REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

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Content

I. Editorial

In the third quarter of 2020, Europe did not stand still despite the ongoing corona pandemic. Numerous current developments in European labour and social security law are presented in the present third edition of the 'HSI Report (en)'.

The CJEU recently issued a significant decision on the interpretation of the Temporary Agency Work Directive (Case C-681/18 – *JH/KG*). It concerned the question of practical relevance, under which conditions the use of temporary agency workers in a workplace is to be regarded as 'temporary'. The court also made clear that transposing national law has to include provisions to safeguard the temporary character of agency work.

National holiday legislation is strongly influenced by Union law and its interpretation by the CJEU. In this respect, it is of particular importance that the German Federal Labour Court has again referred several questions in this area for a preliminary ruling to the CJEU. Specifically, the issue is whether annual leave not taken due to illness or reduced earning capacity is foresighted after a carry-over period if the employer has not ensured that the leave is taken in time (reference numbers of the German Federal Labour Court: 9 AZR 401/19 (A) and 9 AZR 245/19 (A)). A further submission concerns the consideration of holiday periods for overtime bonuses in collective agreements (reference number of the German Federal Labour Court: 10 AZR 210/19 (A)). In addition, a Belgian referral procedure offers the CJEU the opportunity to flesh out its case law on the so-called 'headscarf ban' in the workplace (Case *S.C.R.L.*).

The ECtHR had to rule on the admissibility of criminal sanctions imposed on a trade union member for taking part in an unannounced trade union demonstration on International Women's Day in case *Şenşafak v. Turkey* (No. 5999/13). The Court found that the absence of prior notice did not in itself justify interference with the peaceful freedom of assembly.

In new pending cases, the ECtHR will deal, inter alia, with the admissibility of dismissal for private use of a company mobile phone (case *Tomić v. Croatia*) and questions of anti-discrimination law. In the context of four pension law proceedings, the CJEU expressly pointed out that an ongoing legal dispute may not, in principle, be influenced by a targeted retroactive amendment of the law (*Avellone and Others v. Italy*, *Facchinetti v. Italy*, *Grieco v. Italy* and *Pellegrini v. Italy*). The great importance of appropriate provisions for the participation of children with disabilities in primary education was emphasised in *G.L. v. Italy*.

We hope that the report will once again provide you with a comprehensive overview of the latest developments. You are very welcome to further disseminate the report and to invite colleagues to subscribe to it free of charge.

The editors
Dr. Johanna Wenckebach, Prof. Dr. Martin Gruber-Risak and Dr. Daniel Hlava

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II. Proceedings before the CJEU

Compiled and commented by

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1. Annual leave

Decisions

Judgment of the Court of Justice (Second Chamber) of 16 July 2020 – C-658/18 – *Governo della Repubblica italiana (Statute of the youth of Italy)*

Law: Article 267 TFEU, Article 7 (1) Working Time Directive 2003/88/EC, Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Paid annual leave – Concept of 'fixed-term worker' – Different treatment of justices of the peace and ordinary judges

Core statement: (1) The Giudice di pace (Justice of the Peace, Italy) is a court with the right to bring proceedings within the meaning of Article 267 TFEU.

(2) A Justice of the Peace is an employee within the meaning of Article 7(1) of the Working Time Directive 2003/88/EC if, in the context of his or her duties, he or she provides genuine services which are neither wholly ancillary nor insignificant and for which he or she receives compensation of a remunerative nature. If a Justice of the Peace is appointed for a limited period of time, the right to a fixed-term applies.

(3) Where ordinary judges are entitled to paid annual leave of 30 days, Justices of the Peace employed on a fixed-term basis may be denied such leave if the difference in treatment is justified by the differences in the qualifications required and the nature of the duties falling within the remit of ordinary judges.

Note: The Italian 'Justice of the Peace' (Giudice di pace) has first instance jurisdiction in minor civil and criminal cases. In the main proceedings, it was questionable whether a Justice of the Peace (formally a volunteer) is a worker within the meaning of Article 7(1) of the Working Time Directive 2003/88/EC and is therefore entitled to paid annual leave. Justices of the peace receive remuneration for their work, which is calculated on the basis of the number of decisions issued. For this reason, they do not receive any remuneration during their leave, whereas ordinary (professional) judges (giudice togato) are entitled to 30 days of leave.

Within the scope of the admissibility examination, the CJEU first dealt in detail with the question of whether a Peace Court is a 'national court' within the meaning of Article 267 TFEU and whether it is entitled to address preliminary rulings to the CJEU. The result is affirmative.

In examining whether the Justice of the Peace is a worker under the Working Time Directive, the CJEU makes an overall assessment. Formally, the payments made to Justices of the Peace are compensation for 'honorary' work, but the volume of work and thus the amounts received are nevertheless considerable (para. 99). Thus, within one year, the plaintiff issued 478 judgments and 1306 closure decisions. This indicates that the payments have a

remuneration character. Nor does the fact that Justices of the Peace can organise their work more flexibly than other professions argue against their classification as workers, since they are nevertheless involved in the work organisation of the Court of the Peace, are subject to disciplinary obligations and must comply with service instructions (para. 108 et seq.). With its result that – subject to the examination by the submission court – the Justice of the Peace is a worker with the right to paid annual leave, the CJEU follows the conclusions of the Advocate General *Kokott*.[1]

Moreover, the framework agreement on fixed-term work applies to the Justice of the Peace, who was appointed for four years. Thus, according to Section 4 no. 1 of the Framework Agreement, the Justice of the Peace should not be at a disadvantage compared to ordinary judges employed for an indefinite period, provided that he or she is in a situation comparable to that of ordinary judges. The Court of Justice has considered the activities to be comparable (para. 145 et seq.), but the lesser importance and complexity of the proceedings to be dealt with and the composition of the panel could also argue in favour of this. Finally, the CJEU considered that the difference in treatment in the granting of leave could be justified by the differences in the exercise of the profession (para. 162).

The labour and social security law status of Justices of the Peace will continue to be a matter of concern to the CJEU. In a new Italian reference for a preliminary ruling, the question of social security for Justices of the Peace and their protection against abusive fixed-term contracts is at stake.[2]

New pending cases

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany), order of 7 July 2020 – 9 AZR 401/19 (A)

Law: Article 7 Working Time Directive 2003/88/EC, Article 31 (2) EU GRC

Keywords: Lapse of leave in case of illness – Scope – 15-month period even if the employer fails to cooperate

Note: This time the Federal Labour Court is addressing the CJEU with two preliminary rulings. The proceedings both revolve around the forfeiture of leave due to the failure of the employer to cooperate, so that a consolidation of the cases by the CJEU seems obvious.

The first case (reference number: 9 AZR 401/19 (A)) concerns a woman who has been continuously unfit for work since becoming ill in the course of 2017. She did not take 14 days of the annual leave from 2017. However, the employer failed to specifically request the plaintiff to take her leave in time for the leave year and did not point out to her that this leave could otherwise lapse. The woman is now suing for a declaration that she is still entitled to the 14 days of leave.

In the second case (reference number: 9 AZR 245/19 (A)), the plaintiff, a severely disabled person, has been employed by the defendant since 2000. Since 1 December 2014, the plaintiff has been receiving a full-rate reduced-earning-capacity pension. He asserts that he would still be entitled to 34 days of holidays from 2014 against the defendant. These claims have not lapsed either, as the defendant has not complied with the obligation to provide information (described above) regarding the holidays.

In both cases, the holiday entitlement would have lapsed under German law, because holidays must be granted and taken in the current calendar year (Section 7 (3) of the Federal

[1] Opinions of 23.01.2020 – C-658/18, cf. *Hlava/Höller/Klengel*, HSI-Report 1/2020, p. 16 et seq.

[2] Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Emilia Romagna (Italy) lodged on 4 June 2020 – C-236/20 – *Ministero della Giustizia and Others*.

Holiday Act – Bundesurlaubsgesetz – BUrlG). A carry-over of the leave into the first three months of the following calendar year is only justified under special circumstances. Leave not taken is generally forfeited. However, German holiday law is strongly influenced by the case law of the CJEU. For the CJEU, the right to annual leave from Article 31 (2) of the Charta of Fundamental Rights is a central European fundamental right which must be protected to a special degree.[3] In recent years, it has continuously expanded this protection through its law on annual leave.[4] In its *Max-Planck-Gesellschaft*[5] ruling of 6 November 2018, the CJEU developed the obligation of the employer to cooperate as a mandatory requirement for the expiry of leave. This states that the employer must request the employee in good time and in a concrete manner to take his/her holidays in good time and must inform the employee that failure to take his/her holidays may lead to the holidays lapsing. If the employer fails to do so, the leave will not lapse.[6] In the event that the employee was prevented from performing his/her work during the holiday year for health reasons, Section 7 (3) BUrlG is to be interpreted in accordance with the *KHS*[7] decision of the European Court of Justice of 22 November 2011 as meaning that statutory holiday entitlements do not expire until 15 months after the end of the holiday year in the event of continued incapacity to work.

For the decision of the two cases, the CJEU must now clarify whether EU law allows the holiday entitlement to lapse after the expiry of this 15-month period or, if applicable, a longer period, even if the employer has not fulfilled their obligations to cooperate during the holiday year, although the employee could have taken at least part of the holidays during the holiday year until the onset of the incapacity to work / full reduction in earning capacity.

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany), order of 7 July 2020 – 9 AZR 245/19 (A)

Law: Article 7 Working Time Directive 2003/88/EC, Article 31 (2) EU GRC

Keywords: Reduced earning capacity pension – Forfeiture of leave – Scope – 15-month period even if the employer fails to cooperate

Note: See commentary on German Federal Labour Court, decision of 7 July 2020 – 9 AZR 401/19 (A).

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany), order of 17 June 2020 – 10 AZR 210/19 (A)

Law: Article 7 of the Working Time Directive 2003/88/EC, Article 31(2) EU GRC

Keywords: Consideration of holiday periods for overtime bonuses

Note: By its reference for a preliminary ruling, the Federal Labour Court seeks to ascertain whether a collective agreement which, for the purposes of calculating overtime pay, takes into account only the hours actually worked, leaving aside the hours during which the employee took his or her minimum paid annual leave, is contrary to European Union law. According to the Federal Labour Court, the interpretation of the collective agreement does

[3] CJEU of 6 November 2018 – C-684/16, ECLI:EU:C:2018:874 = NZA 2018, 1474 para. 19 – *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*.

[4] CJEU of 6 November 2018 – C-569/16 and C-570/16 (*Bauer and Wilmeroth*), C-619/16 (*Kreuziger*), C-684/16 (*Max-Planck-Gesellschaft zur Förderung der Wissenschaften*), cf. *Buschmann*, AuR 5/2019, 233; CJEU of 20 January 2009 – C-350/06, C-520/06, ECLI:EU:C:2009:18 – *Schultz-Hoff*.

