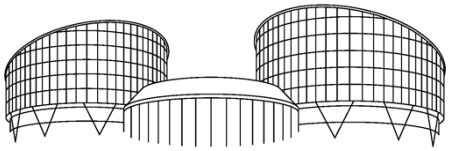

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF DEVINAR v. SLOVENIA

(Application no. 28621/15)

JUDGMENT

STRASBOURG

22 May 2018

FINAL

22/08/2018

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

In the case of Devinar v. Slovenia,

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

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Faris Vehabović,
Carlo Ranzoni,
Georges Ravarani,
Marko Bošnjak, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 27 March 2018,

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

PROCEDURE

1. The case originated in an application (no. 28621/15) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Ms Verena Devinar ("the applicant"), on 9 June 2015.

2. The applicant was represented by Mr I. Makuc, a lawyer practising in Tolmin. The Slovenian Government ("the Government") were represented by their Agent, Ms J. Morela, State Attorney.

3. The applicant alleged that her right to a fair trial under Article 6 of the Convention had been violated.

4. On 2 March 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and lives in Nova Gorica.

6. The applicant was working as a cleaning lady when she allegedly developed serious medical complications in her left wrist, which could only partly have been addressed by surgery. This resulted in her using predominantly her right arm, which in turn resulted in the overburdening of that arm, giving rise to a number of medical problems. Because of these

medical issues she was found, in 2006, to be incapable of further work and officially recognised as having a partial disability.

7. On 30 December 2011 the applicant applied to the Pensions and Disability Insurance Institute of the Republic of Slovenia ("the Institute") for a disability allowance in respect of a physical impairment (*nadomestilo za invalidnost* – hereinafter "disability allowance").

8. On 12 March 2012 the first-instance disability commission of the Institute, located in Nova Gorica, issued a report to the effect that the applicant was not suffering from any physical impairment stipulated in the Self-Management Agreement on the List of Physical Impairments (*Samoupravni sporazum o seznamu telesnih okvar* – hereinafter "the List"; see paragraph 22 below). The commission – composed of an occupational medicine specialist, an orthopaedic specialist and a physical medicine and rehabilitation physician – based its opinion on an examination of the medical records submitted by the applicant and a clinical examination of the applicant.

9. On 15 March 2012 the Nova Gorica unit of the Institute, relying on the opinion of the first-instance disability commission, dismissed the applicant's application for a disability allowance. A copy of the first-instance disability commission's opinion was attached to the decision. The applicant appealed.

10. On 15 May 2012 the second-instance disability commission of the Institute, located in Ljubljana, composed of an occupational medicine specialist and an orthopaedic specialist, examined the applicant's medical file and again issued a report to the effect that no physical impairment stipulated in the List could be found.

11. On 7 June 2012 the Central Office of the Institute, referring to the conclusions of the second-instance disability commission, dismissed the applicant's appeal. A copy of the second-instance disability commission's opinion was attached to the decision.

12. On 12 July 2012 the applicant initiated court proceedings against the Institute before the Ljubljana Labour and Social Court seeking the annulment of the above-mentioned decisions taken by the Institute, arguing that the facts had been wrongly established, and that the procedure had not been properly conducted. She argued that because of the incapacity of her arms the functioning of her body was inhibited and greater efforts were required to satisfy her daily needs. She also argued that the opposing party should have more seriously examined all her medical problems. In her view her physical impairment amounted to at least 50% incapacity; however, the exact degree could only be determined by a medical expert. She accordingly proposed that a medical expert be appointed.

13. On 6 September 2013 the Ljubljana Labour and Social Court, sitting in a single-judge formation, dismissed the applicant's application for a disability allowance. It observed that its role was to check whether the

impugned administrative decisions had been issued in a procedure that had complied with the procedural rules, and had been based on a proper establishment of fact and proper application of the law. It furthermore observed that the claimed physical impairment was a legally relevant fact, whose degree of severity under the relevant legal provisions (see paragraph 22 below) had to be proved in order for entitlement to a disability allowance to be established. After taking into account the documents in the file and the hearing of the applicant, the court found that the Institute had correctly established the facts. Referring to the findings of the disability commissions and its own direct observation of the applicant at the hearing, it concluded that the impairment to the applicant's health did not amount to a physical impairment within the meaning of the law.

14. Considering the above-mentioned findings sufficient to reach its conclusion, the court refused the applicant's request for the appointment of a medical expert as unnecessary.

