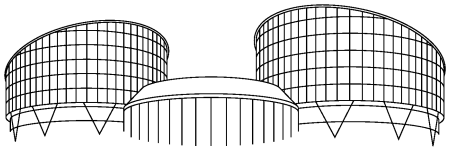

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF ALDEGUER TOMÁS v. SPAIN

(Application no. 35214/09)

JUDGMENT

STRASBOURG

14 June 2016

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

In the case of Aldeguer Tomás v. Spain,

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

Helena Jäderblom, *President*,
Helen Keller,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková, *judges*,
Blanca Lozano Cutanda, ad hoc *judge*,
and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 17 May 2016,

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

PROCEDURE

1. The case originated in an application (no. 35214/09) 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, Mr Antonio Aldeguer Tomás ("the applicant"), on 22 June 2009.

2. The applicant, who had been granted legal aid, was represented by Mr M. Ródenas Pérez, a lawyer practising in Madrid. The Spanish Government ("the Government") were represented by their Agent, Mr F. Sanz Gandásegui, State Attorney.

3. The applicant complained under Article 14 of the Convention taken in conjunction with Article 8 that he had been discriminated against on the ground of his sexual orientation in that he had been denied a survivor's pension following the death of his partner, with whom he had lived in a *de facto* marital relationship for twelve years. In substance the applicant also relied on Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1 to the Convention.

4. On 18 October 2012 the application was communicated to the Government.

5. Judge Luis López Guerra, the judge elected in respect of Spain, withdrew from sitting in the case (Rule 28 of the Rules of Court). On 11 February 2015, the President of the Section accordingly appointed Ms Blanca Lozano Cutanda to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 (a) of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1955 and lives in Pozuelo de Alarcón (Madrid).

7. The applicant cohabited with another man in a homosexual relationship from 1990 until the latter's death on 2 July 2002. During that period they lived together in an apartment belonging to the applicant's partner. When his partner died, the sister and only heir of the applicant's partner gave the applicant, because of the relationship he had had with her brother, an apartment that had belonged to the applicant's late partner and in which the couple had spent their holidays together since 1990.

8. On 19 September 2003 the applicant claimed social security allowances as a surviving spouse, under section 174 (1) of the General Social Security Act, arguing that he had cohabited with his deceased partner for many years.

9. On 22 September 2003 the National Institute of Social Security (*Instituto Nacional de la Seguridad Social*, hereafter referred to as "INSS") refused to grant the applicant a survivor's pension on the ground that since he had not been married to the deceased person, he could not legally be considered as his surviving spouse for the purposes of section 174 (1) of the General Social Security Act. That decision was formally served on 13 June 2005.

10. On 1 July 2005 Law no. 13/2005 amending the provisions of the Civil Code with respect to the right to enter into marriage was passed. Two days later it entered into force. This law legalised same-sex marriage in Spain. In accordance with its first additional provision all legal and regulatory provisions making reference to marriage should be understood thereafter as applicable to all marriages irrespective of the sex of its members (see paragraph 35 below).

11. On 5 July 2005 the applicant filed an administrative complaint against the decision of 22 September 2003. This complaint was dismissed by the INSS on 11 August 2005. The INSS noted that there was no provision in the legislation in force that allowed, for the purposes of social security rights, the person who had been cohabiting with the deceased to gain the status of a widower.

12. On 26 September 2005 the applicant challenged that decision before the Madrid Social Tribunal no. 33 ("the Social Tribunal").

13. In a judgment of 14 November 2005 the Social Tribunal ruled for the applicant. The Social Tribunal firstly outlined that the facts of the case had to be assessed in the light of the newly enacted Law no. 13/2005, which was already in force and deemed constitutional by the tribunal. As to the merits, the Social Tribunal observed that the issue at stake was whether the

applicant, as the surviving partner of a same-sex relationship that ended (following his partner's death) before the entry into force of Law no. 13/2005, had the right to a survivor's pension. The Social Tribunal then reiterated that, according to the well-established domestic case-law, surviving partners of unmarried couples were not entitled to a survivor's pension under section 174 of the General Social Security Act, marriage being a constitutive element to access any such social-security benefit; that the applicant had been prevented from marrying his partner because same-sex marriage had not been recognised in domestic law at the time his partner died; that the social security administration had relied on the fact that the couple had not married to refuse the applicant a survivor's pension; and that it was evident that after the entry into force of Law no. 13/2005, surviving spouses of same-sex marriages were entitled to survivors' pensions on the same footing as survivors of different-sex marriages.

14. The Social Tribunal was of the view that the solution to the legal issue raised by the applicant's case depended on whether it could be inferred from Law no. 13/2005 that Parliament's intention had been that surviving partners of same-sex couples who had been prevented from marrying under the former legislation could access a survivor's pension on a similar footing to same-sex couples who could marry after the entering into force of that Act. The Social Tribunal drew attention in this regard to the provisions and the explanatory memorandum of Law no. 13/2005 to contend that this new legislation had a very strong egalitarian purpose, and that from the date it entered into force, that is to say 3 July 2005, all legal provisions concerning marriage should be interpreted on the basis of the first additional provision of Law no. 13/2005 as applying fully to same-sex marriage (see paragraph 35 below). The Social Tribunal held in this regard that:

> "This is a wide-ranging provision which affects all the other provisions of the legal system making reference to marriage. From now onwards all references to marriage established in the law shall be understood as applying also to marriage celebrated between two persons of the same sex. Accordingly, whoever shall be called to interpret or apply any marriage-related provision should do so in egalitarian terms without taking into consideration whether the spouses are of the same or different sex".

15. The Social Tribunal further recalled that additional provision no. 10 (2) of Law no. 30/1981 of 7 July 1981 amending the provisions of the Civil Code pertaining to marriage and the procedure to be followed for cases of annulment, judicial separation and divorce, recognised the right to obtain a survivor's pension for individuals who had been prevented from marrying a person who later died by the legislation in force until then, provided that he or she had cohabited in a relationship similar to marriage with the deceased person and that the deceased had died before Law no. 30/1981 entered into force.

16. The Social Tribunal stressed that such a provision was included in order to provide a solution for those cohabiting couples consisting of a man and a woman who could not have married under the legislation in force until that time, and thus did not qualify for a survivor's pension, because one or even both of them had still been married to another person whom they had been prevented from divorcing, divorce having been legally impossible in Spain until the passing of Law no. 30/1981. The Social Tribunal considered that the applicant's circumstances were "fully comparable" to those outlined in additional provision no. 10 (2) of Law no. 30/1981 in so far as:

> "- the claimant could not marry his partner because the legislation then in force prevented him from doing so;
>
> - the claimant had shared a marital life with his partner until the latter's death;
>
> - the latter's death had taken place before the entry into force of Law no. 13/2005"

17. The Social Tribunal acknowledged, however, that whereas Law no. 30/1981 was aimed at protecting the rights of those cohabiting heterosexual couples who were prevented from marrying because divorce was prohibited at the time, Law no. 13/2005 was aimed at protecting the rights of those who could not marry on account of their sexual orientation, and that this distinction was the main impediment to the recognition of the applicant's right to a survivor's pension.

