaas, nu de formele wet geen ruimte laat om af te zien van terugvordering. Bij dit alles is van belang eveneens te vermelden dat de Afdeling heeft uitgemaakt dat de bevoegdheid om terug te vorderen sowieso vervalt vijf jaar na de laatste dag van het berekeningsjaar waarop de toeslag betrekking heeft (ABRvS 19 december 2018, ECLI:NL:RVS:2018:4188). Ook dat kan in feite worden gezien als een toepassing van het rechtszekerheidsbeginsel, zoals dat in de hier opgenomen uitspraak aan de orde was.

6. Deze uitspraak is ook gepubliceerd in *EHRC* 2018/155, m.nt. Leijten.

T. Barkhuysen en M.L. van Emmerik