15. On 17 October 2013 the applicant lodged an appeal against the first-instance court's finding. She argued that the impairment to both of her arms, her psychological illness and her headaches meant that the normal functioning of her organism was inhibited and that she had to exert greater efforts in order to perform daily tasks; that the List, which was out of date, could not possibly contain a complete list of all illnesses and injuries; that the first-instance court should not have relied on the opinions of the disability commissions and a doctor (opinions which the applicant had disputed); that the first-instance court should have appointed a medical expert, as requested by the applicant; that the applicant could not have explained all her medical issues at the hearing and that the court had not been in a position to assess the flexibility of her arms.

16. On 6 February 2014 the Higher Labour and Social Court dismissed the applicant's appeal, finding that the facts had been sufficiently established and the substantive law applied correctly. It also found that the refusal of the applicant's request for the appointment of an expert had not undermined the legality of the decision as that decision would not have been any different had an expert been appointed. The Higher Labour and Social Court further found the following:

> "A court in a judicial social dispute ... assesses the correctness and lawfulness of the impugned administrative decisions [in question] and having regard to the dispute of the full jurisdiction [the court] when quashing [the administrative decisions] alone decides on the merits. Within the context of the judicial review of the administrative decisions [the court] is of course not obliged to accept evidence [submitted by] a forensic medical expert if the expert opinions of the disability commissions at first and second instance allow for the conclusion that the negative administrative decisions are correct and lawful because they are based on an assessment by both commissions which is convincing in view of the available medical documentation and the report of [the relevant] medical examination. Such a procedural situation is found in the present case, because in the opinion of the

> appeal court the expert bodies in the pre-judicial administrative proceedings correctly determined that the applicant had no physical impairment."

17. The court furthermore found that physical impairments could not be determined contrary to what was provided in the List. Moreover, the question of whether a particular condition amounted to an impairment was different to the question of whether it amounted to a disability. In the applicant's case, although she had a recognised disability, this fact alone – without any functional problems in respect of inflexibility of joints – could not suffice to categorise her condition as one of physical impairment. The Higher Labour and Social Court agreed with the court of first instance that the disability commissions in the pre-judicial administrative proceedings had made the right assessment when concluding that the applicant had not suffered from any physical impairment. It also pointed out that the court had not been obliged to appoint an independent expert if it had been possible to conclude from the disability commissions' opinions that the Institute's decisions had been well-founded, as had been so in the instant case.

18. The applicant lodged an application for leave to appeal on points of law. She argued that her right to a fair trial had not been respected because the court had refused to appoint a medical expert and had assessed the applicant's condition itself, despite lacking the necessary medical knowledge. She had thereby been deprived of her only possibility to challenge the Institute's decisions. The applicant also drew attention to the fact that in numerous cases court-appointed experts had found the disability commissions' fact-finding to be erroneous. She moreover argued that the first-instance court should not have based its decision on the List.

19. On 10 June 2014 the Supreme Court dismissed the applicant's application, holding that there were no grounds for allowing an appeal on points of law.

20. On 21 July 2014 the applicant lodged a constitutional complaint. She complained that the Supreme Court's decision had not been reasoned. She further argued that she could not have explained all her medical issues at the hearing and that the court had not been in a position to assess the flexibility of her arms. Her only way of effectively challenging the Institute's decision would have been by way of appointing an independent medical expert; as had been proved in the past, independent medical experts had often reached findings contrary to those of disability commissions. She invoked Article 22 (equal protection of rights) and Article 23 (the right to judicial protection) of the Constitution. She also reiterated her complaint about the reliance on the List.

21. On 10 December 2014 the Constitutional Court decided to not accept the applicant's constitutional complaint for consideration, finding that it did not concern an important constitutional question or entail a violation of human rights which would have serious consequences for the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions on disability allowance for physical impairment

22. Under section 143 (1) of the Pensions and Invalidity Insurance Act (*Zakon o pokojninskem in invalidskem zavarovanju*, consolidated version published in the Official Gazette no. 109/06, with further amendments) "physical impairment" is defined as a loss, severe injury or significant incapacity of an insured person's organs, as a result of which normal functioning of the body is inhibited and greater efforts are required to perform vital tasks. Under its third paragraph, the list of different types of physical impairment which render a person eligible for a disability allowance is to be set by the minister responsible for health matters. Until such a list is adopted by the minister, the Self-Management Agreement on the List of Physical Impairments (see paragraph 8 above), which was first adopted in 1983 and most recently amended in 1989, is used in domestic proceedings. Points 8 and 13 of its Chapter IV ("Upper limbs"), section B ("Functional disorders"), indicate what kind of shoulder joint and wrist functional disorders, respectively, are classified as physical impairments.

23. Under section 144 of the Pensions and Invalidity Insurance Act, as in force at material time, an insured person is under certain conditions entitled to a disability allowance in respect of a physical impairment, one of those conditions relating to the degree of severity of the physical impairment in question.