[5] CJEU of 6 November 2018 – C-684/16, ECLI:EU:C:2018:874 = NZA 2018, 1474 – *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*.

[6] CJEU of 6 November 2018 – C-684/16, ECLI:EU:C:2018:874 = NZA 2018, 1474 para. 81 – *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*.

[7] CJEU of 22 November 2011 – C-214/10, ECLI:EU:C:2011:761 = NZA 2011, 1333 – *KHS*.

not allow holiday periods to be taken into account when calculating overtime bonuses. The question is also whether such a collective agreement constitutes an unlawful incentive under Union law to refrain from taking leave.

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2. Codetermination

New pending cases

Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany), order of 18 August 2020 – 1 ABR 43/18 (A)

Law: Article 4 (4) Involvement of employees Directive 2001/86/EC

Keywords: Employee participation in an SE established by transformation – Exclusive right of unions to propose a certain number of seats for employee representatives on the supervisory board – Separate ballot

Note: The request for a preliminary ruling submitted to the CJEU by the First Senate of the Federal Labour Court is intended to clarify the requirements for company co-determination in the conversion of a German Public limited company (AG) with equal co-determination into an SE.

The employer, originally an AG under German law, was converted into an SE in 2014. The participation agreement concluded between the employer and the Special Negotiating Body under the German SE Employee Involvement Act (SE-Beteiligungsgesetz – SEBG) provides for the possibility of reducing the size of the Supervisory Board. In this case, the trade unions may submit nominations for the election of the supervisory board members of the employees; however, there will be no separate ballot.

The applicant unions have subsequently claimed that these provisions are invalid as they violate Section 21 (6) SEBG. Conversion into an SE may not restrict the unions' exclusive right to propose a certain number of seats for employee representatives on the supervisory board.

With its request for a preliminary ruling, the Federal Labour Court now wishes to know whether the participation agreement at issue in the dispute is compatible with co-determination under Section 21 (6) SEBG with Article 4 (4) Involvement of Employees Directive 2001/86/EC. According to this article, the agreement on an SE established by way of conversion must guarantee at least the same degree of employee participation with regard to all components of employee involvement as exists in the company to be converted into an SE. It is disputed that employee participation via trade union representatives on the supervisory board should be regarded as such a component, but the answer is affirmative.[8] The decision is of considerable importance for the future of company co-determination, which is increasingly being circumvented in Germany.[9]

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[8] Cf. *Grüneberg/Hay/Jerchel/Sick*, AuR 2020, 297.
[9] I.M.U. Mitbestimmungsreport Nr. 58 of April 2020, p. 13 et seqq.

3. Data protection

Decisions

Judgment of the Court (Grand Chamber) of 16 July 2020 – C-311/18 – *Facebook Ireland and Schrems*

Law: Article 2(1) and (2), Article 46(1) and Article 46(2)(b) c of General Data Protection Regulation (EU) 2016/679 (GDPR)

Keywords: Transfers of personal data to third countries – EU-US Privacy Shield – Assessment of the adequacy of the level of protection provided in the third country – Standard safeguards for data transfers to third countries

Core statement: (1) the EU-US Privacy Shield violates Union law, the Commission's implementing Decision (EU) 2016/1250 is invalid.

(2) The level of protection for personal data transferred to a third country on the basis of standard data protection clauses must be equivalent to the level guaranteed in the EU by the GDPR.

(3) The supervisory authorities are obliged to prevent the transfer of personal data to a third country if they consider that the level of protection required by Union law cannot be ensured.

(4) Commission Decision 2010/87/EU on standard contractual clauses for the transfer of personal data to processors established in third countries is valid.

Note: In 2015, the judgment of the CJEU's Grand Chamber in Case *Schrems*[10] had caused a sensation in transnational data protection. It concerned the safe harbour decision of the EU Commission, which had bindingly established that the US offers an adequate level of protection for the transfer of personal data. The CJEU declared this decision invalid, which also had a significant impact on the transfer of employee data.[11] In response, the EU entered into an informal agreement with the US on data protection, the EU-US Privacy Shield, which was legally implemented through an implementing Commission Decision. This allowed, inter alia, the transfer of employee data to certified companies in the US. However, the Privacy Shield still did not provide sufficient guarantees that the US secret services could only access the data to the extent absolutely necessary. The envisaged ombudsman mechanism did not suffice. With the present decision of the Grand Chamber of the CJEU, also known as 'Schrems II', a violation of Union law (General Data Protection Regulation, Charta of Fundamental Rights) was found in the EU-US Privacy Shield for this and other reasons and the implementing decision (EU) 2016/1250 was declared invalid.

The CJEU also had to deal with the Commission's standard contractual clauses (Decision 2010/87/EU). Under these clauses, processors in third countries undertake to respect data protection when transferring data. These standard contractual clauses have not been challenged by the CJEU and can therefore continue to be used as a basis for a data transfer.[12]

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[10] CJEU of 6 October 2015 – C-362/14 – *Schrems*.
[11] Cf. *Heuschmid/Hlava*, HSI-Newsletter 4/2015 under IV.1.
[12] Cf. *Kartheuser*, EuGH hebt den Privacy Shield auf: Und jetzt?, in: Legal Tribune Online, 16.07.2020.

4. Equal treatment

Decisions

Judgment of the Court (Third Chamber) of 24 September 2020 – C-223/19 – *YS (Pensions d'entreprise de personnel cadre)*

Law: Article 4(2) and Article 5(2) c Equal Treatment Directive 2006/54/EC, Equal Treatment Framework Directive 2000/78/EC

Keywords: Gender equality in the field of pay and social security – Occupational pensions – Occupational pensions in the form of a direct promise of benefits by the employer

Core statement: (1) If a pension is drawn on the basis of a direct benefit commitment from a state-controlled company, a part of this pension exceeding a certain limit can be withheld and the benefit of a contractually agreed indexation of this pension can be withheld. This applies even if the percentage of former employees whose level of occupational pension has been adversely affected is significantly higher than that of former female employees, provided that such consequences are justified by objective factors unrelated to any discrimination on grounds of sex.

(2) Such legislation does not constitute age discrimination simply because it concerns only beneficiaries who have already exceeded a certain age.

Note: The reference for a preliminary ruling concerns Austrian rules on occupational pensions for managers. The central question of the proceedings is: 'Are men, as the primary recipients of particularly large pensions compared to women who receive substantially smaller pensions on average, indirectly discriminated against by national legislation which introduces, inter alia, a contribution from particularly large 'special pensions' in order to secure the pension revenue?'[13]

Following its previous case law[14], the Court of Justice states that this may constitute indirect discrimination on grounds of sex (Article 5(c) of Directive 2006/54/EC) if the percentage of male workers affected by the scheme is significantly higher than that of female workers. However, the difference in treatment could be justified by objective factors which have nothing to do with gender discrimination (para. 54). The principle, repeated in the present case (recital 60), that budgetary considerations cannot justify discrimination, is in line with its case-law[15]. In addition, the Court states that 'the objectives of ensuring the long-term funding of retirement benefits and narrowing the gap between State-funded pension levels can be considered, having regard to the broad discretion of the Member States, to constitute legitimate social-policy objectives wholly unrelated to any discrimination based on sex' (para. 61).

[13] Opinion of Advocate General Kokott of 7 May 2020 – C-223/19, para. 1.
[14] CJEU of 6 December 2007 – C-300/06 – *Voß*, para. 42.
[15] Cf. only CJEU of 23 October 2003 – C-4/02 and C-5/02 – *Schönheit and Becker*, para. 85.

Opinions

Opinion of Advocate General Bobek delivered on 9 July 2020 – C-463/19 – *Syndicat CFTC*

Law: Article 28(1) Equal Treatment Directive 2006/54/EC

Keywords: Additional leave granted by collective agreement exclusively to women after statutory maternity leave – Rules for the protection of women, in particular during pregnancy and maternity leave

Core statement: Additional leave over and above statutory maternity leave, which is reserved for women workers under national law, is lawful only if it pursues the dual objective of providing for protective measures relating to the physical condition of the woman after childbirth and the special relationship with her child, taking due account in particular of the conditions for entitlement to the leave, its duration and structure, and the legal protection associated with the leave.

Note: Under a French collective agreement, only women have the possibility of requesting special maternity leave in addition to the statutory maternity leave. This additional leave can range from one and a half months to one year or even be extended for a further year. In the main proceedings, a father of a young child applied for that additional maternity leave, which was refused to him on grounds of his sex. Before the national court, the trade union representing him now claimed that this refusal was discriminatory.

In order to assess the case, the Advocate General refers to the criteria developed in the *Hofmann* decision[16] (recital 38 et seq.). These so-called 'Hofmann criteria' were developed on the basis of Article 2(3) of the Equal Treatment of Employees Directive 76/207/EEC (the predecessor of the current Article 28(1) of the Equal Treatment Directive) in order to define more precisely the possibilities for the protection of women 'during pregnancy and maternity leave' with regard to the principle of equality. This specific maternity protection consists on the one hand of its legitimacy 'to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.'[17] The Advocate General considers it to be overdue to adapt these criteria to the present day, in line with social change. On the one hand, the 'maternity exception' was to be interpreted narrowly, so that motherhood was not to be equated with the more general concepts of motherhood or parenthood, but referred to the specific, biologically non-comparable circumstances of women and men (para. 62). On the other hand, the Hofmann criteria were to be regarded as two sides of the same coin, although the purpose of protection with regard to the physical condition of women was to be given a certain priority (para. 63). Additional leave must therefore, in order to fall within the scope of Article 28(1) of Directive 2006/54/EC, pursue the dual objective of providing for protective measures in connection with the woman's physical condition after childbirth and the special relationship with her child. This objective must be reflected in particular in the conditions for entitlement to such leave, its duration and form, and the legal protection associated with the leave (para. 80). In summary, it could therefore be concluded that the longer the leave was organised, the higher the requirements for justification for reserving access to this additional leave exclusively for women (para. 74). The aim is to offer parents freedom of choice in educational decisions and to remove the economic incentives which legally cement certain established social conventions (para. 55).

[16] *CJEU* of 12 July 1984 – 184/83, ECLI:EU:C:1984:273 – *Hofmann*.
[17] *CJEU* of 12 July 1984 – 184/83, ECLI:EU:C:1984:273 – *Hofmann*, para. 25.

With regard to the specific case, the Advocate General came to the conclusion that the relatively long duration of the leave, to which it can be extended, would be the main argument against an 'exemption on maternity' under Article 28(1) of the Equal Treatment Directive.