18. The Social Tribunal considered nonetheless that treating these two groups differently would not be in harmony with the strong egalitarian intention expressed by Parliament with the passing of Law no. 13/2005 and that, accordingly, additional provision no. 10 (2) of Law no. 30/1981 was applicable to the applicant by force of additional provision no. 1 of Law no. 13/2005. The Social Tribunal stated as follows:

> "Therefore, the interpretation that in my opinion better fits the legislature's intention is the following:
>
> - If the first additional provision of Law no. 13/2005 sets out that provisions making reference to marriage shall apply irrespective of the sex of the spouses,
>
> - And one of [these provisions], currently in force to provide access to a survivor's pension, is additional provision no. 10 (2) of Law no. 30/1981.
>
> - The only method to apply it in a way which is consistent with the egalitarian intention of the legislature is to do so irrespective of the sexual orientation of the members of the cohabiting couple.
>
> - In order to ensure that sexual orientation does not constitute discriminatory grounds in the application of additional provision no. 10 (2) of Law no. 30/1981, the right thereby recognised shall currently be interpreted as providing a solution to factual situations such as the one in the instant case in which the impediment to access to a survivor's pension is no other than the sexual orientation [of the claimant]."

19. As regards the administration's submission that in the area of social security benefits the governing principle was that of non-retroactivity of laws and that according to the law in force at the time the applicant's partner

died the former did not qualify for a survivor's pension because they were not married, the Social Tribunal was of the view that this general principle was not absolute and that it did not apply where there was a specific rule giving retroactive effect to laws more favourable to the citizens, as is true of the instant case. Thus, additional provision no. 10 (2) of Law no. 30/1981 should be read in the light of the first additional provision of Law no. 13/2005.

20. As to the degree of retroactivity that should be given to additional provision 10 (2) of Law no. 30/1981 in the applicant's case, the Social Tribunal relied on the constitutive effects of Law no. 13/2005 which created new rights and was effective only from the date it entered into force. Accordingly, the Social Tribunal recognised the applicant's right to be awarded a survivor's pension with effect from 3 July 2005.

21. The INSS and the Treasury General of Social Security appealed (*recurso de suplicación*) against that judgment to the Madrid High Court of Justice (*Tribunal Superior de Justicia*).

22. On 18 September 2006 the Madrid High Court of Justice upheld the appeal and reversed the first-instance judgment. The court found that the legislature had not intended Law no. 13/2005 to cover same-sex partnerships which had been ended by the death of one of the partners before said law had entered into force and that the lack of protection of these unions could not be considered discriminatory in the light of Article 14 of the Spanish Constitution.

23. For the court, it was only as from the entry into force of Law no. 13/2005 that marriage between same-sex couples was recognised and that this law affected other rights for those persons who would wish to marry thereafter. Hence, the court was of the view that Law no. 13/2005 had no retroactive effects, except as otherwise expressly provided, which was not the case at hand.

24. The court further stated that even though Law no. 13/2005 had been inspired by the constitutional principle of equality, prior legislation preventing same-sex marriage could not be deemed unconstitutional as contrary to either any constitutional principle or to the right not to be discriminated against. The court referred to constitutional case-law dating from 1994 according to which the requisite of heterosexuality for the purposes of marriage was fully constitutional and that it was within the margin of appreciation of the public authorities to treat heterosexual marriages more favourably than homosexual partnerships. In this connection, the court maintained that despite the reference in the preamble of Law no. 13/2005 (see paragraph 35 below) to the discriminatory treatment to which homosexuals had traditionally been subjected on account of their sexual orientation, the aim of Parliament in passing that law was merely to respond to a new social reality and award homosexuals the right

to marry, but not to protect same-sex partnerships which had already ended before its enactment.

25. The court referred to constitutional case-law according to which a difference in legal treatment of individuals due to subsequent changes in the law does not necessarily entail discrimination, even if those persons could be said to be in similar circumstances. Given the complexity that a change in legislation might involve, it was for Parliament to establish the characteristics of the legal transition, either by introducing retroactivity clauses or by restricting the application of the new legislation to circumstances arising after its entry into force.

26. The court noted in this regard that Law no. 13/2005 had not included any provision concerning same-sex partnerships which had already ended at the time of its entry into force and that it strictly concerned same-sex couples still in existence at that time and who would be willing to enter into marriage. The court considered that the difference between the situations before and after the passing of Law no. 13/2005 was essentially an expression of the principle of succession of laws without constitutional implications as regards the right not to be discriminated against.

27. As regards the applicability to the present case of additional provision no. 10 (2) of Law no. 30/1981, the Madrid High Court of Justice found that this provision was not applicable to the applicant's case for two main reasons. Firstly, that provision could not be considered as among the provisions to which the first additional provision of Law no. 13/2005 referred. Additional provision no. 10 (2) was, as the Constitutional Court had established, of a provisional or transitory nature and had been envisaged for those specific cases in which one of the partners had died before the entry into force of Law no. 30/1981. It had not been intended to govern future situations. Secondly, that provision had been envisaged for a totally different situation from that of the applicant. Additional provision no. 10 (2) of Law no. 30/1981 was aimed at guaranteeing a survivor's pension to those heterosexuals who had been prevented from marrying their out-of wedlock partner because divorce had not been legal at the time of the latter's death. The inability to remarry for those affected by additional provision no. 10 (2) of Law no. 30/1981 was based on the fact that divorce was not permitted at the time. The institution of marriage was open to them in their capacity as heterosexuals. On the contrary, same-sex couples were absolutely prevented from marrying before Law no. 13/2005 since the institution of marriage was until then restricted to heterosexual couples.

28. Furthermore, the court contended that the applicant could never have fulfilled the *more uxorio* marital cohabitation requirement established by additional provision no. 10 (2) of Law no. 30/ 1981 of, because only those who were in principle eligible for marriage but had been prevented from marrying for whatever reason could qualify for *de facto* marital cohabitation. The applicant and his partner could have never cohabited "as

if married" before the entry into force of Law no. 13/2005, because before then they were ineligible for marriage as they were both male.

29. The applicant lodged an appeal on points of law seeking harmonisation of the case-law (*recurso de casación para la unificación de doctrina*). In a decision of 27 June 2007, the Supreme Court (Social Chamber) declared the appeal inadmissible on the ground that the decision produced for purposes of comparison, specifically a judgment of the High Court of Justice of the Canary Islands of 7 November 2003, was not relevant. That decision was served on 26 July 2007.

30. Relying on Articles 14 (principle of equality and prohibition of discrimination) and 24 § 1 (right to effective judicial protection), the applicant lodged an *amparo* appeal with the Constitutional Court. In a decision of 11 February 2009, served on 17 February 2009, the Constitutional Court declared the appeal inadmissible on the grounds that the applicant had failed to substantiate the special constitutional relevance of his complaints.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. The Constitution

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

Article 9

"2. It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong be real and effective, to remove obstacles which prevent or hinder their full enjoyment [of these rights], and to facilitate the participation of all citizens in political, economic, cultural and social life.

..."

Article 14

"All Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance."

Article 32

"1. Men and women shall have the right to enter into a marriage with full legal equality.

2. The law shall determine the forms of marriage, the requisite age and capacity for marriage, the rights and duties of the spouses, the grounds for separation and dissolution and the effects thereof."

Article 39

"1. The State authorities shall ensure that the family is afforded social, economic and legal protection.

..."

B. The Civil Code

32. The relevant provision of the Civil Code reads as follows:

Article 2

"3. Statutes shall not have retroactive effect, unless otherwise provided therein".

C. Law no. 30/1981 of 7 July 1981, amending the provisions of the Civil Code pertaining to marriage and the procedure to be followed for cases of annulment, judicial separation and divorce ("the Divorce Act")

33. The relevant provisions of "the Divorce Act" read as follows:

Additional provision no. 10

"On a provisional basis, until a definitive regulation is enacted in the relevant legislation, the following rules shall apply in matters concerning pensions and social security ...