B. Rules on procedure

24. Decisions on entitlement to a disability allowance owing to physical impairment are made by the Institute in a two-level administrative procedure – at the first instance by a regional unit and at the second instance by the Central Office of the Institute.

25. For the relevant domestic law regarding court procedure in disputes concerning social-security rights, see *Korošec v. Slovenia* (no. 77212/12, §§ 25-27, 8 October 2015).

C. Disability commissions of the Pensions and Disability Insurance Institute

26. Disability commissions assist the Institute in first- and second-instance proceedings by issuing opinions on disabilities and other matters relevant to decisions on the entitlement to rights arising from pensions and disability insurance.

27. Their organisation and work is regulated by the Rules on the organisation and the method of operation of the disability commissions and

other expert bodies of the Pension and Disability Insurance Institute of Slovenia, as in force at material time (*Pravilnik o organizaciji in načinu delovanja invalidskih komisij ter drugih izvedenskih organov Zavoda za pokojninsko in invalidsko zavarovanje Slovenije* – hereinafter "the Rules"). Under section 17 of the Rules, disability commissions deliver their opinions in panels, the composition of which is decided by the president of the disability commission in question. Each president manages and organises the work of his disability commission. Each panel too has a president, who is appointed by the president of the relevant disability commission. The panel's president is also the rapporteur in the case in question (section 43).

28. A medical doctor – who specialises in a particular discipline of medicine, holds a licence to practice from the Slovenian Medical Chamber, has at least two years of experience in his specialised discipline and is employed or self-employed as a doctor – can be appointed as an expert. A doctor specialising in occupational medicine, with at least four years of experience in his specialised discipline, and who is employed by the Institute, can be appointed as the president of a disability commission (section 5 of the Rules).

29. Experts are appointed by the management board of the Institute, after being nominated by the Director General of the Institute. Experts, except for those employed by the Institute (such as the disability commission's president), are appointed for a period of four years, with the possibility of the renewal of their appointment period (section 4 of the Rules).

30. Under section 14 of the Rules, the expert bodies are obliged to obey the law, the Rules and other general acts of the Institute, the expert practice of the Institute, the guidelines and recommendations of the management, the ethical code and general and ethical principles of their profession, and the basic principles of the General Administrative Procedure Act. Section 15 further stipulates that experts have autonomy when at work and are bound by the professional rules and doctrines.

31. Under section 43, the first-instance disability commission's panel should conduct an interview or examination of an insured person. The insured party can propose that he or she be also examined before the second-instance disability commission (section 56).

D. Selected domestic jurisprudence

32. In its decision no. VIII Ips 3/2006 of 7 November 2006 the Supreme Court noted that the opinions of the disability commissions had the nature of expert opinions (*izvedenških mnenj*) only in pre-judicial proceedings within the Institute itself but not in judicial proceedings, where an expert opinion should be impartial; this meant that it could not be given by a party to the proceedings. In the case under consideration by the Supreme Court,

the lower courts had treated the disability commission's opinion as decisive evidence in determining the appellant's ability to work and thereby upheld the decision of the opposing party (that is to say the Institute). The Supreme Court found that in respect of the nature of such opinions it had been inappropriate for the first-instance court to order an additional opinion from the disability commission and to dismiss the appellant's application for the appointment of an independent expert. It further found it unacceptable that the lower courts had relied, in determining the relevant facts, on an opinion of the expert body of one of the parties to the proceedings. Since the claimant had explicitly opposed this and had requested the appointment of an independent expert, the first-instance court should have allowed her request. The Supreme Court also observed that there had been discrepancies in the medical documentation and that the question of what had been the category of the appellant's disability had remained open. In its view, this question had not been properly addressed by the lower courts, which had instead relied on the additional opinion of the disability commission. In view of the foregoing, the Supreme Court found a violation of the appellant's right to be heard and to participate in the proceedings.

33. On 19 October 2017 the Constitutional Court delivered decision No. Up-233/15. Referring to, *inter alia*, the principles set out in the case of *Korošec,* cited above, it found a violation of Article 22 of the Constitution (equal protection of rights). In particular, it considered arbitrary the lower courts' finding that the disability commissions' opinions constituted public certificates (*javne listine*) and that their accuracy was therefore to be presumed until disproved. It also found a violation of Article 22 on account of the lower courts' conclusion that the complainant's statements at the hearing and the opinions of the disability commissions had sufficed to establish that there had been no physical impairment. It noted in this connection that the Institute's disability commissions were expert bodies of the Institute, which acted as one of the parties to the proceedings, and could not therefore be considered impartial (*nepristranski*). The Constitutional Court further noted that in the circumstances of the case the medical assessment had played a decisive role and that the lower courts had not had sufficient medical expertise to establish whether a physical impairment existed. Thus, by refusing the complainant's request for the appointment of an independent medical expert the lower courts had divested the applicant of any possibility of an effective defence against the finding of the expert bodies of the opposing parties, which were decisive for the administrative decisions challenged in the domestic proceedings.

