

REPORT

ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI

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I. Editorial

The sixth edition of the HSI Report addresses current developments in case law and legal policy at European level in the 2nd quarter of 2021.

The **CJEU** has once again passed some decisions of practical relevance in the recent past. One of them is the applicable social security system in the case of cross-border assignment of temporary agency workers (C-784/19 – *Team Power Europe*). The new requirements of the CJEU put a stop to the "forum shopping" of temporary-work agencies that establish themselves in a Member State with favourable (low) social security contributions in order to lend their employees to user undertakings in other Member States.

The Court also dealt with the law on fixed-term contracts in several judgments. In the *Tesco Stores* case, it strengthened the principle of equal pay for women and men by interpreting the concept of "work of equal value" in Article 157 TFEU. Equal treatment of men and women in the field of social security is the subject of the decision in *INSS*, which concerns a maternity allowance in the case of voluntary early retirement. In *Braathens Regional Aviation*, the Grand Chamber held that a claim for a declaration of discrimination must be (further) examined even if a claim for damages has been admitted but the underlying discrimination has not been acknowledged. Furthermore, in the case *Rapidsped*, the Advocate General delivered its opinion concerning the posting of lorry drivers and the related payment of daily allowances and fuel-saving allowances. The CJEU has recently endorsed the findings (judgment of 8 July 2021, to be presented in the next HSI Report).

The focus of the **ECtHR's** case law is the decision in *Halet v. Luxembourg* (No. 21884/18) on whistleblowing. The background is the "Lux-Leaks" financial scandal. An employee of the tax consultancy PwC had passed on tax documents to the media in this context and was therefore criminally prosecuted.

In addition to this decision, two other judgements of the ECtHR deserve special attention. The case *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Federation (NTF) v. Norway* (No. 45487/17) deals with the legality of an industrial action also in relation to the fundamental economic freedoms of the EU; the EFTA Court was also involved with an opinion for the national courts. In *Melike v. Turkey* (No. 35786/19), a public sector employee was dismissed for confirming critical posts on various Facebook pages with the "Like" button.

We hope that this report will once again provide you with a comprehensive overview of the latest developments in European and international labour law as well as social security law and hope you enjoy reading it.

The editors

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

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II. Proceedings before the CJEU

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1. Annual leave

Opinions

Opinion of Advocate General Hogan, delivered on 15 April 2021 – C-233/20 – job-medium

Law: Article 7 Working Time Directive 2003/88/EC, Article 31(2) Charta of Fundamental Rights

Keywords: substitution of the minimum paid annual leave by a financial compensation upon termination of the employment relationship – termination of the employment relationship by the employee without good cause

Core statement: An annual leave replacement benefit for the current last year of employment may not be excluded on the grounds that the employee unilaterally terminates the employment relationship prematurely without good cause.

Note: In the present proceedings, the plaintiff terminated his employment contract with his employer without observing the notice period. He still had annual leave days left at that time. Referring to Section 10(2) of the Austrian Holiday Act (UrlG), according to which no holiday compensation is owed if the employee terminates without good cause, his employer did not pay him any compensation for the holiday not taken. The referring court asked the CJEU whether this approach complied with EU law.

In his opinion, the Advocate General assumes that it is incompatible. He introduces his reasoning by referring to the high value of the European fundamental right to paid annual leave. In order to comprehensively guarantee this fundamental right, the right to paid annual leave should not be interpreted restrictively.¹ An exception to the right to annual leave may only be granted if it is absolutely necessary for the protection of the employer's interests. In the present case, the employee had acquired the holiday entitlement through the work he had done. To deprive him of the holiday replacement benefit for the sole reason that he had terminated his employment relationship prematurely and without good cause would give the national provision a punitive character which was not covered by the wording and purpose of the directive. This was all the more true as the employer had other contractual and legal possibilities to be compensated for damages caused by the employee's termination.² It was also very unlikely that the employee had not taken the leave in order to increase his remuneration through the holiday pay (para. 30).

¹ Cf. the here relevant judgments of 8 November 2012 – C-229/11 and C-230/11 – *Heimann and Toltschin*, para. 23; of 25 June 2020 – C-762/18 and C-37/19 – *Varhoven kasatsionen sad na Republika Bulgaria and Iccrea Banca*, para. 55.