2. For those who have not been able to marry on account of the legislation in force until now but who have lived as a married couple, when the death of one of the partners has occurred before the entry into force of the present Law, the survivor will be entitled to the benefits provided for in the first paragraph of the present provision and to the corresponding pension in accordance with the following paragraph.

3. The right to a survivor's pension and other passive rights to benefits on account of a death shall be awarded to the person who has been the legal spouse in proportion to the time lived with the deceased spouse, irrespective of the causes that had determined the separation or divorce ..."

D. The Royal Legislative Decree no. 1/1994 of 20 June 1994 on the Consolidated Text of the General Social Security Act, as in force at the time of the death of the applicant's partner ("the General Social Security Act")

34. Under section 174 § 1 of "the General Social Security Act" non-marital relationships did not entitle the survivor to a survivor's pension, even where the persons concerned had lived together. Accordingly, the award of a survivor's pension was conditional on the existence of a lawful marriage between the deceased and the claimant/survivor. Marriage was

deemed to be "lawful" when it had been celebrated in accordance with one of the forms established by Article 49 of the Civil Code.

E. Law no. 13/2005 of 1 July 2005 amending the provisions of the Civil Code as regards the right to enter into marriage

35. The relevant parts of Law no. 13/2005 read as follows:

Preamble

"The legislature has decided to remove a long history of discrimination based on sexual orientation. The establishment of a personal framework that allows those who freely adopt sexual and emotional ties with persons of their own sex to develop their personality and exercise their rights under equal conditions is demanded by the citizens of our time, and this law intends to provide a response to that demand.

Certainly, when the Constitution mandates the legislature to regulate marriage it does not rule out in any way whatsoever a regulation defining partner relationships in a different way than does the regulation existing to date, a regulation covering new forms of life-partner relationships. Moreover, the option reflected in this law has some constitutional foundations that should be taken into account by the legislature. Hence, the promotion of effective equality between citizens in the free development of their personality (Articles 9 § 2 and 10 § 1 of the Constitution), the protection of freedom in so far as forms of coexistence are concerned (Article 1 § 1 of the Constitution) and the establishment of a framework of real equality and enjoyment of rights without discrimination on account of sex, opinion or any other personal or social condition or circumstance (Article 14 of the Constitution), are values established in the Constitution that should be reflected in the rules defining the status of citizenship in a free, pluralistic and open society. From this broad perspective, the regulation of marriage that is hereby established aims at conforming to the manifest reality of Spanish society, in which changes have been brought about in that society with the involvement of groups seeking total equality for all in the enjoyment of rights, regardless of their sexual orientation; this is a reality that demands a framework establishing rights and duties for all those who formalise their partner relationships. In this context, this Law allows marriage to be celebrated between persons of the same or different sex, with full and equal rights and duties, irrespective of its composition. Accordingly, the effects of marriage, which are wholly maintained in respect of the objective make-up of the institution, shall be the same in all spheres, regardless of the sex of the spouses; this includes, amongst other areas, the sphere of social rights and benefits as well as the possibility of being a party to adoption proceedings.

On the other hand, and as a consequence of the first additional provision of this Act, all references to marriage included in our legal system shall be understood as applicable both to a marriage between two persons of the same sex and to a marriage between two persons of the opposite sex."

Single Article. Amendment of the Civil Code as regards the right to enter into marriage

"The Civil Code is modified as follows:

One. A second paragraph is added to Article 44, with the following wording:

Marriage shall have the same requirements and effects whether the spouses are of the same or different sex."

First additional provision: application to the legal system

"Legal and regulatory provisions making reference to marriage shall be understood as applicable irrespective of the sex of its members."

F. Law no. 40/2007 of 4 December 2007 on social security measures, amending the General Social Security Act

36. Law no. 40/2007, which entered into force on 1 January 2008, amended Article 174 of the General Social Security Act (Article 174 § 3) recognising for the first time the right to a survivor's pension for unmarried couples, heterosexual or homosexual, who had lived together continuously for more than five years before the death of the insured partner. In addition, the third additional provision of this Law extended retroactively this right to *de facto* partners who had been widowed prior to the entry into force of the law and where the survivor was found in situations of particular need. In this regard, the third additional provision established, among other requirements, that the couple "had had children together". The claim had to be filed within a period of twelve months of the entry into force of Law no. 40/2007 (see *Muñoz Díaz v. Spain*, no. 49151/07, § 30, ECHR 2009).

G. The case-law of the Constitutional Court

37. In its decision no. 222/1994 of 11 July 1994 the Constitutional Court dismissed an *amparo* appeal which requested that the equivalent effects as marriage be granted to the *more uxorio* cohabitation of two homosexuals, for the purposes of a survivor's pension. It stated that "in the same way as a heterosexual couple cohabiting, a partnership between persons of the same biological sex is not a legally regulated institution, nor is its establishment embodied in a constitutional right; quite the opposite to marriage between a man and a woman, which is a constitutional right (Article 32 § 1 of the Constitution)". The court upheld the constitutionality of the heterosexual principle as the defining criterion of a marital bond. Consequently, it accepted that the public powers granted privileged status to a family union consisting of a man and a woman, as opposed to a homosexual union. The Constitutional Court relied on the case-law of the Court under Article 12 of the Convention (*Rees v. the United Kingdom*, 17 October 1986, § 11, Series A no. 106, and *Cossey v. the United Kingdom*, 27 September 1990, § 22, Series A no. 184).

38. The Constitutional Court followed the same approach in its decision of 21 October 1999 in the case of *Mata Estevez v. Spain* ((dec.),

no. 56501/00, ECHR 2001-VI), in which it declared the *amparo* appeal inadmissible on the grounds that it was ill-founded.

39. On 30 September 2005 seventy-two members of Parliament (representing an opposition party at that time) brought an action before the Constitutional Court challenging the constitutionality (*recurso de inconstitucionalidad*) of Law no. 13/2005. They argued that Law no. 13/2005 denaturalised the concept of marriage set forth in Article 32 of the Spanish Constitution, which explicitly referred to men and women.

40. In its judgment no. 198/2012 of 6 November 2012 the Constitutional Court, sitting as a full court, dismissed the constitutional action and concluded that Law no. 13/2005 was fully compliant with Article 32 of the Constitution. As regards the situation before the entry into force of Law no. 13/2005, the court did not consider that it was necessary to address the issue of whether homosexual couples would have had the constitutional right to marry at that time.

41. In its judgment no. 41/2013 of 14 February 2013 the Constitutional Court considered that the requirement of having had children to access a survivor's pension in the case of *de facto* unions established by the third additional provision of Law no. 40/2007 (see paragraph 36 above) was in breach of the principle of equality before the law enshrined in Article 14 of the Constitution. The Constitutional Court was of the view that the difference in treatment established by the law, based on the requirement of having had children together, led to a disproportionate result by denying certain survivors of unmarried couples (homosexual and heterosexual couples who had not had their own or adopted children together, for legal or biological reasons) access to the protection provided by the pension. It therefore concluded that the difference in treatment lacked an objective and reasonable justification. The court considered that it was not necessary to examine whether the impugned provision was also discriminatory on grounds of sexual orientation. As to the effects of this ruling, the Constitutional Court indicated that the fact of declaring unconstitutional the requirement of having had children together, as established by the third additional provision of Law no. 40/2007, did not mean that those persons who had not filed a claim for a survivor's pension within the deadline of twelve months from the entry into force of the law could now do so. Nor could this judgment call into question the authority of *res judicata* of final judgments in which the courts had applied the contested requirement.