34. In the same case the Constitutional Court noted that there might be instances when a request for an independent expert had not been sufficiently substantiated. However, in the case under the consideration of the Constitutional Court the complainant's request was based on the medical documentation, which he and his doctor had considered to have shown that

his health had deteriorated and that he had consequently suffered from a physical impairment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

35. The applicant complained that in basing their decisions on the opinions of the disability commissions and refusing to appoint an independent expert the domestic courts had violated her right to a fair trial. She relied on Article 6 § 1 of the Convention, which in its relevant part reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

36. The Court notes that the application 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' arguments

(a) The applicant

37. The applicant complained that in basing their decisions on the opinions of the disability commissions of the Institute the courts had violated the principle of equality of arms.

38. She observed in this connection that the opinions of the disability commissions had been on several occasions found to be erroneous by court-appointed experts. Furthermore, the only way to challenge the opinions was by obtaining an opinion from an independent court-appointed expert, but she had been denied such an opportunity during the proceedings.

39. The applicant alleged that although they were composed of physicians, the disability commissions were not independent bodies but were appointed by the opposing party. Therefore, there were reasonable grounds to suggest that the disability commissions had not acted impartially. She relied on the position of the Supreme Court on the nature of the opinions delivered by the disability commissions (see paragraph 32 above).

40. She further argued that the courts could not have had the necessary medical knowledge to decide on the matters at hand without ordering an independent expert opinion.

(b) The Government

41. The Government submitted that the first-instance court had based its decision that the applicant suffered from no physical impairment pursuant to the List on the concurring opinions of the disability commissions given during the pre-judicial procedure and the main hearing, at which the court had been able at first hand to observe the flexibility of the applicant's right shoulder joint and left wrist. They pointed out that the applicant's personal physician in 2006, when initiating the procedure regarding the rights from disability insurance, stated in the proposal that the applicant had not had any of the physical impairments. The applicant had signed that proposal and then at the main hearing in 2013 had stated that her state of health was the same as it had been in 2006.

42. The Government argued that it was for the national courts to assess the evidence before them and to decide which evidence would be produced for the establishment of facts. They referred to the domestic rules on civil procedure (see paragraph 25 above) and stressed that the adducing of evidence had been conducted in accordance with those rules.

43. They further considered that the domestic courts had given adequate and clear reasons for the refusal of the applicant's request that an expert opinion be sought. They observed in this connection that the applicant had not submitted any allegations that would have justified the appointment of an independent medical expert. Having made a comprehensive assessment of all the evidence, and not having found any divergence between the medical documentation and opinions of the disability commissions, the court had been justified in dismissing as irrelevant the applicant's application for an expert to be appointed by the court. In any case, the applicant had had an opportunity to declare her view regarding the opposing party's allegations and to present her evidence.

44. Lastly, the Government argued that the fact that the disability commissions had been linked to the opposing party in the proceedings had not in itself meant that they had been biased, since their opinions had been issued in accordance with the rules of medical science and of their profession. According to domestic jurisprudence the disability commissions were not considered to constitute "court experts", but that did not mean that their opinions could not have been used as documentary evidence in court proceedings.

2. The Court's assessment

(a) General principles

45. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national courts to assess the evidence before them. The Court's task under the Convention is rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *Elsholz v. Germany* [GC], no. 25735/94, § 66, ECHR 2000-VIII).

46. As regards the expert evidence, the Court has recently, in *Letinčić v. Croatia*, no. 7183/11, 3 May 2016, summarised the relevant principles as follows:

> " 48. Article 6 § 1 of the Convention places the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see, for instance, *Perez v. France* [GC], no. 47287/99, § 80, ECHR 2004I; and *Van Kück*, cited above, § 48). It thereby embodies the principle of equality of arms which, with respect to litigation involving opposing private interests, implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see, for example, *Andrejeva v. Latvia* [GC], no. 55707/00, § 96, ECHR 2009; and *Dombo Beheer*, cited above, § 33).
>
> ...
>
> 50. In the context of expert evidence, the rules on the admissibility thereof must not deprive the party in question of the opportunity of challenging it effectively. In certain circumstances the refusal to allow further or an alternative expert examination of material evidence may be regarded as a breach of Article 6 § 1 (see *Van Kück*, cited above, § 55; and, *mutatis mutandis*, *Matytsina v. Russia*, no. 58428/10, § 169, 27 March 2014). In particular, where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or her or to be shown the documents he or she has taken into account. What is essential is that the parties should be able to participate properly in the proceedings before the "tribunal" (see *Mantovanelli v. France*, 18 March 1997, § 33, *Reports of Judgments and Decisions* 1997-II).
>
> 51. It should be also noted that Article 6 § 1 of the Convention guarantees a right to a fair hearing by an independent and impartial "tribunal" and does not expressly require that an expert heard by that tribunal fulfil the same requirements (see *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007). However, the opinion of an expert who has been appointed by the relevant court to address issues arising in the case is likely to carry significant weight in that court's assessment of those issues. In its case-law the Court has recognised that the lack of neutrality on the part of a court-appointed expert may in certain circumstances give rise to a breach of the principle of equality of arms inherent in the concept of a fair trial (see *Bönisch v. Austria*, 6 May 1985, §§ 30-35, Series A no. 92) ..."