The opinion of the Advocate General is to be welcomed as a sign of equal rights. This is particularly important in times of the Covid-19 pandemic, in which steps already taken towards lived equality through the home office, the associated double burden of additional care work (especially for women) and the relapse into traditional role models are called into question.[18]

New pending cases

Reference for a preliminary ruling from the Tribunal du travail francophone de Bruxelles (Belgium) lodged on 27 July 2020 – C-344/20 – *S.C.R.L.*

Law: Articles 1 and 2(2)(a) of the Framework Directive 2000/78/EC on equal treatment

Keywords: Ban on headscarves – Internal company rule requiring employees 'not to express their religious, philosophical or political convictions in any way, whether by words, clothing or in any other way' – Are religion and belief two facets of the same protected characteristic or different ones? – Unequal treatment compared to other visible signs of religious expression

Note: In the main proceedings, a woman of Islamic faith applied for a traineeship with a housing management company. In the context of its policy of neutrality, the company has an internal rule that employees may not 'express their religious, philosophical or political convictions in any way, whether by words, clothing or in any other way'. The applicant was denied the internship because she refused to take off her headscarf. The company justified its decision on the grounds that the trainee administrator also had customer contact and that wearing the headscarf would not comply with its strict policy of neutrality. Her suggestion to wear a different type of headscarf instead was not accepted either.

The CJEU had already dealt with the headscarf ban at the workplace in two highly regarded decisions in 2017.[19] In the *G4S Secure Solutions* case, the Court had basically recognised that the employer's wish 'to express a policy of political, philosophical or religious neutrality in relations with public and private customers' was a legitimate objective within the meaning of the Equal Treatment Framework Directive.[20] The present proceedings provide the Court with the opportunity to further refine and correct its case-law. Clarification would be desirable, for example, to the effect that an abstract danger or mere assertion of the harmfulness of religious symbols for the image of a company is not sufficient to justify an encroachment on the freedom of religion, which is protected by fundamental law.[21] The case law of the ECtHR on the freedom of religion enshrined in Article 9 ECHR should also be more closely integrated, which extends its protection more widely and, via Article 52 (3) of the Charta on Fundamental Rights, acquires significance in determining the content of Article 10 of the Charta.[22]

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[18] *Kohlrausch/Zucco*, WSI Policy Brief No. 40, May 2020, under https://www.boeckler.de/data/Boeckler-Impuls_2020_08_S4-5.pdf.

[19] Judgments of CJEU of 14 March 2017 – C-157/15 – *G4S Secure Solutions* and of 14 March 2017 – C-188/15 – *Bougnaoui and ADDH*, cf. *Hlava*, HSI-Newsletter 1/2017 under II. = AuR 2017, 456.

[20] CJEU of 14 March 2017 – C-157/15 – *G4S Secure Solutions*, para. 37.

[21] *Hlava*, HSI-Newsletter 1/2017 under II.

[22] In general: NK-GA/*Heuschmid/Lörcher*, Art. 52 GRCh para. 22 et seq.; cf. *Hlava*, HSI-Newsletter 1/2017 under II.

Reference for a preliminary ruling from the Tribunal Superior de Justicia de Cataluña (Spain) lodged on 8 June 2020 – C-244/20 – *INSS*

Law: Article 3(2) Equal Treatment Directive Social Security 79/7/EEC, Articles 2, 3, 6 TEU, Article 19 TFEU, Article 17(1), Article 21(1) EU GRC, Article 14 ECHR

Keywords: More difficult access for de facto life partnerships and women to survivors' and family benefits – Exclusion of these benefits from the scope of the Equal Treatment Directive Social Security 79/7/EEC – Concepts of 'birth' and 'belonging to a national minority'

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5. General matters

Opinions

Opinion of Advocate General Sánchez-Bordona delivered on 10 September 2020 – Joined Cases C-407/19 and C-471/19 – *Katoen Natie Bulk Terminals and General Services Antwerp*

Law: Articles 15(2) and 16 EU GRC, Articles 45, 49 TFEU

Keywords: Access to the profession and recruitment – Harbour workers (stevedores) included in a quota (pool) – Mobility of stevedores between port areas – Provisional application of a national scheme incompatible with Union law

Core statement:

In case C-471/19:

A system of recognition of dock workers serving to protect a port area does not, a priori, infringe the freedom of establishment of undertakings wishing to employ non-recognised dock workers and the freedom of establishment of undertakings. It is therefore basically in conformity with Union law. However, the system must be based on transparent, objective and non-discriminatory criteria that are known in advance in order to enable stevedores from other Member States to prove that they meet requirements in their home country that are comparable to those for domestic port workers.

A recognition system in the sense of a 'closed store', which was created under the control of the trade unions and employers' organisations of the port in question and which imposes disproportionate restrictions on companies and employees from other Member States, is contrary to Union law. Legal uncertainty and the risk of social tensions are not compelling reasons for such a closed store recognition system.

In case C-407/19:

A system of access to port work is contrary to European Union law if the arrangements for its application include one of the following features:

- Procedures controlled by the local employers' organisation and trade unions that control the entry of new workers without providing adequate procedural guarantees.
- The requirement of certain professional qualifications, when these are certified by bodies controlled by the local employers' organisation and trade unions of the port in question.

- The recognition of non-quota (pool) dock workers only for the duration of their employment contracts and with the application of a restrictive transitional regime in respect of that duration.
- The restriction of the mobility of workers between the different port areas of a Member State, as agreed in collective agreements.
- The requirement of a safety certificate, which must be renewed for each employment contract and which is issued by the issue of a card by a private company.

Opinion of Advocate General Szpunar delivered on 10 September 2020 – C-62/19 – *Star Taxi App*

Law: Article 2(a), Article 4 of Directive 2000/31/EC (Directive on electronic commerce), Article 1(1)(b) of Directive (EU) 2015/1535 on information society services, Article 9 and 10 of Directive 2006/123/EC on services

Keywords: Concept of 'information society services' – Service which brings cab customers into direct contact with cab drivers – Licensing rules for service activities

Core statement: A service that brings cab customers into direct contact with cab drivers via app (electronic application) is an information society service if it is not inseparably linked to the transport service as an integral part. Providers of information society services may be subject to licensing regulations which apply to providers of economically equivalent services which are not information society services. The granting of the authorisation may not be made subject to requirements which are technologically unsuitable for the service planned by the applicant.

New pending cases

Reference for a preliminary ruling from Appeals Service Northern Ireland (United Kingdom) made on 7 April 2020 – C-247/20 – *VI v Commissioners for Her Majesty's Revenue and Customs*

Law: Article 7 (1) Free Movement Directive 2004/38/EC

Keywords: Criteria for comprehensive sickness insurance cover as a condition of the right of residence – Requirement that the cover must extend to that person and to all members of his family concerned – Agreements between the United Kingdom and Ireland on the common travel territory with regard to sickness insurance cover as 'reciprocal agreements'

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6. Social security

Decisions

Judgment of the Court (Grand Chamber) of 16 July 2020 – C-610/18 – *AFMB and others*

Law: Article 14(2)(a) of Regulation (EEC) No. 1408/71 on the application of social security schemes, Article 13(1)(b) of Regulation (EC) No. 883/2004 on coordination

Keywords: Coordination of social security – Lorry driver – Concept of 'employer' – Usual place of employment in two or more Member States – Disparity between contractual employer in Cyprus and actual employer in the Netherlands

Core statement: For the purposes of European law, the employer of a lorry driver engaged in international road haulage is the undertaking which is actually authorised to give instructions to that driver, which in reality bears the corresponding wage costs and which is actually authorised to dismiss him, and not the undertaking with which the driver has concluded an employment contract and which is formally indicated in that contract as the employer of the driver.

Note: A company incorporated under Cypriot law recruits drivers who work on behalf of and under the instructions of Dutch contractors, without themselves being resident in Cyprus. The Dutch authorities certify the applicability of Dutch law in the field of social security, which is being challenged by the Cypriot company. According to Article 14(2)(a) of Regulation 1408/71 and Article 13(1) of Regulation 883/2004, the law applicable in the case at issue would be that of the place where the employer is established.

The Court of Justice defines the concept of entrepreneur in functional terms, primarily for reasons of protection against abusive arrangements. The contractual employer may therefore be different from the actual employer. An employer may therefore also be regarded as the transport undertaking which is actually entitled to give instructions to the driver, which in reality has to bear the corresponding wage costs and which is actually entitled to dismiss the driver.

Judgment of the Court (Fourth Chamber) of 23 September 2020 – C-777/18 – *Vas Megyei Kormányhivatal (Soins de santé transfrontaliers)*

Law: Article 20 Coordination Regulation (EC) No. 883/2004; Article 26 Implementing Regulation (EC) No. 987/2009; Article 8 Patient Directive 2011/24/EU; Article 56 TFEU (freedom to provide services)

Keywords: Cross-border healthcare – Planned treatment abroad in the EU – Prior authorisation – Reasonable time limit

Core statement: (1) Medical care which the insured person has taken out of his own volition in a Member State other than that in which he resides because he considers that such care or equally effective care could not be obtained within a medically justifiable period of time in the Member State of residence falls within the concept of 'planned treatment' within the meaning of Article 20 of Regulation (EC) No. 883/2004 in conjunction with Article 26 Implementing Regulation (EC) No. 987/2009. Such medical care is therefore in principle subject to authorisation by the competent institution of the Member State of residence.

(2) If, nevertheless, a planned treatment is received without prior authorisation, there is an entitlement to reimbursement if

- the insured person was unable, because of his or her state of health or the urgency of receiving such treatment there, to apply to the competent institution for such authorisation or to await its decision, and
- the other conditions for assumption of the costs of benefits in kind pursuant to Article 20(2), second sentence, of Regulation (EC) No. 883/2004 are fulfilled.

(3) If reimbursement of costs is excluded in the absence of prior authorisation, this is contrary to the freedom to provide services (Article 56 TFEU) and Article 8(2)(a) of the first paragraph of Article 8(1) of the Patent Directive 2011/24/EU.

(4) The fixing of a period of 31 days for the granting of prior authorisation and a period of 23 days for refusal of such authorisation is permissible if it allows account to be taken at the same time of the specific features and urgency of the individual case.

Note: The main proceedings concern the reimbursement of medical treatment received in other EU countries. The Hungarian claimant is blind in one eye. The other eye has been diagnosed with glaucoma that could not be treated in his country of residence. As his field of vision became increasingly narrow and the intraocular pressure steadily increased, he consulted a doctor in Germany, who successfully operated on him the day after the examination. The applicant sought reimbursement from his social security institution in Hungary for the costs of treatment in Germany. The latter refused to reimburse him on the ground that it was a planned treatment for which he was entitled to reimbursement under Article 20 of Regulation (EC) No. 883/2004, read in conjunction with Article 26 Regulation (EC) No. 987/2009, he should have applied for prior authorisation.