42. In its judgment no. 92/2014 of 10 June 2014 the Constitutional Court examined the constitutionality of Article 174 § 1 of the General Social Security Act, as it stood before the entry into force of Law no. 40/2007 on social security measures. The Constitutional Court examined this issue in the context of an *amparo* appeal lodged by an appellant who complained, under Article 14 of the Constitution, about the denial of a survivor's pension following the death of his homosexual partner in 2002 (before the entry into

force of Law no. 40/2007). The court referred to the margin of appreciation of the legislature in the area of social security rights and to the Court's decision in *Mata Estevez v. Spain* (cited above), where the Court had accepted that the exclusion of same-sex couples from the survivor's pensions social security scheme was not in breach of Article 8, taken in conjunction with Article 14 of the Convention. In the view of the Constitutional Court, it was solely for the legislature to decide when to extend the right to a survivor's pension to other situations, and to what extent to do so. This is what the Spanish legislature had done by introducing same-sex marriage in 2005 (thus allowing same-sex couples to enter into marriage and benefit from survivors' pensions) and by extending in 2007 the right to a survivor's pension to stable, *de facto* unions, both heterosexual and homosexual, under certain conditions. According to the court, this was the legislature's policy choice and the situation existing before could not, of itself, be considered incompatible with the principle of equality, as protected by Article 14 of the Constitution.

43. The Constitutional Court applied the principles set out in its judgment no. 92/2014 and therefore rejected on the merits several *amparo* appeals, including those where the appellant had relied on the application by analogy of additional provision no. 10 (2) of Law no. 30/1981, following the entry into force of Law no. 13/2005 (see for instance, judgments no. 124/2014 of 21 July 2014, no. 157/2014 of 6 October 2014, in which the public prosecutor had supported the grant of the *amparo* relief to the individuals concerned).

H. The case-law of the Supreme Court

44. In its judgment of 29 April 2009, the Supreme Court (Social Chamber) ruled on an appeal on points of law seeking harmonisation of the case-law on the specific issue of survivors' pensions for same-sex couples in which one of the partners had died before the entry into force of Law no. 13/2005. The Supreme Court noted that Law no. 13/2005 did not contain any transitional provision giving retroactive effect vis-à-vis situations predating the entry into force of the law. Nor was it possible to apply by analogy additional provision no. 10 (2) of Law no. 30/1981, which concerned only cohabiting heterosexual couples who had been prevented from marrying because divorce had not been legal before 1981. The situation of same-sex couples before 2005 was totally different, in that same-sex marriage was not regulated at all and there had been no constitutional right to same-sex marriage before that date. In the view of the Supreme Court, Law no. 13/2005 had not been enacted to put an end to a previous situation of discrimination which ran contrary to the Constitution. Its purpose was to create a new set of rights and obligations for same-sex couples, with only *ex nunc* effects for the future.

45. The judgment of the Supreme Court contained a dissenting opinion authored by Judge F. Salinas Molina, which was joined by four other judges of the Social Chamber. The dissenting judges considered that additional provision no. 10 (2) of Law no. 30/1981 should be applied by analogy to same-sex couples who had been prevented from marrying before 2005. This application by analogy was based on the similarity between the two situations (existence of a legal impediment to enter into marriage before the entry into force of a new law and impossibility to marry after that date due to the death of one of the members of the couple), and on the fact that in both cases the purpose of the pension was to meet the needs of the surviving partner. The fact that during the legislative process concerning Law no. 13/2005 the transitional or retroactive scope of the law had not been discussed did not mean that additional provision no. 10 (2) of Law no. 30/1981 was not applicable by analogy. Furthermore, Law no. 13/2005 was aimed at securing full equality for same-sex couples in the field of marriage, including for the purposes of social rights and benefits. Accordingly, judges should interpret and apply the legislation in conformity with that purpose, in order to avoid discriminatory treatment. The dissenting judges referred to the case-law of the Court, as well as Article 26 of the International Covenant on Civil and Political Rights and Article 21 § 1 of the Charter of Fundamental Rights of the European Union.

I. Relevant Council of Europe materials

46. In its Recommendation 924 (1981) on discrimination against homosexuals, the Parliamentary Assembly of the Council of Europe (PACE) criticised the various forms of discrimination against homosexuals in certain member States of the Council of Europe. In Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member States, it called on member States, among other things, to enact legislation to provide for registered partnerships. Furthermore, in Recommendation 1470 (2000) on the more specific subject of the situation of gays and lesbians and their partners in respect of asylum and immigration in the member States of the Council of Europe, it recommended to the Committee of Ministers that it urge member States, inter alia, "to review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnership and families are treated on the same basis as heterosexual partnerships and families ...".

47. Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe, adopted on 29 April 2010 and entitled "Discrimination on the basis of sexual orientation and gender identity", calls on member States to "ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000", by providing, *inter alia*, for:

"16.9.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;

16.9.2. 'next of kin' status;

16.9.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;

16.9.4. recognition of provisions with similar effects adopted by other member states;"

48. In Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers recommended that member States:

"1. examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;

2. ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;

..."

49. The Recommendation also observed as follows:

"23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights.

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live."

J. The United Nations Human Rights Committee

50. The United Nations Human Rights Committee has examined the issue of pension rights for same-sex survived partners in two individual cases. In both cases, the Human Rights Committee found a violation of Article 26 of the International Covenant on Civil and Political Rights (equality before the law and prohibition of discrimination). In the first case, *Young v. Australia*, communication no. 941/2000, 6 August 2003, the Human Rights Committee observed as follows (footnotes omitted):

"10.3 The Committee notes that the State party fails specifically to refer to the impugned sections of the Act (sections 5(E), 5(E) 2 and 11) on the basis of which the

author was refused a pension because he did not meet with the definition of a "member of a couple" by not "living with a member of the opposite sex". The Committee observes that the State party does not deny that the refusal of a pension on this basis is a correct interpretation of the VEA but merely refers to other grounds in the Act on which the author's application could have been rejected. The Committee considers, that a plain reading of the definition "member of a couple" under the Act suggests that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The State party does not contest this. Consequently, it remains for the Committee to decide whether, by denying a pension under the VEA to the author, on the ground that he was of the same sex as the deceased Mr. C, the State party has violated article 26 of the Covenant.

10.4 The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation. It recalls that in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences. It transpires from the contested sections of the VEA that individuals who are part of a married couple or of a heterosexual cohabiting couple (who can prove that they are in a "marriage-like" relationship) fulfill the definition of "member of a couple" and therefore of a "dependant", for the purpose of receiving pension benefits. In the instant case, it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr. C, for the purpose of receiving pension benefits, because of his sex or sexual orientation. The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation."

51. In the case of *X. v. Colombia*, communication no. 1361/2005, 30 March 2007, the Human Rights Committee held as follows (footnotes omitted) :

"7.1 The author claims that the refusal of the Colombian courts to grant him a pension on the grounds of his sexual orientation violates his rights under article 26 of the Covenant. The Committee takes note of the State party's argument that a variety of social and legal factors were taken into account by the drafters of the law, and not only the mere question of whether a couple live together, and that the State party has no obligation to establish a property regime similar to that established in Act No. 54 of 1990 for all the different kinds of couples and social groups, who may or may not be bound by sexual or emotional ties. It also takes note of the State party's claim that the purpose of the rules governing this regime was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm.

7.2 The Committee notes that the author was not recognized as the permanent partner of Mr. Y for pension purposes because court rulings based on Act No. 54 of 1990 found that the right to receive pension benefits was limited to members of a

heterosexual de facto marital union. The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation. It also recalls that in previous communications the Committee found that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences. The Committee also notes that, while it was not open to the author to enter into marriage with his same-sex permanent partner, the Act does not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. The Committee finds that the State party has put forward no argument that might demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective. Nor has the State party adduced any evidence of the existence of factors that might justify making such a distinction. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author's right to his life partner's pension on the basis of his sexual orientation."