47. The Court further notes that the position occupied by the experts throughout the proceedings, the manner in which they perform their functions, and the way the judges assess their opinions are relevant factors

to be taken into account in assessing whether the principle of equality of arms has been complied with (see *Zarb v. Malta* (dec.), no. 16631/04, 27 September 2005; *Lasmane v. Latvia* (dec.), no. 43293/98, 6 June 2002; and *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007). In this connection, the Court has found that the Convention does not bar the national courts from relying on expert opinions drawn up by specialised bodies to resolve the disputes before them when this is required by the nature of the contentious issues under consideration. What it does require, however, is that the requirement of neutrality on the part of an appointed expert be observed, that the court proceedings comply with the adversarial principle and that the applicant be placed on a par with his or her adversary, namely the State, in accordance with the principle of equality of arms (see *Letinčić*, cited above, § 61).

48. In particular, the Court has previously found that while the fact that an expert charged with giving an opinion on a matter in dispute is employed by the same administrative authority as that involved in the case might give rise to a certain apprehension on the part of the applicant, what is decisive is whether the doubts raised by appearances can be held to be objectively justified (see *Korošec v. Slovenia,* no. 77212/12, § 54, 8 October 2015; *Sara Lind Eggertsdóttir*, cited above § 48; *Brandstetter v. Austria*, 28 August 1991, § 44, Series A no. 211; and *Galea and Pavia v. Malta* (dec.), nos. 77209/16 and 77225/16, § 46, 4 July 2017).

(b) Application of these principles to the present case

49. The Court notes at the outset that the present case concerns the reliance by the Ljubljana Labour and Social Court on the opinions of the opposing party's in-house expert bodies – that is to say the Institute's disability commissions. These bodies were not appointed as experts by the court, but had provided the expert opinions for the purpose of the administrative decisions which had subsequently been challenged in the judicial proceedings. The opinions concurred that the applicant did not suffer from a physical impairment within the meaning of the List and was therefore not entitled to a disability allowance (see paragraphs 8 and 10 above).

50. The Ljubljana Labour and Social Court reviewed all aspects of facts and law on which the aforementioned administrative decisions had been based and likewise dismissed the applicant's application for a disability allowance without, however, appointing an independent expert to assess the applicant's condition (see paragraphs 13, 14 and 16 above). It is true that in its decision the court made certain references to its own observations regarding the applicant's condition (see paragraph 13 above). However, since the medical question of whether the applicant had suffered a physical impairment fell, as a matter of principle, outside the area of expertise of judges (see paragraph 33 above; see also *Korošec*, cited above, § 47, and,

mutatis mutandis, *Mantovanelli v. France*, 18 March 1997, § 36, *Reports of Judgments and Decisions* 1997-II) and since no other expert evidence was produced in the proceedings before the court, it must be considered that the expert opinions provided by the disability commissions had a decisive role in the court's assessment of the merits of the case.

51. In the present case the Court finds it understandable that doubts could have arisen in the mind of the applicant as to the impartiality of the medical experts whose opinions were relied on by the courts, given that they were appointed and employed or contracted by the Institute – her opponent in the proceedings. However, while the applicant's apprehensions concerning the impartiality of the experts may be of a certain importance, they cannot be considered decisive as there is nothing objectively justifying any fear that the disability commissions' experts lacked neutrality in their professional judgment (see *Letinčić*, cited above, § 62, and *Krunoslava Zovko v. Croatia*, no. 56935/13, § 44, 23 May 2017). In this connection, the Court observes that neither the contents of the case file nor the applicant's submissions disclose any evidence that the relevant medical experts lacked the requisite objectivity, and nor did the applicant argue that this might have been so (see, *mutatis mutandis*, *Galea and Pavia*, cited above, § 47, and *Krunoslava Zovko*, cited above, § 45).