The CJEU found that such deliberate treatment in another Member State constituted ‘planned treatment’ within the meaning of the Regulations and thus in principle required prior authorisation. However, special circumstances had to be taken into account when deciding on the reimbursement of costs. These include, in particular, the urgency of the treatment that rendered it impossible to wait for a decision. Furthermore, Hungarian law contains an explicit provision which excludes the reimbursement of costs if there is no prior authorisation. The Court of Justice ruled that this provision constituted a disproportionate restriction of the freedom to provide services and was contrary to Directive 2011/24/EC. The objective of limiting costs does not apply to medical consultations and even in the case of costly treatment and hospital treatment, the special circumstances of the individual case must be considered.

Opinions

Opinion of Advocate General Szpunar delivered on 17.09.2020 – C-710/19 – *G.M.A. (Demandeur d'emploi)*

Law: Articles 14(4)(b), 15 and 31 Free Movement Directive 2004/38/EC, Article 45 TFEU

Keywords: Job search – Right of residence in the host Member State – Reasonable time for a job seeker to take note of job offers and take the necessary measures for recruitment

Core statement: (1) The host Member State is obliged to allow a job seeker a reasonable period of time after the initial period of three months of legal residence in order to enable him or her to seek suitable job offers and take the necessary measures for recruitment. During this period, the job seeker may stay in the territory without having to provide evidence that he or she has a reasonable prospect of being recruited.

Where a Union citizen is deprived of the right of residence for more than three months, any change in circumstances which occurred after the administrative restriction on his or her right of residence must be taken into account if that change shows that the job seeker had such a right of residence.

New pending cases

Reference for a preliminary ruling from the Augstākā tiesa (Latvia), lodged on 12 July 2019 – C-535/19 – *A (Soins de santé publics)*

Law: Article 3(1)(a) of Regulation (EC) No. 883/2004, Article 24 of Directive 2004/38/EC on Citizenship of the Union, Articles 18, 20(1) and 21 TFEU

Keywords: Public health care as part of 'sickness benefits' – Refusal of social security claims by EU citizens who are not workers at the time – Denial of entitlement to public, publicly funded health care by all Member States concerned

Reference for a preliminary ruling from the Tribunale Amministrativo Regionale per la Emilia Romagna (Italy) lodged on 4 June 2020 – C-236/20 – *Ministero della Giustizia and Others*

Law: Articles 20, 21, 31, 33 and 34 EU GRC, Framework Agreement on fixed-term work (transposed by Directive 1999/70/EC), Framework Agreement on part-time work (transposed by Directive 97/81/EC), Article 7 Working Time Directive 2003/88/EC, Articles 1 and 2(2)(a) Equal Treatment Directive 2000/78/EC

Keywords: Italian Justice of the Peace – Volunteering – Equal treatment with professional judges in terms of remuneration and social security – Exclusion from any social security scheme for employees – Protection against abusive chain limitation of Justice of the Peace

Note: In the case Governo della Repubblica italiana (Statut des juges de paix italiens), the CJEU recently decided on the question whether Justices of the Peace – in Italy responsible at first instance for minor civil and criminal cases – are entitled to paid annual leave under Article 7 of the Working Time Directive and whether, as fixed-term workers, they can also claim the same (more extensive) leave as professional judges.[23] The now newly pending preliminary ruling concerns first of all the inclusion of Justices of the Peace in the social security system. This concerns, on the one hand, the question of equal treatment vis-à-vis professional judges and, on the other hand, more generally, access to the social security scheme to which workers are entitled under Italian law. Another issue is the protection of Justices of the Peace as fixed-term workers.

Reference for a preliminary ruling from the Corte costituzionale (Italy) lodged on 30 July 2020 – C-350/20 – *INPS*

Law: Article 12(1)(e) of Directive 2011/98/EU (Directive on the combined work and residence permit for third-country nationals), Article 3(1)(b) and (j) of the Coordination Regulation (EC) No. 883/2004

Keywords: Granting of childbirth and maternity allowances – Distinction between foreigners holding a long-term residence permit and foreigners holding a combined permit regulated by Directive 2011/98/EU

[23] CJEU of 16 July 2020 – C-658/18 – *Governo della Repubblica italiana (Statut des juges de paix italiens)*, cf. *Hlava/Höller/Klengel*, HSI-Report 3/2020, p. 32.

Action brought on 22 July 2020 – C-328/20 – *Commission v Austria*

Law: Coordination Regulation (EC) No. 883/2004, Free Movement Regulation (EU) No. 492/2011

Keywords: Infringement proceedings – Child benefit – Reduction of family benefits according to the price level in the children's State of residence

Note: The Commission's infringement proceedings against Austria concern Austrian law which provides that the amount of family allowances for employees working in Austria is based on the cost of living in the Member State of residence of their children. This would put beneficiaries whose children live in a Member State with a high price level in a better position than those whose children live in a Member State with a lower price level. This indexation also concerns the amount deducted for children. According to information from the Austrian Ministry for Family Affairs (presented on the portal of the Austrian Chambers of Labour), this leads to considerable reductions in benefits in some cases. While the reduction of the current basic amount of family allowance (140 EUR) in Germany only results in a minus of 2.60 EUR, indexation in Bulgaria leads to a deduction of 62.70 EUR.[24] The EU Commission considers this regulation to be indirect discrimination against migrant workers.

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7. Tax law

Opinions

Opinion of Advocate General Szpunar delivered on 17 September 2020 – C-288/19 – *Finanzamt Saarbrücken*

Law: Article 2(1)(b) c, Article 26(1)(b), Articles 45, 56(2) of the VAT Directive 2006/112/EC

Keywords: VAT – Supply of services for consideration – Place of supply of services – Place of supply of services – Hiring of means of transport – Supply of company cars to employees

Core statement: (1) The supply of a vehicle allocated to his business by a taxable person for the private use of an employee does not constitute a supply of services for consideration within the meaning of these provisions if the employee neither pays remuneration for it nor waives part of his or her remuneration or other benefits which the taxable person owes him or her nor performs additional work for the supply of the vehicle to him or her.

(2) If the transfer of the vehicle is for more than 30 days against payment, Article 56(2) of Directive 2006/112/EC must be interpreted as meaning that the term 'hiring out of a means of transport for a period which is not only shorter' covers this transfer.

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[24] *Portal der Arbeiterkammern*, Indexierung der Familienbeihilfe mit Bezug auf *Bundeskanzleramt*, Familienbeihilfenbeträge für Kinder, die sich ständig im EU/EWR-Raum und der Schweiz aufhalten.

8. Temporary work

New pending cases

Reference for a preliminary ruling from the Hof van beroep Antwerpen (Belgium) lodged on 15 June 2020 – C-265/20 – *Universiteit Antwerpen and Others*

Law: Clause 4(1) of the Framework Agreement on fixed-term work (by Directive 1999/70/EC) and Clause 4(1) of the Framework Agreement on part-time work (by Directive 97/81/EC),

Keywords: University lecturer employed for 20 years with about 20 consecutive part-time employment contracts of short duration and statutory employment from one to three years without a limitation of the total number of renewals – Independence of universities – Abusiveness of employment conditions

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9. Transfer of business

Decisions

Judgment of the Court (Fifth Chamber) of 9 September 2020 – Joint Cases C-674/18 and C-675/18 – *TMD Friction*

Law: Article 3 (4) and Article 5 of the transfer of business Directive 2001/23/EC, Article 8 of the insolvency Directive 2008/94/EC

Keywords: Occupational pension schemes – Insolvency – Transfer of liability for supplementary pensions for employees of a business transferred by an insolvent transferor to the transferee

Core statement: (1) National law may provide that the purchaser of a business which has been sold in the context of insolvency proceedings is not liable for entitlements under supplementary company pension schemes. However, as regards the amount for which the purchaser is not liable, national law must provide for a level of protection at least equivalent to that required by Article 8 of Directive 2008/94/EC.

(2) Provisions of national law under which the purchaser of a business from an insolvent transferor does not pay for part of the vested rights acquired from the transferor, while the insolvency insurance institution does not have to pay for vested rights which have not yet become non-forfeitable and the insolvency insurance is calculated on the basis of the gross monthly remuneration at the time of the opening of the insolvency proceedings must preserve the minimum protection granted by Article 3(4)(b) of Directive 2001/23/EC.

(3) Article 8 of Directive 2008/94/EC has direct effect vis-à-vis an institution established under private law which has been designated by the Member State concerned as the institution responsible for the insolvency insurance of employers in the field of occupational retirement provision, provided that the latter can be regarded as equivalent to the State.

Note: According to the case-law of the German Federal Labour Court, the entry of the acquirer of the undertaking into the rights and obligations of the transferor under Paragraph 613a(1)(1) of the German Civil Code (BGB) does not include any entitlements to a

supplementary occupational pension scheme which arose before the opening of the insolvency proceedings. The background to this is a ruling by the Federal Labour Court from 1980.[25] The principle of equal treatment of creditors contradicts the result that the transferred workforce asserts its claim against a new, solvent debtor and is thus unduly favoured over other creditors, in particular over employees who have left the company. Although the *Pensionssicherungsverein* is liable for losses, this is only the case for vested entitlements and due to different, and generally less favourable, calculation bases. The loss resulting from the insolvency is estimated at 142.22 EUR per month in the preliminary proceedings, an amount which can be freely entered in the insolvency table.

It was questionable whether this legal situation was compatible with the Directive on the transfer of business. According to Article 3(1) of Directive 2001/23/EC, the rights and obligations of the transferor under an employment contract existing at the time of the transfer are transferred to the transferee by virtue of the transfer. The exception under Article 5(2) of Directive 2001/23/EC for claims which fall due before the insolvency petition does not apply, since the retirement pension is only due after the insolvency petition.

The exception in Article 3(4) of Directive 2001/23/EC allows Member States to exclude occupational pension rights from the rights to be maintained by the transferee. The Member States must then take the necessary measures to protect the interests of employees. Such measures must be at least equivalent to the protection required by Article 8 of Directive 2008/94/EC.

It is now questionable whether it constitutes equivalent protection if the *Pensionssicherungsverein* only pays for the vested rights. According to the CJEU, Article 8 of Directive 2008/94/EC does not require the prevention of any pension reduction. The reduction must only be proportionate. A reduction by which an employee loses more than half of his or her pension rights does not meet these requirements.[26] The calculation must be based on all the pension benefits that can actually be obtained; it must not be limited to vested rights and entitlements.[27]

Furthermore, the reduction should not seriously affect the worker's ability to earn a living. A reduction in old-age benefits for a former worker who is living or would have to live in the future below the at-risk-of-poverty threshold determined by the Statistical Office of the European Union (Eurostat) for the Member State concerned is therefore inadmissible.[28]

Even though the CJEU emphasises that the national court has a margin of assessment, it specifies the requirements of Union law to such an extent that it is to be expected that the Federal Labour Court will adapt its case-law on the reduction of supplementary pension benefits in the event of a transfer of business.