K. The Inter-American system of human rights protection

52. In the case of *Atala Riffo and daughters v. Chile* ((Merits, Reparations and Costs), judgment of 24 February 2012, Series C No. 239), the Inter-American Court of Human Rights considered that the decision of the Chilean courts to remove three children from the custody of their lesbian mother constituted discriminatory treatment against her on the basis of her sexual orientation, in breach of her right to equality (Article 24, in conjunction with Article 1 § 1 of the American Convention on Human Rights) and her right to private and family life (Article 11 § 2 and 17 § 1 of the American Convention).

53. With regard to the presumed right of Ms Atala Riffo's children to live in a "normal and traditional" family, an argument used by the Chilean courts, the Inter-American Court of Human Rights observed as follows (footnotes omitted):

"142. The Court confirms that the American Convention does not define a limited concept of family, nor does it only protect a "traditional" model of the family. In this regard, the Court reiterates that the concept of family life is not limited only to marriage and must encompass other *de facto* family ties in which the parties live together outside of marriage.

143. International case law is consistent on this point. In the case of *Salgueiro da Silva Mouta v. Portugal*, the European Court considered that the decision of a national court to remove an underage child from the custody of a homosexual parent, with the argument that the child should live in a traditional Portuguese family, lacked a reasonable relationship of proportionality between the measure taken (withdrawal of the custody) and the purpose sought (protection of the best interest of the minor).

144. Similarly, in the Case of *Karner v. Austria*, the European Court of Human Rights stated that:

"The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. [...] as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people".

145. In the instant case, this Court finds that the language used by the Supreme Court of Chile regarding the girls' alleged need to grow up in a "normally structured family that is appreciated within its social environment," and not in an "exceptional family", reflects a limited, stereotyped perception of the concept of family, which has no basis in the Convention, since there is no specific model of family (the "traditional family")."

54. The Inter-American Commission on Human Rights, in its Report No. 5/14 of 2 April 2014 (*Case 12.841 Angel Alberto Duque v. Colombia*), examined a case in which the applicant complained that he had been denied a survivor's pension on account of his sexual orientation. The Inter-American Commission considered as follows (footnotes omitted):

"74. Since evaluating whether a distinction is "reasonable and objective" must be done on a case-by-case basis, the Commission, the Court, and other international courts and agencies have made use of a standard test involving several elements: (i) the existence of a legitimate goal; (ii) the suitability or logical means-to-end relationship between the goal sought and the distinction; (iii) the necessity, in order words, whether other less burdensome and equally suitable alternatives exist; and (iv) proportionality *strictu sensu*, i.e., the balance between the interests at stake and the level of sacrifice required from one party compared to the level of benefit of the other.

75. Based on this, the Commission must now assess whether the exclusion of same sex couples from the right to a survivors' pension pursued a legitimate aim and, if so, whether such restriction complied with the requirements of suitability, necessity and proportionality.

76. In the chapter on established facts, the Commission has shown that the decision to deny Mr. Duque a survivor's pension as JOJG's permanent partner was expressly and exclusively based on the fact that they were a same-sex couple. The Commission notes that no other reasons were cited —not in the reply from COLFONDOS, not in the *tutela* action, and not in the case file with the IACHR—. In particular, when confirming the lower-court ruling, the Twelfth Circuit Civil Law Court of Bogotá maintained that the exclusion of same-sex couples was justified based on the fact that the survivor's pension was intended to protect the family, understood as being "formed by the union of a man and a woman, the only beings capable of preserving the species through procreation."

77. In this vein, the Commission notes that the reasons to exclude the alleged victim from the right to a survivor's right, which were given both by administrative and judicial authorities, stemmed from the need to "protect the family". Preliminarily, the Commission considers that such purpose could, in the abstract, constitute legitimate goals that the State could pursue when restricting rights.

78. However, as for the suitability requirement, the Commission finds that the reasoning offered by administrative and judicial authorities works only if one assumes

a narrow and stereotyped understanding of the concept of family, which arbitrarily excludes diverse forms of families such as those formed by same-sex couples, which are deserving of equal protection under the American Convention. In effect, the Inter-American Court has established that "the American Convention does not define a limited concept of family, nor does it only protect a 'traditional' model of the family". The Commission considers that there is no causal relationship between the means used and the goal pursued, failing to satisfy the suitability requirement. Hence the other requirements for the legitimacy of the restriction need not be examined.

79. Furthermore, the fact that subsequent case law of the Constitutional Court expanded legal protection to include all types of families shows that there was no reason to maintain that narrow concept of family.

(...)

81. In view of the above, the Commission finds that the State violated the principle of equal justice and non-discrimination, recognized in Article 24 of the American Convention, read in conjunction with the obligations to respect and ensure the rights, as set forth in articles 1(1) and 2 of the Convention, to the detriment of Ángel Alberto Duque."

55. On 21 October 2014, the Inter-American Commission submitted the case to the Inter-American Court. In *Duque v. Colombia* ((Preliminary Exceptions, Merits, Reparations and Costs), judgment of 26 February 2016, Series C No. 310), the Inter-American Court concluded that Colombia had breached the principle of equality and non-discrimination, enshrined in Article 24 of the American Convention, read in conjunction with Article 1 § 1 (§§ 89-138). It considered that the exclusion of same sex couples from the right to a survivors' pension under the Colombian legislation applicable at the time of the facts (2002) had been discriminatory on the basis of sexual orientation. The fact that the Constitutional Court had declared that exclusion unconstitutional in 2008 had not remedied the violation, since it was not clear that according to the current legislation the applicant could be granted a survivor's pension with retroactive effects.

THE LAW

ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

56. The applicant complained that he had been discriminated against on the ground of his sexual orientation in that, as a survivor of a *de facto* same-sex union, he had been denied a survivor's pension. The applicant complained in particular of the difference of treatment between *de facto* same-sex unions who had been unable to achieve legal recognition before the legalisation of same-sex marriage in 2005, and unmarried heterosexual

couples who had been unable to marry before divorce was legalised in Spain in 1981. The applicant relied on Article 14 taken in conjunction with Article 8 of the Convention.

57. The Court reiterates that since it is the master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant or a government (see, among other authorities, *Tarakhel v. Switzerland* [GC], no. 29217/12, § 55, ECHR 2014; and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 59, 9 July 2015). By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by the parties. In the present case, when notice of the application was given to the Government the parties were asked to submit observations on whether the refusal by the authorities to award the applicant a survivor's pension had breached Article 14 of the Convention in conjunction with Article 8 of the Convention and/or Article 1 of Protocol No. 1 to the Convention. Although the applicant did not explicitly rely in his observations on Article 1 of Protocol No. 1, the Court considers it appropriate to examine the case submitted to it from the standpoint of Article 14 in conjunction with Article 1 of Protocol No. 1 also.

58. Accordingly, the relevant provisions in relation to the applicant's complaint are the following:

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 8

"1. Everyone has the right to respect for his private and family life ...

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."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

59. The Government alleged that the applicant had not invoked the right to property either in the domestic proceedings or in his application before the Court. Moreover, they highlighted that neither had it been invoked before the Constitutional Court owing to the fact that it is not among the rights and freedoms protected by *amparo* proceedings. Therefore, the Government asked the Court to declare this part of the application inadmissible for non-exhaustion of domestic remedies pursuant to Article 35 § 1 of the Convention. The Government referred in this respect to the Court's reasoning in the case of *Schalk and Kopf v. Austria* (no. 30141/04, §§ 112-115, ECHR 2010). The Government also emphasised that in any case the applicant had failed to address the Court within six months of the last domestic decision for the purposes of said provision.