² The plaintiff had to pay a contractual penalty to his employer because of his ungrounded resignation; also, an unauthorised resignation from work constitutes a breach of contract, which in principle leads to a claim for damages by the employer under national law.

2. Equal treatment

Decisions

Judgment of the Court (Second Chamber) of 3 June 2021 – C-624/19 – Tesco Stores

Law: Article 157 TFEU (equal pay)

Keywords: equal pay for men and women – direct effect – concept of “work of equal value” – workers of different sexes having the same employer – different establishments

Core statement: Article 157 TFEU has direct effect in disputes between private parties in which a breach of the principle of equal pay for men and women for “work of equal value” within the meaning of the provision is alleged.

Note: Article 157 TFEU stipulates the right to equal pay for men and women for equal work or work of equal value. In the present ruling, the CJEU has commented on the question of whether the provision is also directly applicable with regard to “work of equal value”³, i.e. whether female employees can derive their own claim directly from this provision.⁴

The claimants are employed by the British retailer Tesco. They claim that they perform, if not the same, then at least equivalent work compared to a group of male employees in another establishment of the same employer and are therefore entitled to payment of the differential remuneration.

The Court rejects the idea that the definition of “work of equal value” must be concretised by national law and that direct application is therefore out of the question (paras. 19 et seq.). It refers to its extensive case law on the right to equal pay. It has already been established that the principle of the right to equal pay has direct effect. It is for the courts of the member states to determine whether work of equal value exists; in this respect, there are no decisive particularities compared to the assessment of equal work. A different interpretation would also impair the practical effectiveness of the provision (para. 35).

It was also irrelevant whether the employees worked in different companies. The decisive factor in determining unequal treatment is that they work for the same employer. In addition to the purely legal position, it must be taken into account whether the employer represents a “single source” to which the unequal treatment can be attributed (paras. 37 et seq.).⁵

Judgment of the Court (Second Chamber) of 3 June 2021 – C-914/19 – Ministero della Giustizia (Notaires)

Law: Article 6(1) Equal Treatment Framework Directive 2000/78/EC, Article 21 Charter of Fundamental Rights

Keywords: principle of equal treatment in employment and occupation – prohibition of discrimination on grounds of age – national regulation setting an age limit of 50 years for access to the profession of notary

³ For more details on the determination of equivalence, see *Kocher*, in: Schlachter/Heinig, Europäisches Arbeits- und Sozialrecht, 2nd ed. 2021, § 5 paras. 142 ff.

⁴ On the direct applicability of the primary law claim to equal pay for equal work or work of equal value already CJEU of 8 April 1976 – C-43/75 – *Defrenne II*, paras. 4 et seq., where para. 20 already deals with work of equal value.

⁵ On the actual responsibility as a criterion of attribution also *Kocher*, op. cit., § 5 paras. 92, 137.

Core statement: A national provision is contrary to Union law if it sets an age limit of 50 years for admission to the profession of notary.

Judgment of the Court (Sixth Chamber) of 12 May 2021 – C-130/20 – INSS
(Complément de pension pour les mères – II)

Law: Article 4(1) Equal Treatment Directive 79/7/EEC

Keywords: national legislation granting a maternity pension supplement to women who have had a certain number of children – exclusion from that pension supplement of women who have applied for early retirement – scope of Equal Treatment Directive 79/7/EEC

Core statement: The Equal Treatment Directive does not apply when women are denied a maternity pension allowance when they voluntarily take early retirement instead of only taking a pension at the age provided for by law or for reasons provided for by law.

Note: The present case concerns an employee who had opted for early retirement and was therefore denied a maternity pension allowance on the basis of national law. She brought an action against this decision, arguing that she was treated less favourably than women who had retired early at the statutory age or for other legal reasons. This was because the latter could receive the pension supplement she wanted.

The referring court now wanted to know from the CJEU whether such a situation was to be regarded as direct discrimination within the meaning of the Equal Treatment Directive.

The CJEU answered in the negative. It justified its decision by stating that the term "discrimination on grounds of sex" in Article 4(1) of the Equal Treatment Directive only refers to cases of discrimination between male and female employees. However, this was not the case in the present case, as it was a matter of unequal treatment between employees of the same sex.