New pending cases

Reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) lodged on 5 June 2020 – C-237/20 – *Federatie Nederlandse Vakbeweging*

Law: Transfer of business Directive 2001/23/EC

Keywords: Transfer of business – Term bankruptcy proceedings

Note: It is questionable whether Dutch proceedings can be considered as bankruptcy proceedings within the meaning of Article 5 (1) of Directive 2001/23/EC, which involve a so-

[25] Federal Labour Court of 17 January 1980 – 3 AZR 160/79, NJW 1980, 1124.

[26] CJEU of 19 December 2019 – C-168/18 – *Pensions-Sicherungs-Verein*, para. 55, cf. *Schminke*. 45, HSI-Newsletter 4/2019, comment under II.

[27] Para. 85 et seqq.

[28] Para. 80.

called pre-package. According to this pre-package, the transfer of (part of) the company is prepared prior to the declaration of bankruptcy and is only completed after the declaration of bankruptcy. Before the declaration of bankruptcy, the court-appointed liquidator must be guided by the interests of all creditors and by social interests such as the interest in preserving jobs, which must be monitored by the court-appointed bankruptcy judge.

It is also questionable whether the condition that 'the bankruptcy proceedings or any analogous proceedings are under the supervision of a competent public authority' is met if the transfer of (part of) the business is prepared in a pre-package before the declaration of bankruptcy and is carried out after the declaration of bankruptcy and if the procedure is organised in accordance with Dutch law.

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10. Working time

New pending cases

Reference for a preliminary ruling from the Verwaltungsgericht Darmstadt (Germany) lodged on 30 July 2019 – C-580/19 – *Stadt Offenbach am Main (Période d'astreinte d'un pompier)*

Law: Article 2 Working Time Directive 2003/88/EC

Keywords: On-call duty of a fire department chief of operations – Obligation to reach the city limits within 20 minutes in operational clothing and vehicle – No specification of the location by the employer – Factual restriction of the choice of location and personal protection of interests

Note: The procedure once again concerns the question under which conditions the on-call times of firefighters outside the office are to be considered as working time. Advocate General *Pitruzzella* has in the meantime submitted his opinions[29] for the constellation to be assessed here, which will be presented in the next report.

Reference for a preliminary ruling from the Rayonen sad Lukovit (Bulgaria) lodged on 15 June 2020 – C-262/20 – *Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' came Ministerstvo na vatreshnite raboti*

Law: Article 12 (a) Working Time Directive 2003/88/EG, Article 20 and 31 Charta of Fundamental Rights

Keywords: Working time of police and firefighters – Health protection during night work – Requirement that night work is shorter than the normal duration of work during the day – Equal treatment between employees of private employers and public servants as regards the duration of night work

Note: Background of this case is the lawsuit of a Bulgarian civil servant against his employer concerning the remuneration of night work. The official is a shift leader in the fire and population protection department of the Ministry of the Interior. The Bulgarian labour law stipulates that the normal duration of day work is eight hours and that of night work seven

[29] Opinion of the Advocate General *Pitruzzella* of 6 October 2020 – C-580/19 – *Stadt Offenbach am Main (Période d'astreinte d'un pompier)*.

hours. There is no comparable regulation for firefighters and police officers. It is now questionable whether the normal duration of night work must be shorter than the normal duration of day work according to Article 12(a) Working Time Directive 2003/88/EG, which requires measures for health protection during night and shift work. In addition, the question arises as to whether equal treatment must be established here in relation to other workers for whom the normal duration of day and night work is explicitly regulated.

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III. Proceedings before the ECtHR

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1. Data protection

(In)admissibility decisions

Decision (2nd section) of 8 September 2020 – No. 40120/11 – *Sevgisunar v. Turkey*

Law: Article 8 ECHR (right to respect for private and family life)

Keywords: Refusal of promotion – Right to have information on criminal proceedings removed from the personal file

Core statement: The storage of information in personal files concerning the private life of a person falls within the scope of Article 8 ECHR.

Note: The complainant was a Deputy Head of Department in the former Ministry of Culture. Following the merger of the Ministry of Culture and the Ministry of Tourism in 2003, his application for the post of Deputy Director was not considered and he was transferred to a library as an expert. He appealed against that decision, which was dismissed by the Administrative Court on the ground that the filling of the post of Deputy Director was not objectionable from the point of view of selection and that the rejection of the complainant's application was therefore lawful. In the meantime, he had learned that his personal file contained information on criminal proceedings pending against him in 1983 and 1994, but which did not lead to a conviction. An action for removal of this data before the administrative courts was unsuccessful. In his complaint, the complainant alleges infringement of Article 8 of the ECHR, taking the view, in particular, that the information contained in his personal file gave cause for the rejection of his application.

The Court points out that, although the storage of data relating to the private life of a person falls within the scope of Article 8 ECHR, it is not possible to determine whether that information is necessary for the purposes of the application of Article 8 ECHR.[30] However, a breach of Article 8 ECHR presupposes the production of concrete evidence that the harm to a person's career is due to the information concerning private life contained in the personal file or that the national authorities have failed to fulfil their obligation to respect the confidentiality of the data contained in that file. The complainant was unable to provide any evidence to that effect. Moreover, he was able to continue his career in the civil service without hindrance. The Court therefore declared the appeal inadmissible on the ground of manifest failure to state reasons, in accordance with Article 35(3)(a) and (4).

[30] ECtHR of 4 May 2000 – No. 28341/95 – *Rotaru v. Romania*.

New pending cases (notified to the respective government)

No. 46343/19 – *Tomić v. Croatia* (1st section) submitted on 26 August 2019 – delivered on 8 July 2020

Law: Article 8 ECHR (right to respect for private and family life)

Keywords: Termination of employment – Private use of the business telephone

Note: The complainant was employed in the public sector and was dismissed by her employer for private use of the business telephone. The national courts upheld this dismissal. The complainant considers this to be an infringement of her right to respect for private and family life under Article 8 ECHR, referring to the case law of the Court of Justice.[31]

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2. Freedom of movement

New pending cases (notified to the respective government)

No. 10845/20 – *Tobolich v. Russia* (3rd section) submitted on 13 February 2020 – delivered on 1 September 2020

Law: Article 2 Additional Protocol No. 4 (free movement of persons)

Keywords: Dismissal from civil service – Breach of a departure ban

Note: The complainant was an officer of the Moscow Police, with a confidential security clearance and therefore had access to state secrets. An order issued by the Ministry of the Interior limited the right to leave Russia for all employees who had access to classified information and required them to surrender their passports. Since the complainant's children live in Moldova, she repeatedly went there with the permission of her superior. Disciplinary proceedings were subsequently initiated against them with the aim of removing them from their official status. After the court of first instance found only a reprimand for failure to hand over her passport, the Court of Appeal upheld the complainant's removal from the civil service. In her complaint, she alleges infringement of Article 2 of Additional Protocol No. 4, since she was dismissed for unauthorised travel abroad.

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[31] ECtHR of 3 July 2008 – No. 62617/00 – *Copland v. United Kingdom*.

3. Freedom of association

Decisions

Judgment (2nd section) of 7 July 2020 – No. 5999/13 – *Şenşafak v. Turkey*

Law: Article 11 ECHR (freedom of assembly and association)

Keywords: Participation in a unionised demonstration – Sentenced to prison

Core statement: The right to organise or to participate in peaceful assembly is so important in a democratic society that it cannot be subject to any restriction relating to the person as a trade union member.

Note: The complaint concerns the complainant's criminal conviction for taking part in a demonstration on the occasion of International Women's Day on 8 March 2005. The complainant, an official of the defendant state, took part in a demonstration organised by Eğitim-Sen, the Turkish Trade Union for Education, Science and Culture. The demonstration was organised by a group of about 100 people between 6 p.m. and 6:30 p.m. and took place from the building of KESK, the Public Employees' Trade Union Confederation, to a nearby square, where it ended with the reading of a statement. During the meeting, banners were displayed, and 14 torches were lit. Apart from the obstruction of vehicle and pedestrian traffic, the demonstration was peaceful. It had been previously reported to the local police headquarters, but the police prefect in charge was not informed of the event, which would have been required under Turkish law. Although the security forces called on the participants in the demonstration to disperse it, no police intervention took place. Criminal proceedings were then initiated against the complainant. She was accused of violating Turkish law by participating in an unannounced demonstration and by failing to comply with the police's request to dissolve the demonstration. She was sentenced by the Criminal Court to one year and three months imprisonment without parole. The sentence was upheld on appeal. In her appeal, the appellant alleges infringement of her right to freedom of assembly under Article 11 of the ECHR.

As regards the fundamental principles deriving from Article 11 of the ECHR, the Court of Justice refers to its settled case-law[32] according to which the right to freedom of assembly is one of the foundations of a democratic society and cannot therefore be interpreted restrictively. It includes in particular the right to freedom of peaceful assembly, both in private and in public places. Applying those principles, the Court concludes that the interference with the appellant's right to freedom of assembly, although imposed by law by the obligation to register the demonstration, also pursued a legitimate objective, namely the maintenance of public order. However, as regards the question whether the interference was necessary in a democratic society, the Court points out, first, that the absence of prior notice does not justify interference with the exercise of the right to freedom of peaceful assembly. This is particularly so in the present case, given that the trade union Eğitim-Sen had previously announced that national demonstrations would be held on International Women's Day. Moreover, the national courts have not weighed up the interests at stake against the legitimate objectives justifying the interference. In particular, no account was taken of the fact that the demonstration was peaceful, that the local police authorities were informed of the

[32] ECtHR of 15 May 2014 – No. 19554/05 – *Taranenko v. Russia*; ECtHR of 20 February 2003 – No. 20652/92 – *Djavit An v. Turkey*; ECtHR of 4 May 2004 – No. 61821/00 – *Ziliberberg v. Moldova*; ECtHR of 5 May 2009 – No. 31684/05 – *Barraco v. France*; ECtHR of 2 October 2001 – No. 29221/95 – *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*; ECtHR of 23 October 2008 – No. 10877/04 – *Sergey Kuznetsov v. Russia*; ECtHR of 21 October 2020 – No. 4916/07 – *Alekseyev v. Russia*; ECtHR of 24 July 2012 – No. 40721/08 – *Fáber v. Hungary*; ECtHR of 18 June 2013 – No. 8029/07 – *Gün et al. v. Turkey*; ECtHR of 15 May 2014 – No. 19554/05 – *Taranenko v. Russia*.

demonstration and that, even under Turkish law, peaceful demonstrations may be organised without prior authorisation. Since the right to participate in a peaceful assembly is so important that it is not subject to restrictions on a person's trade union membership,[33] the Court concluded that the decision of the national courts to impose a prison sentence on the complainant for taking part in a peaceful demonstration was disproportionate. An infringement of Article 11 of the ECHR was found to have occurred and the complainant was awarded compensation of 2,250 EUR.[34]

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4. Freedom of expression

(In)admissibility decisions

Decision (3rd section) of 7 July 2020 – No. 57462/19 – *Mahi v. Belgium*

Law: Article 10 ECHR (freedom of expression)

Keywords: Disciplinary action for public statements to the press – Special responsibility as a teacher

Core statement: Although the protection of freedom of expression granted by Article 10 ECHR is of paramount importance in a democratic society, an interference with this freedom can be justified by the special duties and responsibilities associated with the status of a teacher.