52. That being said, the Court observes that, pursuant to the views of the Supreme Court and Constitutional Court, the disability commissions cannot be considered to have the same degree of neutrality as the court-appointed experts, the latter constituting auxiliaries of the court in question, not of the parties (see paragraphs 32-34, and 44 above). Therefore, the Court finds it important that the claimants in disputes such as the one at stake in the present case are able to obtain the appointment of an independent expert – which indeed was a possibility under the domestic rules and practice of which the applicant availed herself (see paragraphs 12, 33, 34 and 38 above).

53. The Court further notes that it is primarily for the domestic courts to judge whether the requested expert opinion would serve any useful purpose (see, *mutatis mutandis*, *H. v. France*, 24 October 1989, §§ 60 and 61, Series A no. 162-A). The Court's role is limited to ascertaining whether the proceedings as a whole were fair (see *Elsholz*, cited above, § 66).

54. The Court notes in this respect that in order to decide on the applicant's entitlement to receive a disability allowance, the regional unit of the Institute sought the opinion of medical experts of the first-instance disability commission, who examined both the applicant's medical records and the applicant in person (see paragraph 8 above). Following the applicant's appeal, the applicant's medical file was reviewed by the medical experts of the second-instance disability commission. On the basis of the latter's findings, the Central Office of the Institute dismissed the applicant's

appeal, thereby upholding the dismissal of her application for a disability allowance (see paragraph 10 above).

55. The Court furthermore observes that the applicant had an opportunity to challenge the relevant decisions of the Institute before the Labour and Social Court. The role of that court was to check whether the impugned administrative decisions had been issued in a procedure that had complied with the relevant procedural rules and had been based on a proper establishment of the facts and a proper application of the law (see paragraph 13 above). The Labour and Social Court held an oral hearing at which the applicant was in a position to put forward her arguments related to, *inter alia,* the findings of the disability commissions' opinions.

56. In view of the above, the Court notes that while the disability commissions' opinions had, as the Court has already found above, an important influence on the outcome of the proceedings (see paragraph 50 above), the applicant was made aware of them and did have an opportunity to challenge them in writing, as well as at an oral hearing before the Labour and Social Court. She could have submitted specific objections concerning the disability commissions' objectivity and its findings and supported her view by submitting an opinion from her general practitioner (see, by contrast, *Korošec*, cited above, § 8) or any other physician treating her – or any other evidence for that matter (see paragraph 12 above).

57. However, the applicant failed to submit any argument questioning the disability commissions' findings, other than disputing them. The applicant hence failed to substantiate to the minimum necessary degree her request for the appointment of an independent expert. In this regard the present case differs from a case recently decided by the Slovenian Constitutional Court, where a request for the appointment of an independent expert was substantiated by reference to medical documents and the opinion of the complainant's doctor (see paragraphs 33 and 34 above).

58. Therefore, and having regard to the above-mentioned conclusion that no specific arguments were adduced by the applicant to place in doubt the requisite objectivity of the respective disability commissions or the accuracy of their findings (see paragraphs 51 and 57 above) – and noting that no other shortcomings (such as a lack of effective participation in the proceedings before the disability commissions; see, by contrast, *Letinčić*, cited above, §§ 65-67) were alleged by the applicant – the proceedings considered as a whole were not contrary to the requirements of a fair trial.

59. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 22 May 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Ganna Yudkivska
Registrar	President

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

(a) Concurring opinion of Judge De Gaetano;

(b) Dissenting opinion of Judge Pinto de Albuquerque.

G.Y.
M.T.

SEPARATE CONCURRING OPINION OF JUDGE DE GAETANO

1. While I agree that in this case there was no violation of Article 6 § 1 of the Convention, in my view the most important point which had to be addressed was not so much "whether the proceedings as a whole were fair" – an expression into which one may read a lot depending on the sophistication or otherwise of the legal system involved (see *passim*, albeit in the context of criminal proceedings, *Al-Khawaja and Tahery v. the United Kingdom* [GC] nos. 26766/05 and 22228/06, 15 December 2011; see also the joint dissenting opinion in *Scholer v. Germany* no. 14212/10, 18 December 2014), but rather the underlying question of the role of expert evidence in the determination of the overall fairness of the proceedings.