Judgment of the Court (Eighth Chamber) of 12 May 2021 – C-27/20 – CAF

Law: Article 7(2) Free Movement Regulation (EU) No. 492/2011; Article 45 TFEU (freedom of movement for Workers)

Keywords: workers returning to their Member State of origin – reduction of child benefit entitlement – inclusion of income earned in the penultimate year before payment of child benefit

Core statement: A national rule is in conformity with Union law which determines as the reference year for the calculation of the family benefits to be granted the penultimate year preceding the payment period. Even if this has the effect that, in the event of a significant increase in the income of a national civil servant on secondment to a Union institution based in another Member State, the amount of child benefit is greatly reduced for two years when that civil servant returns to his Member State of origin.

Judgment of the Court (Third Chamber) of 15 April 2021 – C-511/19 – Olympiako
Athlitiko Kentro Athinon

Law: Article 2 and Article 6(1) Equal Treatment Directive 2000/78/EC

Keywords: prohibition of age discrimination – Greek economic crisis – public service – employees transferred to a labour reserve pending dismissal – reduction in salary and reduction or loss of severance pay – employees about to retire

Core statement: retired public sector workers can be placed in a labour reserve (leading to a reduced income and redundancy pay and a loss of promotion opportunities) until they are made redundant, if this arrangement pursues a legitimate employment policy objective and the means of achieving that objective are appropriate and necessary.

Note: The background to the disputed regulation is the massive austerity measures to which Greece had committed itself to its creditors as a result of the economic crisis.⁶ According to the regulation public sector workers can be placed in a labour reserve until they are dismissed if they become entitled to a full retirement pension within a certain period of time (up to 24 months). They receive a lower remuneration, which is also offset against any severance pay that may be granted. Since this only affects employees close to retirement age (with a specific minimum age, depending on the insurance), the question arose as to whether this constitutes prohibited age discrimination.

The CJEU first emphasised that budgetary objectives such as the intended reduction of wage costs in the public sector – even in the context of a severe economic crisis – do not constitute a legitimate objective that could justify unequal treatment under Article 6(1) of Directive 2000/78/EC (paras. 36 et seq.).⁷ However, the Greek regulation also pursues employment policy goals. On the one hand, the transfer to the labour reserve was intended to avoid dismissals. On the other hand, a balanced age structure of younger and older employees in the public service is promoted, as only (older) employees close to retirement age are affected (paras. 40 et seq.). In the question of proportionality, however, "special attention" must also be paid to the fact that the prohibition of age discrimination in the light of the EU fundamental right in Article 15 Charta of Fundamental Rights (right to work) also concerns the "participation of older workers in the labour force and thus in economic, cultural and social life" (para. 46). Based on the overall circumstances (duration of the transfer to the labour reserve, Greece's economic situation and various additional protective measures for the workers concerned), the CJEU concludes that the Greek regulation in question is justified.

Judgment of the Court (Grand Chamber) of 15 April 2021 – C-30/19 – Braathens Regional Aviation

Law: Articles 7 and 15 Equal Treatment Directive 2000/43/EC, Article 47 Charta of Fundamental Rights (effective legal protection)

Keywords: Compensation for discrimination – acknowledgement of the claim for damages without admitting the existence of the alleged discrimination – link between the damages paid and the alleged discrimination

Core statement: Where a court is seized of an action for damages on the grounds of discrimination under Directive 2000/43/EC, it must be able to consider the application for a declaration of such discrimination even if the respondent agrees to pay the damages claimed but does not admit the existence of the discrimination. The national court must, if necessary, disapply any conflicting (procedural) provision of national law.

Note: This decision concerns discrimination against an air passenger, but the findings are equally applicable to discrimination in a professional context. A passenger with Chilean roots living in Sweden had to undergo an additional security check on a domestic flight in Sweden due to a decision by the flight commander. The national discrimination ombudsman

⁶ For additional information on various labour market policy measures in Greece and their evaluation, see *Däubler*, *Deregulierung statt Wiederaufbau in Griechenland*, *HSI-Working-Paper No. 9*, 2016; *Rödl/Callsen*, *Kollektive soziale Rechte unter dem Druck der Währungsunion – Schutz durch Art. 28 EU-Grundrechtecharta?*, *HSI-Schriftenreihe Bd. 13*, 2015 (*both German*).