60. The Court reiterates that Article 35 § 1 of the Convention requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance (see, for instance, *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236; *Vučković and Others v. Serbia* [GC], no. 17153/11, § 72, 25 March 2014) and in compliance with the formal requirements and time-limits laid down in domestic law. Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (*Vučković and Others,* cited above, § 72).

61. The Court notes that in the present case, although the applicant did not explicitly rely on the right to property (either under Article 1 of Protocol No. 1 or under Article 33 of the Spanish Constitution) before the first-instance Social Tribunal or the Madrid High Court of Justice, the subject matter of the dispute before those courts was linked to the alleged violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 in that it concerned the difference of treatment between homosexual couples and heterosexual couples regarding eligibility for a survivor's pension. The Court has previously held that the interest in receiving a survivor's pension from the State may fall within the ambit of Article 1 of Protocol No. 1 (see, for instance, *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 58, 2 November 2010; *Muñoz Díaz*, cited above, §§ 42-46), In these circumstances, the Court considers that the applicant raised before the domestic courts, at least in substance, the complaint relating to his entitlement to a survivor's pension.

62. As regards the application of the six-month rule, the Court notes that no *amparo* relief is available in respect of the right of property. Accordingly, the final domestic decision relevant to Article 1 of Protocol No. 1 was the decision of 27 June 2007 (served on 26 July that same year) by which the Social Chamber of the Supreme Court declared

inadmissible the appeal on points of law lodged by the applicant, not the Constitutional Court's decision on the alleged violation of the fundamental rights and freedoms for which *amparo* relief was available, namely those set out in Articles 8 and 14 of the Convention. Conversely, an *amparo* appeal clearly was required before the complaints of private and family life and of discrimination contrary to Article 14 –which are at the heart of the application to the Court– could be referred to the Court. Further, the complaint under Article 14 could only be made in conjunction with other rights guaranteed by the Convention. Requiring the applicants to apply to the Court on two different dates in order to comply with that special feature of domestic law, even though they do not rely solely on Article 1 of Protocol No. 1, would be to construe the six-month time-limit too formally. The Court considers it more in keeping with the spirit and purpose of the Convention to treat the applicant's complaints together for the purpose of determining when the six-month period started to run in the instant case. In that connection, it reiterates that the six-month rule is autonomous and must be construed and applied according to the facts of each individual case, so as to ensure the effective exercise of the right to individual application (*Fernández-Molina González and Others v. Spain* (dec.), no. 64359/01, ECHR 2002-IX; *Sociedad Anónima del Ucieza v. Spain*, no. 38963/08, § 45, 4 November 2014). Consequently, the Court finds that this complaint was lodged within the six-month period allowed by Article 35 § 1 of the Convention.

63. The Court, therefore, rejects the Government's objections in this respect. It finds, moreover, that the applicant's 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.

B. Merits

1. The parties' submissions

64. The applicant contended that the Madrid High Court of Justice's decision by which he had ultimately been refused a survivor's pension amounted to a breach of his right not to be discriminated against on account of his sexual orientation. He stated that the Madrid High Court of Justice should have interpreted the domestic legislation in the same way as the Social Tribunal had done in order to avoid a discriminatory treatment and should have thus recognised his right to a survivor's pension.

65. Relying on the first-instance judgment of the Social Tribunal, the applicant stated that the legislature's egalitarian intention in this regard seemed clear from the wording of Law no. 13/2005. Furthermore, he argued that this egalitarian spirit was also detectable in the field of unmarried

couples, as could be inferred from Law no. 40/2007 of 4 December 2007 on measures in the area of social security. In particular, the third additional provision of this Law extended with retroactive effect the right to a survivor's pension to stable cohabiting couples under certain circumstances. As the Constitutional Court has established in its recent case-law, the purpose of a survivor's pension is to compensate surviving partners for the economic loss suffered on account of their partner's death awarding them a sum which is dependent on the contributions made to the relevant social security system by the deceased partner.

66. The applicant further referred to the judgment of the Social Tribunal, in which it was established that he was in a relevantly similar situation to that of an unmarried surviving partner of a different-sex partnership who was entitled to a survivor's pension under additional provision no. 10 (2) of Law no. 30/1981. He argued that he had been the victim of a difference in treatment based solely on his sexual orientation and that this discrimination lacked any objective justification.

67. The Government asserted that it is not for the Court to determine the domestic legislation that should be applied to a particular case. Thus, the legal issue in the present case is to assess whether the Madrid High Court of Justice's ruling, declaring that additional provision no. 10 (2) of Law no. 30/1981 was not applicable to the case at hand due to the express lack of retroactive recognition of the right to a survivor's pension in Law no. 13/2005, amounted to discrimination under Article 14 of the Convention.

68. In this connection, the Government submitted that the instant application did not give rise to any issue under Article 14 of the Convention because the applicant's situation was not relevantly similar to the situation of those whom the legislature had intended to benefit with additional provision no. 10 (2) of Law no. 30/1981. Thus, they contended that additional provision no. 10 (2) was not suitable for comparison in so far as it had had the very specific purpose of providing a provisional and extraordinary solution to the situation of different-sex couples who had been prevented from marrying owing to the ban on divorce which had been in force until the enactment of Law no. 30/1981.

69. Alternatively, the Government argued that if the Court were to compare both situations, they would not satisfy the elements required by its case-law to find discrimination. They contended that the difference in treatment between the 1981 Law and the 2005 Law pursued a "legitimate aim" and had an "objective and reasonable justification". By Law no. 30/1981 the legislature of the time repealed a prohibition to divorce which was completely unjust and contrary to the European consensus then pertaining, its additional provision no. 10 (2) being aimed at protecting individuals who had been deprived of the right to marry in application of that prohibition and that consequently did not qualify for a survivor's

pension. Law no. 13/2005, on the contrary, enacted a new institution on which there had been no established consensus in Europe. Consequently, there was no discriminatory difference in treatment in the decision to restrict the right to a survivor's pension to same-sex couples married after the entry into force of Law no. 13/2005.

70. The Government further stated that if, as the Court had ruled in *Schalk and Kopf* (cited above), the Contracting States were not under an obligation under Article 12 of the Convention or under Article 8 taken in conjunction with Article 14 to recognise same-sex marriage and the area of recognition of same-sex relationships should still be regarded as one of evolving rights where States must enjoy a margin of appreciation in the timing of the introduction of legislative changes, it would be completely inappropriate for the Court to require them to provide for a retroactive application of legislation recognising same-sex marriage and, furthermore, that this retroactive effect was analogous to those of a transitory provision enacted twenty-four years before with a view to providing a solution to very specific situations concerning different-sex couples who had been prevented from marrying. To impose such an obligation would remove all margin of appreciation from the State because it would mean in practice pushing back the effects of that legislation to a date twenty-four years before its approval.

71. Lastly the Government accepted that, unlike Law no. 13/2005, Law no. 40/2007 sets out a provision including limited retroactivity for the recognition of a right to a survivor's pension with respect to cohabiting couples that had been prevented from marrying before such law entered into force. However, they stated that such a provision was irrelevant for the present case and that it was within the domestic legislature's discretion to decide whether to extend or not to unmarried couples the benefits initially granted only to married couples.