Note: The complainant is a teacher of Islamic religion at educational establishments in the French community in Belgium. In February 2015, he addressed an open letter to the press, criticising the role of the media in the coverage of the assassination of the French satirical magazine Charlie Hebdo. For breach of the duty of neutrality, the French Community of Belgium initiated disciplinary proceedings against the complainant with a view to removing him from the service. A disciplinary order to that effect was withdrawn and converted into a transfer to another educational establishment. Although the Conseil d'État did not consider the open letter to be related to the complainant's teaching duties, it did not consider it to be unrelated to his status as a teacher. An action brought against it was unsuccessful at all instances. The complainant claims that the disciplinary measure imposed on him infringes his right to freedom of expression under Article 10 ECHR.

The Court emphasises the outstanding and essential nature of freedom of expression in a democratic society,[35] but at the same time highlights its limitations. The protection granted by Article 10 ECHR extends to the professional sphere in general and to civil servants in particular.[36] However, teachers have special duties and responsibilities with regard to their freedom of expression, as they are a symbol of authority in the field of education for

[33] ECtHR of 26 April 1991 – No. 11800/85 – *Ezelin v. France*; ECtHR of 17 July 2008 – Nos. 23018/04, 23034/04, 23042/04, 23071/04, 23073/04, 23081/04, 23086/04, 23091/04, 23094/04, 23444/04 and 23676/04 – *Urcan et al. v. Turkey*; ECtHR of 18 June 2013 – No. 8029/07 – *Gün et al. v. Turkey*; ECtHR of 21 July 2015 – No. 70396/11 – *Akarsubaşı v. Turkey*.

[34] See also the comment by Lörcher, HSI-Report 3/2020, p. 11.

[35] ECtHR of 7 December 1976 – No. 5493/72 – *Handyside v. United Kingdom*; ECtHR of 8 July 1986 – No. 9815/82 – *Lingens v. Austria*; ECtHR of 23 September 1994 – No. 15890/89 – *Jersild v. Denmark*.

[36] ECtHR of 26 September 1995 – No. 17851/91 – *Vogt v. Germany*; ECtHR of 13 November 2008 – No. 64119/00 – *Kayasu v. Turkey*.

students.[37] As long as the right to freedom of expression of public officials is at stake, the duties and responsibilities mentioned in Article 10 (2) ECHR take on a special significance, which has to be taken into account when considering whether the interference is proportionate to the declared objective. Even if the complainant's statements are not criminally reprehensible in the present case, it was to be expected from him, in his capacity as a teacher, that he would be reluctant to take into account the importance, particularly in the context of the tensions that prevailed in the school after the attacks in Paris in January 2015. Moreover, the complainant's comments were not a spontaneous oral reaction, but a prepared written statement that had been made available to a wide public. Since the disciplinary measure resulted in the complainant being transferred to another school, it is not disproportionate and the interference with the complainant's freedom of expression was necessary in a democratic society. Since the complaint was manifestly unfounded, it had to be declared inadmissible in accordance with Article 35(3) and (4) of the ECHR.

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5. Non-discrimination

New pending cases (notified to the respective government)

No. 25226/18 – *Pajak and others v. Poland* (1st section) submitted on 21 May 2018 – delivered on 7 September 2020

Law: Article 6 ECHR (right to a fair trial); Article 14 ECHR (prohibition of discrimination); Article 8 ECHR (right to respect for private and family life)

Keywords: Retirement – Right to extension of service – Access to a court

Note: The complainants were judges at various district courts. They applied to be able to continue to exercise their office after reaching the age of 60 to 70, which is possible according to the legal provisions, provided their state of health allows it and this is confirmed by a medical certificate. Although a medical certificate was provided, the complainants were refused the right to continue to exercise their duties, as neither the interests of justice nor the public interest would have required it. The complainants have not been granted an appeal against this decision. The complainants complain of discrimination on grounds of age and sex and of lack of access to a national court. The Court of Justice is required to examine, on the one hand, whether Article 6 of the ECHR applies to the present case and, on the other hand, whether the national legislation on the retirement age of judges involves discrimination.

No. 38977/19 – *Samsin v. Ukraine* (5th section) submitted on 18 July 2019 – delivered on 7 September 2020

Law: Article 8 ECHR (right to respect for private and family life); Article 14 ECHR (prohibition of discrimination)

Keywords: Removal from the judiciary – Political activities for the former president – Loss of pension rights

[37] ECtHR of 15 February 2001 – No. 42393/98 – *Dahlab v. Switzerland*; ECtHR of 18 May 2004 – No. 57383/00 – *Seurot v. Switzerland*; ECtHR of 7 June 2011 – No. 48135/08 – *Gollnisch v. France*.

Note: The complainant was a judge at the Supreme Court. During Viktor *Yanukovych's* presidency, he held the post of Chairman of the Commission for State Legal Education. Because of this activity, he was dismissed from the office of Supreme Court judge on the basis of a law, which also deprived him of pension benefits. The complainant has challenged this decision before the national courts without success. In addition to the infringement of Article 8 ECHR, the complainant also alleges discrimination against persons who did not occupy senior posts during Mr *Yanukovich's* term of office and who were not dismissed from their post.

No. 1478/14 – *Ącalska v. Poland* (3rd section) submitted on 20 December 2013 – delivered on 7 September 2020

Law: Article 14 ECHR (prohibition of discrimination); Article 8 ECHR (right to respect for private and family life); Article 1 Additional Protocol No. 1 (protection of property)

Keywords: Entitlement to a survivor's pension – Concept of 'family'

Note: For more than 25 years, the complainant lived in cohabitation with an employee of the presidential administration, who was married to another woman. The children from the other relationship were raised together by the couple. The complainant's partner died in a plane crash in 2010. Based on a resolution adopted by the Polish Council of Ministers, the families of the victims of the plane crash were given the opportunity to apply for a special pension. The complainant subsequently applied for the special pension, which was refused because she was not the 'family' of the person who died in the plane crash. An action brought against that decision was unsuccessful at all instances before the administrative courts. In each case, it was argued that the complainant was not married to the victim and that her economic situation had not deteriorated significantly after the death of her partner. The complainant feels discriminated against in her status as an unmarried life partner by the refusal of the special pension and alleges a violation of Article 14 ECHR in conjunction with Article 7 and 8 ECHR and Article 1 Additional Protocol No. 1.

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6. Participation of persons with disabilities

Decisions

Judgment (1st Section) of 10 September 2020 – No. 59751/15 – *G.L. v. Italy*

Law: Article 14 ECHR (prohibition of discrimination); Article 2 Additional Protocol No. 1 (right to education); UN-BRK

Keywords: Entitlement of an autistic child to supplementary school care – Consideration of real needs – Reasonable accommodation – Importance of international law

Core statement: The ECHR must be read as a whole and interpreted in such a way as to promote the internal coherence of its various provisions, taking into account all the rules and principles of international law applicable between the Parties.

Explanatory notes: The complaint concerns the right to be granted learning assistance for primary school pupils with disabilities. The complainant was born in 2004. She was diagnosed with non-verbal autism. During her attendance at the kindergarten, she was

granted the support of a care teacher and special assistance on the basis of legal regulations. The aim of these measures is to help children with disabilities to develop their independence and communication skills in order to improve their interpersonal life and their integration into the school system. On entering primary school, the complainant was no longer granted these benefits. A request to this effect by the complainant's parents was rejected on the grounds that she was provided with care at primary school that was appropriate to her disability and that no further state support services were available. The complainant's parents paid the costs of the special assistance that continued to be claimed from their own resources. They brought an action against the competent state authorities for reimbursement of the costs incurred in that connection. The Administrative Court dismissed the action and justified its decision in particular by reference to the austerity measures ordered by the State. The appeal lodged against this decision was unsuccessful. In her appeal, the appellant alleges infringement of the prohibition of discrimination on grounds of her disability, taking the view that the State has failed to fulfil its obligation to ensure equal opportunities for people with disabilities.

The Court emphasises that the right to education is indispensable to the realisation of human rights in a democratic society and occupies a fundamental place[38] and is therefore one of the most important public services in a modern State. Even if it is a costly service and the resources available to the public authorities to provide it are limited, it must not be disregarded that education, unlike certain other services, is a right directly protected by the ECHR. With regard to Article 14 ECHR, the Court reaffirms that discrimination consists in treating persons in comparable situations differently without objective and reasonable justification, such justification being subject to the condition that it pursues a legitimate aim or takes sufficient account of the principle of proportionality.[39] The Court takes the dispute as an opportunity to reiterate that the interpretation of the ECHR, and in particular of Article 14 ECHR and Article 2 Additional Protocol No. 1, must take account of the rules of international law, taking into account developments in the standards to be achieved thereafter.[40] In particular, the exercise of the right to education and non-discrimination are of great importance.

Applying those principles, the Court of Justice finds, first, that the Italian legal system guarantees the right to education for children with disabilities in the form of inclusive education in ordinary schools. It was therefore necessary to examine in the present case whether the national authorities had taken reasonable steps, within the limits of their discretionary powers in relation to the complainant, to ensure that the rights conferred on her by Article 2, Additional Protocol No. 1(i) of the Italian Constitution were respected. in connection with Article 14 ECHR. As the complainant was not able to attend primary school under conditions equivalent to those of pupils without disabilities due to her disability, it must be assumed that she was not discriminated against. However, the budgetary restrictions put forward by the government as an objection to the grant of the benefit applied for cannot be limited exclusively to the reduction of the educational opportunities for disabled people. On the contrary, they should have had the same effect on the provision of education for disabled and non-disabled pupils. In this context, the Court reaffirms the particular importance of international law for the interpretation of the ECHR. It refers in that regard to Article 15 of the revised European Social Charter (RESC) and to the United Nations Convention on the Rights of Persons with Disabilities (UNICRP). These require States to promote the full integration and participation of people with disabilities in society, in particular through

[38] ECtHR of 14 May 2014 – No. 16032/07 – *Velyo Velev v. Bulgaria*.