2. The decision in *Letinčić*, quoted extensively in the judgment, cannot be of much help here. In *Letinčić* the Court found a violation of Article 6 § 1 because of a number of procedural shortcomings both in the course of the administrative proceedings as well as before the Administrative Court. On the contrary, in the instant case no procedural shortcomings were alleged to have occurred either before the first-instance disability commission or the second-instance disability commission (the administrative or "pre-judicial" proceedings), nor before the Ljubljana Labour and Social Court or the Higher Labour and Social Court (the judicial, or "judicial-review", proceedings). The applicant simply did not agree with the findings of the medical experts of these two commissions, upon which findings the *administrative* decision was taken that the applicant did not qualify for the requested disability allowance. In the *judicial proceedings* the evidential burden was upon the applicant to show, even if only on a *prima facie* basis, that the Institute's decision was flawed because of some shortcoming in the experts' assessments. This she could have done by producing *ex parte* evidence in the form of medical documentation, as correctly indicated in paragraph 56 of the judgment. She failed to do so. In these circumstances, to hold that the Labour and Social Courts were obliged to appoint additional experts would have been tantamount to holding that there is an automatic right to such additional experts irrespective of the state of the evidence before those courts.

3. Of course, had the Labour and Social Courts declared in some way that they were "bound" by the findings of the medical experts of the commissions, or had they requested additional expertise from medical experts linked to the commissions or the Institute, the case-law mentioned in paragraphs 32 to 34 of the judgment would have kicked in.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. This case is about the equality of arms in judicial proceedings, and specifically the different treatment of litigants in the acquisition of evidence. In itself, the topic is evidently of the utmost importance. The importance of this case is further enhanced by the fact that the majority departed, without good reason, from the recent and consistent case-law of the Slovenian Supreme Court and Constitutional Court. Even worse, the majority overruled the Court's own solid case-law with regard to the respondent State (see *Korošec v. Slovenia*, no. 77212/12, 8 October 2015) and to another State (see *Letinčić v. Croatia*, no. 7183/11, 3 May 2016, and *Krunoslava Zovko v. Croatia*, no. 56935/13, 23 May 2017), thereby disregarding Article 30 of the Convention. These reasons alone would have led me to vote against the majority. There is however an additional reason, of a more general nature, which warrants my dissent, namely the distortion of the technique of distinguishing in the present case. This evidently triggers the burning issue of the consistency, or lack of it, of the Court's case-law.

2. The applicant complained about the objective impartiality of the disability commissions of the Pensions and Disability Insurance Institute ("the Institute"), which was the respondent in the judicial proceedings. According to her, her case had been decided on the basis of expert opinions prepared by the disability commissions, the domestic courts having refused her request for the appointment of an independent expert. The majority did not dispute these facts and even found it understandable that doubts could have arisen in the mind of the applicant as to the experts' impartiality (see paragraph 51 of the judgment). Nevertheless, they concluded that there had been no violation, because "the applicant failed to submit any argument questioning the disability commissions' findings, other than disputing them" (see paragraph 57 of the judgment).

3. To my mind, the objective impartiality of the disability commissions is highly questionable, in view of the fact that their members are either employed or appointed for a period of four years by the same Institute that is the respondent in the judicial proceedings (see paragraph 29 of the judgment). The possibility of renewal of the experts' appointment leaves them even more susceptible to the interests of the Institute (see paragraph 29). Furthermore, these experts are embedded in the organisational structure of the Institute and are bound by, *inter alia*, its acts, recommendations and practice (see paragraph 30 of the judgment). Their neutrality can be seriously called into question for these reasons even in the absence of any concrete evidence of actual bias on their part. The majority simply disregarded these facts. They also disregarded the judgments delivered by the Slovenian Supreme Court and Constitutional Court in cases similar to the present one (see paragraphs 32 and 33 of the judgment), in

which both courts found that the experts of the disability commissions were not impartial, in the light of their legal and factual position within the Institute.

4. The majority missed the point when they argued that "the applicant failed to submit any argument questioning the disability commissions' findings, other than disputing them" (see paragraph 57 of the judgment). The applicant did not raise an issue regarding the subjective impartiality of the individual experts, but clearly raised an issue about the lack of objective impartiality of the disability commissions or, to put it differently, about the lack of institutional impartiality of the experts working in these commissions, which had impacted on their assessment of her physical disability. Throughout the domestic proceedings the applicant disputed the findings of the disability commissions and alleged that her condition amounted to a physical impairment, an assertion which she intended to prove by way of the appointment of an independent expert (see paragraphs 9, 12, 15 and 18 of the judgment). Her request that the domestic court appoint an independent expert was therefore not frivolous. The Labour and Social Court's refusal on the grounds that the appointment of an independent expert would be unnecessary (see paragraph 14 of the judgment) meant that the applicant, herself lacking the necessary medical knowledge, was left with no opportunity to substantiate her application for a disability allowance. The Higher Labour and Social Court's confirmation of that refusal on the grounds that the decision on disability would have been the same had an expert been appointed (see paragraph 16 of the judgment) assumed, to the detriment of the applicant, what had to be demonstrated. This is precisely the type of presumption in favour of the disability commissions' opinions that the Constitutional Court criticised (see paragraph 33 of the judgment).