2. The Court's assessment

(a) Applicability of Article 14 taken in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1

72. The Court points out at the outset that Article 8 of the Convention does not guarantee as such a right to benefit from a specific social security scheme or a right to be granted a survivor's pension (see, *mutatis mutandis, P.B. and J.S. v. Austria*, no. 18984/02, § 25, 22 July 2010; *Youri Romanov v. Russia*, no. 69341/01, § 45, 25 October 2005). The Court reiterates that as concerns "family life in Article 8 of the Convention this notion not only includes dimensions of a purely social, moral or cultural nature but also encompasses material interests (*Merger and Cros v. France*, no. 68864/01, § 46, 22 December 2004).

73. In the instant case the applicant formulated his complaint under Article 14 taken in conjunction with Article 8 of the Convention and the Government did not dispute the applicability of those provisions, referring to *Schalk and Kopf v. Austria*, cited above, §§ 92-95. The Court finds it appropriate to follow this approach (*Schalk and Kopf*, cited above, § 88).

74. The Court has repeatedly held that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among other authorities, *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II; *E.B. v. France* [GC], no. 43546/02, § 47, 22 January 2008; *Schalk and Kopf*, cited above, § 89; *X and Others v. Austria* [GC], no. 19010/07, § 94, ECHR 2013; and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 72, ECHR 2013 (extracts)). The prohibition of discrimination enshrined in Article 14 applies to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide (see *E.B. v. France*, cited above, § 48; and *Muñoz Díaz*, cited above, § 42).

75. The Court notes, on the basis of the case file, that the applicant formed a stable, same-sex, *de facto* union with his late partner for more than eleven years. It is not disputed that their relationship fell within the notion of "private life" within the meaning of Article 8 of the Convention. The Court also points out that in its judgment in *Schalk and Kopf*, it considered that, in view of the rapid evolution in a considerable number of member States regarding the granting of legal recognition to same-sex couples following the decision in *Mata Estevez* (cited above), "it [would be] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple [could not] enjoy 'family life' for the purposes of Article 8" (see *Schalk and Kopf*, cited above, § 94, concerning a cohabiting same-sex couple living in a stable, *de facto*, union; see also, for a non-cohabiting same-sex couple, *Vallianatos and Others*, cited above, § 73). The Court is of the view that the applicant's relationship with his late partner fell within the notion of "private life" and that of "family life".

76. Furthermore, while Article 8 does not address the issue of survivors' pensions, Spanish legislation expressly provided for such a right to spouses and to surviving partners of unmarried heterosexual couples who had been legally unable to marry before the entry into force of Law no. 30/1981 (see, *mutatis mutandis*, *Manenc v. France* (dec.), no. 66686/09, 21 September 2010). Consequently, the State, which went beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53

of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14.

77. Accordingly, the circumstances of the present case fall within the ambit of Article 8 of the Convention, and Article 14 is applicable.

78. Nor has it been disputed that the present case falls within the ambit of Article 1 of Protocol No. 1. The Court has previously held that the interest in receiving a survivor's pension from the State may fall within the ambit of Article 1 of Protocol No. 1 (see, for instance, *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 58, 2 November 2010; *Muñoz Díaz,* cited above, §§ 42-46). Therefore, Article 14 is also applicable in conjunction with Article 1 of Protocol No. 1.

(b) Compliance with Article 14 taken in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1

(i) General principles

79. According to the Court's settled case-law, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations (*Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment (see *Schalk and Kopf,* cited above, § 96; and *X and Others,* cited above, § 98). The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94).

80. The Court has also held that Article 14 does not prohibit a Contracting State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may, without objective and reasonable justification, give rise to a breach of that Article (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2006-VI; and *Muñoz Díaz,* cited above, § 48).

81. Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require "particularly convincing and weighty reasons" by

way of justification (see, for example, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, ECHR 1999-VI; *Karner v. Austria*, no. 40016/98, §§ 37 and 42, ECHR 2003-IX; and *Vallianatos and Others*, cited above, § 77). Where a difference in treatment is based on sex or sexual orientation the State's margin of appreciation is narrow (see *Karner*, cited above, § 41, and *Kozak v. Poland*, no. 13102/02, § 92, 2 March 2010). Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 36, ECHR 1999-IX; *E.B.*, cited above, §§ 93 and 96; *X and Others*, cited above, § 99; and *Vallianatos and Others*, cited above, § 77).

82. On the other hand, a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general economic or social measures, which are closely linked to the State's financial resources (see, for instance, *Stec and Others*, cited above, § 52; and *Şerife Yiğit,* cited above, § 70). The authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. In such a case, the Court would generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V, and *Manzanas Martín v. Spain*, no. 17966/10, § 41, 3 April 2012). Moreover, in an area of evolving rights where there is no established consensus, the Court has admitted that States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes (see *Stec and Others*, cited above, §§63-65; see, in particular, *Schalk and Kopf*, cited above, § 105, *M.W. v. the United Kingdom* (dec.), no. 11313/02, 23 June 2009, and *Courten v. the United Kingdom* (dec.), no. 4479/06, 4 November 2008, relating to the introduction in Austria and the United Kingdom of legislation on civil or registered partnerships).

(ii) Application of the above principles to the facts of the present case

83. The Court observes at the outset that the aim of Law no. 13/2005 was to take away the existing distinction between same-sex couples and different-sex couples with regard to the right to enter into marriage, as from its date of entry into force. As to the circumstances of the present case, the Court notes that the national authorities' refusal to grant the applicant a survivor's pension was based exclusively on the fact that at the material time the applicant was not married to his deceased partner, marriage being a precondition for receiving a survivors' pension and his partner having died three years before the recognition of same-sex marriage pursuant to Law no. 13/2005. The applicant's complaint concerns the interpretation and application of the domestic legislation by the Madrid High Court of Justice in that it did not recognise the retroactive effect of Law no. 13/2005 for the

purposes of rights to a survivor's pension, in contrast to the solution provided for by Law no. 30/1981 for different-sex cohabiting couples who, while legally unable to marry before that law came into force, were eligible for a survivor's pension by virtue of the retroactivity clause contained in its additional provision no. 10 (2). For the applicant, by choosing not to apply that retroactivity clause to his factual situation, the Madrid High Court of Justice's decision resulted in discriminatory treatment based solely on his sexual orientation.

84. The Court reiterates that its role is not to rule on which interpretation of the domestic legislation is the most correct, but to determine whether the manner in which that legislation has been applied has infringed the rights secured to the applicant under Article 14 of the Convention (see, among many other authorities and *mutatis mutandis*, *Pla and Puncernau v. Andorra*, no. 69498/01, § 46, ECHR 2004-VIII; and *Fabris v. France* [GC], no. 16574/08, § 63, ECHR 2013 (extracts)).

85. In the present case, the applicant claimed that his situation was relevantly similar or analogous to that of a surviving partner of a different-sex cohabiting couple, who, while being legally unable to marry his/her partner before Law no. 30/1981 came into force, qualified for a survivor's pension by virtue of the retroactivity clause expressly included therein. The Government, however, argued on the basis of the judgment rendered by the Madrid High Court of Justice that there was no true analogy since same-sex couples could not marry at all before the entry into force of Law no. 13/2005, whereas different-sex couples were eligible for marriage but could not exercise such right because divorce was not legal. Therefore, the question to be addressed by the Court is whether the applicant's situation is comparable to the situation that had arisen in Spain a quarter of a century earlier, of a surviving partner of a different-sex cohabiting couple, in which one or both partners were unable to remarry because they were still married to another person whom they were prevented from divorcing under the legislation in force at the material time.

86. The Court observes that there are certain similarities between both situations taken in the abstract: a legal obstacle prevented same-sex couples such as that of the applicant and different-sex cohabiting couples from entering into marriage and benefitting from the legal effects attached to such institution; the unmarried partners had lived together as a couple, and one of the partners had died before the entry into force of new legislation which removed the legal impediment to marriage.