[39] ECtHR of 24 May 2016 – No. 38590/10 – *Biao v. Denmark*; ECtHR of 19 December 2018 – No. 20452/14 – *Molla Sali v. Greece*; ECtHR of 23 February 2016 – No. 51500/08 – *Çam v. Turkey*.

[40] ECtHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia*; ECtHR of 07 February 2013 – No. 16574/08 – *Fabris v. France*.

measures, including technical aids, designed to overcome obstacles to communication and mobility.

In the light of the foregoing, the Court concludes that the refusal by the national authorities to grant the appellant benefits which enabled her to receive training equivalent to that received by persons without disabilities was disproportionate. The Court reaffirms that the discrimination is all the more serious because it took place in the context of primary education, which is the basis for education and social integration and the first experiences of living together.[41] Accordingly, the national authorities did not exercise their discretion with due care in order to strike a balance between the conflicting interests. The Court found that there had been a breach of Article 14 ECHR in conjunction with Article 2 Additional Protocol No. 1 and awarded the complainant damages of 10,000 EUR and 2,520 EUR. In a favourable opinion, Judge *Wojtyczek* underlines the importance of inclusive education for dealing with people with disabilities.

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7. Procedural law

Decisions

Judgment (2nd Section) of 15 September 2020 – No. 21218/12 – *Čivinskaitė v. Lithuania*

Law: Article 6 ECHR (right to a fair trial)

Keywords: Disciplinary proceedings against a public prosecutor – Bias of the court by previous campaign of politicians and media – No violation of Article 6 ECHR

Core statement: Whether courts are influenced by public statements by politicians and the media with regard to the assessment of the facts of life does not depend on the subjective perception of the person concerned, but on objective facts that justify the court's concern about the court's bias.

Note: The complainant was a senior prosecutor at the Kaunas District Public Prosecutor's Office. On the instructions of the regional prosecutor's office, she was assigned by the chief prosecutor to investigate a criminal case of sexual abuse of a minor. The main defendant in these proceedings was a former adviser to the President of the Seimas, the Lithuanian Parliament. He complained several times during the investigation that access to the investigation file had not been granted. Following an investigation by the regional prosecutor's office, which was ordered and which revealed serious procedural shortcomings, the General Prosecutor's Office decided to transfer the investigation to the Vilnius regional prosecutor's office. At the end of the investigation, disciplinary proceedings were initiated against the complainant, alleging, inter alia, that she had not properly supervised the staff responsible for the investigation. The disciplinary procedure resulted in the complainant's demotion and transfer to the post of public prosecutor at the district prosecutor's office. The criminal investigation was the subject of a parliamentary committee of inquiry which led to the resignation of the Prosecutor General. In addition, the proceedings attracted considerable attention from the public, politicians and the media.

[41] ECtHR of 21 June 2011 – No. 5335/05 – *Ponomaryovi v. Bulgaria*.

The complainant brought an action before the Regional Administrative Court against the disciplinary measure imposed on her, claiming that the investigation had been conducted in accordance with the law and that the disciplinary measure, even if she were guilty of a breach of duty, was disproportionate. Furthermore, she complained that the decision on the disciplinary measure had been influenced by the public statements made by the politicians and the media coverage. The Administrative Court dismissed the complaint, not commenting on the complainant's objection regarding the public statements of politicians and media coverage. The appeal against the decision of the Administrative Court was unsuccessful before the Supreme Administrative Court. In her appeal, the appellant alleges concern about the judges' bias due to the political and media involvement in the case, so that she was not given a fair trial before an independent and impartial court within the meaning of Article 6 ECHR.

As regards the admissibility of the complaint, the Court, referring to its previous case-law,[42] points out that Article 6 ECHR applies to 'ordinary labour disputes' between the State and its servants. The same applies to disciplinary proceedings brought against civil servants. As far as the merits of the complaint are concerned, the Court first of all assumes that public statements by politicians[43] or media campaigns[44] are in principle likely to influence the impartiality of the Court and may therefore give rise to concerns of bias. However, it must be borne in mind that, in a democracy, legal disputes which have a public impact are inevitably commented on by the media, so that any media comment does not impair the impartiality of the Court of First Instance and thus the right to a fair trial. Rather, sound evidence is required in individual cases to objectively justify reservations about the impartiality of judges.[45] In the present case, the Court does not consider that the results of the parliamentary committee of inquiry, the public statements of high-ranking politicians or the media coverage constitute an objective violation of the impartiality of the courts which had to decide on the disciplinary measure imposed on the complainant. As regards, in particular, the media campaign, the Court finds that the reporting constitutes an exercise of the freedom of expression guaranteed by Article 10 of the ECHR and that, in that regard, the subjective fears of the person concerned regarding the impartiality of the courts required by the courts are irrelevant. What is decisive is whether, in the particular circumstances of the individual case, those fears can be regarded as objectively justified.[46] Taking into account the complainant's submissions, the Court found no reason to believe that the independence and impartiality of the administrative courts had been compromised by public statements made by public officials and politicians, so that no infringement of Article 6 ECHR could be established.

Judge *Bošnjak*, in a dissenting opinion, takes the view that the national courts have not sufficiently dealt with the complainant's objection of partiality already raised in the proceedings there, which is incompatible with the prohibition of arbitrariness and therefore constitutes an infringement of Article 6(1) ECHR.

[42] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*.
[43] ECtHR of 20 July 2002 – No. 48553/99 – *Sovtransavto Holding v. Ukraine*, ECtHR of 9 February 2012 – No. 42856/06 – *Kinský v. Czech Republic*.
[44] ECtHR of 24 January 2017 – No. 57435/09 – *Paulikas v. Lithuania*.
[45] ECtHR of 24 January 2017 – No. 57435/09 – *Paulikas v. Lithuania* with further citations.
[46] ECtHR of 24 January 2017 – No. 57435/09 – *Paulikas v. Lithuania* with further citations.

Judgment (1st section) of 10 September 2020 – No. 67705/14 – *Idžanović v. Croatia*

Law: Article 6 ECHR (right to a fair trial)

Keywords: Recognition of an accident at work – Obligation to hold an oral hearing even in an administrative procedure

Core statement: The holding of an oral hearing in both the administrative and the judicial proceedings can only be dispensed with for reasons of efficiency and economy if the sole purpose is to assess legal or highly technical issues and not to judge the credibility of the parties involved in the proceedings or the facts in dispute.

Note: The complainant applied to the Croatian Health Insurance Fund for recognition of an accident at work for the purpose of obtaining health insurance benefits. He had suffered an accident while working as an employed engineer for a private construction company. The employer, who was consulted on the facts of the case during the administrative procedure, denied that the complainant was entitled to be at the scene of the accident at the time of the accident. The health insurance institution refused to recognise the injuries suffered by the complainant as the result of an accident at work, justifying its decision by reference to the employer's submissions that the accident was not related to work-related tasks, since the complainant was not entitled to be at the place where the accident occurred. The complainant was not given an oral hearing during the administrative procedure to further clarify the facts of the case. The appeal brought before the Supreme Administrative Court against the decision of the health insurance institution was unsuccessful, referring to the findings of the health insurance institution in the administrative procedure. The Court ruled without holding an oral hearing, which under Croatian law is only necessary if the complexity of the dispute makes this necessary or if the Court considers it useful to clarify the subject matter of the dispute. The constitutional complaint lodged against this decision was rejected as inadmissible. In his complaint, the complainant alleges infringement of Article 6 ECHR, since an oral hearing did not take place either in the administrative procedure or in the judicial procedure.

In stating the reasons for its decision, the Court of Justice starts from the premise that the decision of the national courts depends exclusively on the question in dispute between the parties, namely whether the complainant's accident occurred in the context of work-related tasks. This is a question of establishing the facts and not an exclusively legal assessment. The Supreme Administrative Court failed to state the reasons why the facts to be established should have no bearing on the resolution of the dispute, which would have been necessary in order to dispense with an oral hearing. However, such a statement of reasons would have been mandatory, since only exceptional circumstances could have justified the waiver of an oral hearing.[47] Such exceptional circumstances can only consist in the fact that a legal dispute has as its sole object the assessment of legal or highly technical issues and that, for reasons of procedural economy, an oral hearing can therefore be dispensed with.[48] If, however, the credibility of parties to the proceedings or facts in dispute are to be assessed or the courts cannot reach a decision solely on the basis of the submissions of the parties or other written documents, the holding of an oral hearing is indispensable.[49] Moreover, the oral hearing also gives the parties the opportunity to exchange arguments orally and enables the court to clarify both factual and legal issues in direct communication with the parties. This importance of the oral procedure should not be underestimated. Applying those principles, the Court concludes that the waiver of an oral hearing was not justified in the present case

[47] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen et al. v. Finland.*

[48] ECtHR of 23 April 1997 – No. 14696/89 – *Stallinger and Kuso v. Austria*; ECtHR 11 July 2002 – No. 36590/97 – *Göç v. Turkey* with further citations.

[49] ECtHR of 2 May 2019 – No. 19601/16 – *Adžić v. Croatia*.

and therefore finds that Article 6 of the ECHR is infringed. It ordered the defendant State to pay compensation of 1,500 EUR.

Judgment (Third Section) of 29 September 2020 – No. 9191/07 – *Balashova and Cherevichnaya v. Russia*

Law: Article 6 ECHR (right to a fair trial)

Keywords: Court order for payment of remuneration – Delay in enforcement

Core statement: Delaying the fulfilment of a financial claim arising from a judicial decision for less than one year is in principle compatible with the ECHR, while any further delay is disproportionate.

Note: The complainants were employed by a state institution responsible for the quality control of dairy products. This body was initially under the Russian Ministry of Agriculture. Following a government decision, the institution was placed under the supervision and financing of the City of Saint Petersburg in 1998. In 2000, the Ministry of Agriculture decided to dissolve the institution. The complainants were released as a result of the liquidation in 2002. They brought an action before the Moscow Regional Court against both the State Institution and the Ministry of Agriculture for arrears of remuneration. In 2002, as a former employer, the institution was ordered to pay the claims. As far as the claim was directed against the Ministry, it was dismissed on the grounds that the Ministry was not the employer of the complainants. In 2003, the Moscow City Court upheld this decision in the appeal proceedings, after the Ministry had settled parts of the claims that had been awarded. Further enforcement measures arising from the judgment were unsuccessful. In 2006, the Ministry was ordered to pay the remainder of the claims on the basis of a new complaint filed against it. The competent district court held that the Ministry was liable on behalf of the state institution and that the original judgements could not be enforced so far. This judgment was overturned in the appeal instance and the claims were rejected. The Court of Appeal held that the Ministry was not vicariously liable for claims against the State institution. At the time the present complaint was lodged in 2008, the complainants' claims from 2002 had not been satisfied. They claim that the non-execution of the 2002 judgment infringed their right to a fair trial under Article 6 ECHR.