5. The majority sought to distinguish this case from *Korošec* by pointing out that the applicant had not supported her view by submitting an opinion from her general practitioner or any other physician treating her, or any other evidence for that matter (see paragraph 56 of the judgment). The practice of distinguishing is a rather subtle technique which does not allow for boundless judicial discretion. In law, to distinguish a case means that a rule or principle set out in a similar precedent case will not apply due to significantly different facts between the two cases.

According to *Korošec*, the case should be decided by "taking into account three factors: (1) the nature of the task entrusted to the experts; (2) the experts' position within the hierarchy of the opposing party; and (3) their role in the proceedings, in particular the weight attached by the court to their opinions" (see *Korošec*, cited above, § 52). Hence, the fact that the applicant had or had not submitted a medical opinion or any other evidence was irrelevant for the decision of the Court. Let me put this even more clearly. In *Korošec*, the Court was crystal-clear about the unacceptable role

of the experts of the disability commissions, and in particular the decisive nature of their opinions. On this basis alone the Court found a violation of Article 6 of the Convention. The fact that in *Korošec* the applicant had submitted an opinion by a general practitioner was not a decisive, important, significant fact. It was not even mentioned, let alone evaluated, in the reasoning of the "Court's assessment" part of the judgment (see *Korošec*, cited above, §§ 49-57).

6. Distinguishing one case from another involves showing the relevant dissimilarities between the two, not that the cases are different on the basis of an unimportant, peripheral, marginal, incidental fact. That is exactly what the majority failed to do, and by failing to do so they delivered a serious blow to the consistency and coherence of the Court's case-law. Worse still, they overruled valid case-law delivered by this Court against the respondent State and later confirmed against another State (see *Letincic*, cited above, and *Krunoslava Zovko*, cited above), without any regard for Article 30 of the Convention. This blunt inconsistency in the case-law warrants the intervention of the Grand Chamber. If this case is not referred to the Grand Chamber and accepted by its panel under Article 43 (3) of the Convention, the domestic authorities will find themselves lost in the middle of confusing and contradictory case-law of the Court, and even worse, the authority of the Grand Chamber and ultimately of the Court will be seriously damaged (on the respect due to the precedential force of the Court's judgments see my separate opinion in *Herrmann v. Germany* [GC], no. 9300/07, 26 June 2012).

7. Moreover, the majority failed to see that the applicant was raising the issue of the lack of objective impartiality of the disability commissions *per se* and its impact on her own case. The argument as to the lack of impartiality of in-house experts working in these commissions is even more compelling when the extra-judicial evidence they produce is accorded decisive weight by the courts. In the present case the majority conceded that the expert opinions provided by the disability commissions had had a decisive role in the domestic courts' assessment of the merits of the applicant's case (see paragraph 50 of the judgment). Having no medical qualifications, the domestic judges were bound to attach significant weight to the disability commissions' opinions on a medical issue decisive for the outcome of a case (see *Korošec*, cited above, § 56).

Furthermore, I observe that the Ljubljana Labour and Social Court based its decision on the opinions of the disability commissions and the judge's own observation of the applicant at the hearing. Given the lack of any explanation as to the judge's medical expertise regarding the disability issue at stake, it is rather odd that the domestic court was ready to replace the opinion of an independent expert with the judge's own observations (see paragraph 13 of the judgment; see also the Constitutional Court's opinion in the similar case referred to in paragraph 33 of the judgment). The Ljubljana

Labour and Social Court furthermore referred to certain findings in proceedings that had taken place more than five years prior to the applicant's request for a disability allowance. However, as the applicant highlighted in her appeal, those proceedings concerned a different issue. Unfortunately, this point remained unaddressed by the Higher Labour and Social Court.

8. Having regard to the foregoing, I cannot but conclude that the refusal by the Ljubljana Labour and Social Court to appoint an independent expert, which was upheld on appeal, meant that the applicant's procedural position was not put on a par with that of her adversary, the Institute, as it was required to be by the principle of equality of arms. What is more, the fairness of the judicial proceedings was itself compromised by the domestic courts' reliance on the disability commissions' opinions as decisive evidence in the case, given the Institute's role in the judicial proceedings (see, *mutatis mutandis*, *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 54, 5 July 2007).

9. Hence, I conclude that there has been a breach of Article 6 § 1 of the Convention. This was an opportunity for the Court to state *urbi et orbi* that precedents mean something in Strasbourg; however, it missed that opportunity. If referred to the Grand Chamber under Article 43 of the Convention, this case should indeed be accepted by the Grand Chamber panel in order to reinstate the relevant precedent of *Korošec*. Judicial consistency *oblige*.