87. However, the Court considers that these elements alone are not sufficient to place the applicant in 2005 in a relevantly similar position to that of a surviving partner of a different-sex couple who had been unable to marry because divorce was not permitted until 1981. As noted by the Government, additional provision no. 10 (2) of Law no. 30/1981 had the very specific purpose of providing a provisional and extraordinary solution

to those couples, giving the surviving partner access to a survivor's pension under certain conditions (see paragraph 27 above). This, as may be assumed, against the background of a situation where the participation in building up pension rights by paid work had not been equally distributed among the sexes, since women were underrepresented in the work force.

Furthermore, although there was in both cases a legal impediment to marriage, this impediment was of a different nature. In the case of the applicant, he was unable to marry his partner due to the fact that the legislation in force at the relevant time (during his partner's lifetime) restricted the institution of marriage to different-sex couples. Same-sex couples were consequently ineligible for marriage according to that legislation, which was not deemed unconstitutional by the domestic courts (see paragraphs 24 and 37-45 above). As regards different-sex couples who had been unable to marry before divorce was legalised in 1981, the impediment to marriage was based on the fact that one or both partners were at the relevant time still married to another person whom they could not divorce. The inability of a couple in that situation to marry before 1981 did not result from the sex or the sexual orientation of its members but from the fact that one or both partners were legally married to a third person and that divorce was not permitted at the time of the death of one of the partners. What was at stake was an impediment to remarrying which affected one or both partners, not an impediment to marrying: the specific factual and legal situation addressed by the 1981 legislation cannot be genuinely compared to the position of a same-sex couple who were ineligible for marriage in absolute terms, irrespective of the marital status of one or both of its members.

88. In the Court's view, the difference in context and the difference in nature of the legal impediment to marriage make the situation of the applicant in 2005 fundamentally different from that of different-sex couples covered by additional provision no. 10 (2) of Law no. 30/1981.

89. This view is unaffected by the fact that the Spanish legislature recognised the right to a survivor's pension to same-sex couples after the death of the applicant's partner, by introducing in 2005 same-sex marriage (thus allowing same-sex married couples to benefit from survivors' pensions), and by extending in 2007 the right to a survivor's pension to stable *de facto* unions, both heterosexual and homosexual, under certain conditions (see paragraph 36 above). The enactment of this legislation cannot be taken as an admission by the domestic authorities that the non-recognition of same-sex marriage, or the exclusion of same-sex couples from some of the rights and benefits available to married couples, was at the relevant time incompatible with the Convention (see also paragraphs 37-45 above as regards the case-law of the Constitutional Court and the Supreme Court).

90. In this connection, the Court recalls that it held in 2010 in its case of *Schalk and Kopf* that States enjoyed a margin of appreciation as regards the timing of the introduction of legislative changes in the field of legal recognition of same-sex couples and the exact status conferred on them, an area which was regarded as one of evolving rights with no established consensus (see *Schalk and Kopf*, cited above, §§ 105 and 108; see more recently, *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 163, 21 July 2015). It has also held that the Convention does not oblige Contracting States to grant same-sex couples access to marriage (see *Schalk and Kopf*, cited above, §§ 63 and 101, and *Hämäläinen v. Finland* [GC], no. 37359/09, § 71, ECHR 2014), marriage being widely accepted as conferring a particular status and particular rights on those who enter it (see *Burden*, cited above, § 63, and *Şerife Yiğit*, cited above, § 72). Therefore, the Spanish legislature cannot be criticised under the terms of the Convention for not having introduced the 2005 or the 2007 legislation at an earlier date which would have entitled the applicant to obtain the benefit of a survivor's pension (see, *mutatis mutandis*, *M.W.* and *Courten*, both cited above).

91. In conclusion, the Court considers that the applicant is not in a relevantly similar situation to that of a surviving partner of a different-sex couple who had been unable to marry because of an impediment to remarrying which had affected one or both members of the couple before 1981. It follows that there has been no discrimination and, therefore, no violation of Article 14 taken in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT,

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

2. *Holds*, unanimously, that there has been no violation of Article 14 read in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 14 June 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips Registrar	Helena Jäderblom President

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

H.J.
J.S.P.

SEPARATE OPINION OF JUDGE KELLER

1. I voted against the majority on the first point of the operative part of this judgment, but was in agreement with my colleagues for the second point. In my view, the Court should have examined this case exclusively under Article 14 in conjunction with Article 1 of Protocol No. 1. The majority, however, chose a different approach and examined the case in the light of Article 14 read in conjunction with Article 8 and Article 1 of Protocol No. 1, respectively. This approach does not take into account that the scope of these two rights is distinct. In many cases, this distinction does not play a decisive role. However, for the two countries – Monaco and Switzerland – that have not ratified Protocol No. 1, the distinction is important.

2. As I have previously argued, together with Judges Spano and Kjølbro in our dissenting opinion in the case of *Di Trizio v. Switzerland* (no. 7189/09, judgment of 2 February 2016), a financial allowance in the form of support provided by the State primarily falls into the ambit of Article 1 of Protocol No. 1 (see, for example, *Moskal v. Poland*, no. 10373/05, §§ 93 *et seq*., 15 September 2009, and *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 53, ECHR 2006-VI). It is only where some additional elements are fulfilled, such as a clear legislative intent to provide an incentive for the organisation of family life (see, for example, *Konstantin Markin v. Russia* [GC], no. 30078/08, § 130, ECHR 2012), that a purely financial award can fall into the ambit of Article 8 and can therefore be examined in the light of Article 14. To decide otherwise would blur the lines between the protection of property rights on the one hand and private and family life on the other.

3. The applicant in the present case exclusively invoked Article 14 in conjunction with Article 8. The Court communicated the case under both Article 8 and Article 1 of Protocol No. 1 (both read in conjunction with Article 14) and recharacterised the issue in paragraph 57 of the judgment. Although this is possible under the Court's case-law in accordance with the principle *jura novit curia* (compare, *inter alia*, *Tarakhel v. Switzerland* [GC], no. 29217/12, § 55, ECHR 2014; *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 43, ECHR 2012; and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, 17 September 2009), one has to bear in mind that this approach should be the exception rather than the rule, as it causes problems with regard to the exhaustion of domestic remedies on an almost regular basis (this is also true in the case at hand, see paragraph 59 for the Government's objection). In the light of the principle of subsidiarity, it is always most unfortunate if the national courts have not been given the opportunity to deal with a particular legal issue before it is examined by the Court.

4. In paragraph 75 of the present judgment, the Court simply states that the *de facto* relationship between the applicant and his late partner falls into the ambit of Article 8. This is undoubtedly true. However, this is not the issue in the present case. Rather, the question here concerns the right to retroactive equal treatment in *purely financial matters* of same-sex *de facto* couples who could not marry because of their sexual orientation, compared to heterosexual couples who lived in a *de facto* relationship because they could not legally divorce from their spouses.

5. In my view, the majority fail to provide any convincing reason why the pension in question should fall into the ambit of family or private life as protected under Article 8 as well as under the right enshrined in Article 1 of Protocol No. 1.

6. Once the Court declared the complaint admissible, I had no difficulty in joining the majority. The crucial element in this case is the comparability of two groups: on the one hand, heterosexual partners who lived in a *de facto* relationship with a new partner while being legally barred from divorce, and, on the other, same-sex partners in a *de facto* relationship. The legal analysis is made additionally difficult by the fact that the legislator acted regarding the first group more than 25 years earlier than in the case of the second. To grant the State a wide margin of appreciation in such a difficult situation, which also has considerable financial implications, seems to me to be the right approach.