The Court, recalling its case-law,[50] points out that a disproportionate delay in the execution of a final judgment may infringe the ECHR. In order to assess whether the delay was reasonable, it is necessary to examine the complexity of the enforcement procedure, the conduct of the creditor and the public authorities concerned and the content of the judgment.[51] As regards the duration of the delay, the Court of Justice has consistently held that the delay in payment of a sum of money following a court judgment of less than one year is in principle compatible with the ECHR, whereas any further delay is regularly unreasonable.[52] In this context, the national authorities have a responsibility to ensure that judgments given against the State, once they have become final and enforceable, are complied with.[53] On the other hand, the successful party to the proceedings is required to take the necessary steps to enforce the judgment.[54]

Since, in the present case, the delay in enforcement is more than four years and nine months, it must be assumed that enforcement has been delayed within the meaning of the Court's case-law. Nor did the appellants themselves cause the delay, since they initiated the

[50] ECtHR of 7 May 2002 – No. 59498/00 – *Burdov v. Russia.*
[51] ECtHR of 15 February 2007 – No. 22000/03 – *Raylyan v. Russia.*
[52] ECtHR of 17 January 2012 – No. 9046/07 – *Kosheleva et al. v. Russia*.
[53] ECtHR of 7 May 2002 – No. 59498/00 – *Burdov v. Russia.*
[54] ECtHR of 20 October 2005 – No. 69306/01 – *Shvedov v. Russia.*

enforcement measures in good time. To the extent that the state authorities were unable to enforce the judgment because the debtor's accounts could not be found, this is within the sphere of influence of the state authorities. Accordingly, the Court found that there had been a violation of Article 6 ECHR and awarded the complainants compensation of 3,500 EUR each.

New pending cases (notified to the respective government)

No. 20497/19 – *Šatvar v. Croatia* (1st section) submitted on 9 April 2019 – delivered on 7 July 2020

Law: Article 6 ECHR (right to a fair trial)

Keywords: Termination of employment – Withdrawal of the action – Power of representation of the employer

Note: The complainant had taken legal action against the employer's termination of his employment relationship. During the trial, the employer's representative, who was registered as director of the company by court order, declared that the decision to dismiss the complainant was overturned. He subsequently withdrew the complaint. In subsequent proceedings, in which the complainant had pursued outstanding remuneration claims in court, the court found that, contrary to the entries in the commercial register, the employer's representative was not authorised to represent the company. This led to the effectiveness of the dismissal with the consequence that the claim for payment of the remuneration was dismissed as unfounded. The complainant alleges infringement of Article 6 of the ECHR, since the national courts failed to give a reasoned judgment in the proceedings for protection against dismissal.

No. 57227/19 – *Vučko v. Croatia* (3rd section) submitted on 13 February 2020 – delivered on 1 September 2020

Law: Article 6 ECHR (right to a fair trial)

Keywords: Dismissal with notice of change – Offer of another job – Admissibility of an appeal procedure

Note: The complainant had brought an action against a dismissal with notice of change of employment offering her another job, which was dismissed by both first- and second-instance decisions of the labour courts. On the other hand, she had only appealed on points of law that were to be decided (‘extraordinary appeal’), even though national law would have allowed another appeal (‘ordinary appeal’). The Supreme Court dismissed the appeal as inadmissible and did not consider a further appeal. The appellant therefore alleges infringement of Article 6 of the ECHR in that she was deprived of access to a court.

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8. Social security

Decisions

Judgment (1st Section) of 9 July 2020 – No. 6561/10 – *Avellone and Others v. Italy*

Law: Article 6 ECHR (right to a fair trial)

Keywords: Increase of a state pension due to a change in the law – Time of adjustment – Retroactive change in the law during ongoing litigation

Core statement: A retroactive legislative provision aimed at influencing a judicial decision in an ongoing legal dispute constitutes, unless it is necessary for overriding reasons of public interest, interference by the legislature in the administration of justice and is contrary to the principle of the rule of law.

Note: The 30 complainants are recipients of state pensions as war-disabled persons, war widows or civilian war victims or their relatives as heirs under a law dating from 1970. A legal provision that came into force in 1985 provided for a monthly increase in these pensions in order to adjust to the rising cost of living. The National Social Security Agency (INPS) granted the complainants the pension increase from the date on which they became entitled to the pension. The complainants appealed against this decision, demanding that the pension increase be calculated from the date of entry into force of the law in 1985. After the administrative courts dismissed the appeals, the appellate courts ruled in favour of the complainants in individual decisions up to 2007. The interpretation of the Act contained therein, namely that the pension increase is to be granted from the date of its entry into force, was already confirmed by the Court of Appeal in 2005. On 1 January 2008, a law came into force which provided that the 1985 law was to be interpreted to the effect that the planned pension increases were to be granted from the time of retirement. A constitutional complaint lodged against this was unsuccessful. Subsequently, the national courts dismissed the complainants' respective actions, which continued to assert that the pension increases were to be granted from the date of entry into force of the 1985 Law. In their complaint, they allege legislative interference with pending litigation which infringes the right to a fair trial under Article 6 of the ECHR.

The Court assumes that where the calculation of the pension increase based on the amendment to the law leads to an economic disadvantage to the complainants, the complaint is admissible. In other cases, where the complainants did not suffer a significant disadvantage, the Court declared the complaints inadmissible, since, according to Article 35(3)(b) ECHR, examination by an international court is only justified in cases where the infringement of a right has reached a minimum degree of seriousness. This assessment depends on the circumstances of the individual case.[55] With regard to the complaints admissible in the light of the latter, the Court, recalling its settled case-law, states that the legislature is not precluded from regulating, by means of new, retroactive provisions, laws derived from existing laws. However, the principle of the rule of law and the notion of a fair trial enshrined in Article 6 of the ECHR prohibit, except for overriding reasons in the public interest, interference by the legislature in the administration of justice in order to influence a judicial decision in an ongoing dispute.[56] It is clear from the fact that, until the adoption of the amendment to the law in 2008, the courts regularly ruled in favour of the respective complainants that the intervention of the legislature constitutes a shift in the balance in favour

[55] ECtHR of 13 March 2012 – No. 45175/04 – *Shefer v. Russia*.
[56] ECtHR of 28 October 1999 – No. 24846/94 – *Zielinski and Pradal & Gonzalez et al. v. France*; ECtHR of 15 April 2014 – No. 21838/10 – *Stefanetti et al. v. Italy*.

of one of the parties and was not foreseeable in the present case. Thus, the adoption of the law, at the time when the proceedings were pending, determined the substance of the dispute and had the effect of influencing the outcome of the pending case in favour of the State. Accordingly, the Court finds that there was an infringement of Article 6 of the ECHR.

Judgment (1st section) of 3 September 2020 – No. 34297/09 – *Facchinetti v. Italy*

Law: Article 6 ECHR (right to a fair trial)

Keywords: Recalculation of a foreign pension – Consideration of a fictitious income – Retroactive change of law during ongoing legal disputes

Core statement: A retroactive legislative provision aimed at influencing a judicial decision in an ongoing legal dispute constitutes, unless it is necessary for imperative reasons of public interest, interference by the legislature in the administration of justice and is contrary to the principle of the rule of law.

Note: The complainant is the heir of her late husband, who is entitled to a pension from Switzerland on the basis of several years' employment there. An Italian-Swiss agreement governs the calculation of the pension taking into account the income earned in Switzerland. The Italian pension insurance institution took a notional salary as a basis for calculating the total pension in relation to the income earned in Switzerland by the complainant's predecessor. As a result, only a quarter of the pension which it would have received had it taken into account the income actually earned was calculated. An action for a corresponding adjustment of the pension was successful at first and second instance. During the current revision procedure, a law came into force which confirmed the interpretation of the agreement by the Italian pension insurance institution. In application of that law, the Court of Appeal set aside the decisions taken at first instance and dismissed the action. The appellant alleges infringement of Article 6 of the ECHR by reason of unlawful interference by the legislature in a pending case.

The Court had already found an infringement of Article 6 ECHR in identical proceedings.[57] The principle of the rule of law and the notion of a fair trial laid down in Article 6 of the ECHR prohibit interference by the legislature in the administration of justice, the purpose of which is to influence a judicial decision in an ongoing case. It sees no reason to rule otherwise in the present case. The Court therefore found that there had been a breach of Article 6 of the ECHR and awarded the complainant compensation of 5,000 EUR and pecuniary damages of 11,212 EUR.

Judgment (1st Section) of 3 September 2020 – No. 59753/09 – *Grieco v. Italy*

Law: Article 6 ECHR (right to a fair trial)

Keywords: Recalculation of a foreign pension – Consideration of a fictitious income – Retrospective change of law during ongoing litigation

Core statement: A retroactive legal provision aimed at influencing a court decision in an ongoing legal dispute constitutes, unless it is necessary for overriding reasons of public interest, an interference of the legislature in the administration of justice and is contrary to the principle of the rule of law.

Note: See judgment (1st section) of 3 September 2020 – No. 34297/09 – *Facchinetti v. Italy*.

[57] ECtHR of 31 May 2011 – No. 46286/09 – *Maggio et al. v. Italy*; ECtHR of 15 April 2014 – No. 21838/10 – *Stefanetti et al. v. Italy*.

(In)admissibility decisions

Decision (1st section) of 7 July 2020 – No. 31141/09 – *Pellegrini v. Italy*

Law: Article 6 ECHR (right to a fair trial)

Keywords: Recalculation of a foreign pension – Consideration of a fictitious income – Retroactive change of law during ongoing legal disputes

Core statement: A retroactive legal provision aimed at influencing a court decision in an ongoing legal dispute constitutes, unless it is necessary for overriding reasons of public interest, an interference of the legislature in the administration of justice and is contrary to the principle of the rule of law.

Note: See judgment (1st section) of 3 September 2020 – No. 34297/09 – *Facchinetti v. Italy*.

In the present case, the Court of Justice declared the complaint inadmissible under Article 35(4) ECHR, since the complainant did not suffer any economic disadvantage as a result of the application of the law, so that the adoption of the law did not affect the decision of the national court. The complainant cannot therefore be a victim of a violation of Article 6 ECHR.

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