⁷ Cf. CJEU of 21 December 2016 – C-201/15 – *AGET Iraklis*, para. 106.

considered this to be discrimination and sued the airline for damages of approximately 1,000 euros. The company agreed in court to pay the damages, but refused to recognise the discrimination. After recognising the claim for damages, the Swedish court no longer saw any possibility of continuing the proceedings with regard to a finding of possible discrimination and dismissed the claim as inadmissible in this respect. After the appeal was also unsuccessful, the Swedish Supreme Court turned to the CJEU for clarification as to whether the Equal Treatment Directive 2000/43/EC required a different assessment here.

With reference to the relevant case law⁸, the Grand Chamber of the CJEU emphasised that the Member States could regulate the type of sanctions for discrimination, but that the sanctions under Article 15 of Directive 2000/43/EC must be "effective, proportionate and dissuasive" (paras. 36 et seq.). In the present case, the proceedings ended with a judgment recognising the claim for damages (which was legally binding on the court) without any discrimination having been established or admitted by the defendant (discrimination was rather expressly denied) and this "even though that was the cause on which the claim for compensation was based and is, for that reason, an integral element of that action" (para. 42). Such a national rule, which makes it impossible for a court to decide on the existence of discrimination after an acknowledgement of damages, violates Articles 7 and 15 of Directive 2000/43 in conjunction with Article 47 Charter of Fundamental Rights (paras. 44 et seq.). The CJEU, referring to the Opinion of Advocate General Øe⁹, emphasises that "the requirement to pay a sum of money cannot ensure a truly deterrent effect as regards the author of the discrimination (...) contests the existence of any discrimination but considers it more advantageous, in terms of cost and reputation, to pay the compensation claimed by the claimant, while also thereby avoiding a finding by a national court that there had been discrimination" (para. 49). The possibility under Swedish law to have discrimination established and sanctioned in criminal proceedings does not change this, nor do other considerations (on the principle of disposition, procedural economy and the effort to settle disputes amicably).

In German law, Section 307 p. 1 ZPO stipulates that a party who acknowledges an asserted claim in whole or in part is to be judged accordingly. However, such a judgment by confession can only be issued if the claim and the acknowledgement are the same, whereby the claim can also be changed subsequently (e.g. claim for performance instead of declaratory judgement).¹⁰ According to the present ruling, when acknowledging a claim for damages due to discrimination, it will have to be taken into account to a greater extent whether only the claim for the amount of money was acknowledged or whether the underlying discrimination was also acknowledged. This applies in any case if the discrimination victim's claim is particularly aimed at a declaratory judgement. What significance the present judgement may have for the possibility of a separate finding of discrimination detached from the claim for damages requires further consideration. From this point of view, it would be conceivable to assume a legitimate interest in a separate claim for declaratory relief alongside the claim for damages.

⁸ CJEU of 10 July 2008 – C-54/17 – *Feryn*; CJEU of 25 April 2013 – C-81/12 – *Asociația Accept*.

⁹ *Opinion* of the Advocate General Øe of 14 May 2020 – C-30/19, para. 84, as a result of which this discrimination would be legally non-existent.

¹⁰ *Musielak* in: *Musielak/Voit*, ZPO, 2021, 18th ed., § 307 para. 16.

Opinions

Opinion of Advocate General Saugmandsgaard Øe, delivered on 22 April 2021 – C-824/19 – Komisija za zaštitu ot diskriminatsia

Law: Article 2 (1) and (2), Article 4 (1) and Article 5 Equal Treatment Framework Directive 2000/78/EC

Keywords: discrimination on grounds of disability – professional exercise of the function of a lay judge by a blind person in criminal proceedings – essential and determining professional requirement with regard to the exercise of the function

Core statement: Member States must take appropriate measures to integrate a blind person into the world of work. This also includes the paid work of a lay judge in criminal proceedings. If the blind person meets the national criteria for being a lay judge in criminal cases and is admitted to work in a court, he or she may not be excluded from participating in these cases altogether because it is presumed that he or she is unable to perform his or her duties because of his or her disability.

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3. Fixed term employment

Decisions

Judgement of the Court (Seventh Chamber) of 24 June 2021 – C-550/19 – Obras y Servicios Públicos and Acciona Agua

Law: Section 5 Framework Agreement on Fixed-term Work (implemented by Directive 1999/70/EC), Article 3(1) Transfer of Undertakings Directive 2001/23/EC

Keywords: abuse through successive fixed-term contracts in the construction industry ("fijo de obra") – transfer of undertakings – collective agreement according to which transferred workers only have the rights and obligations arising from their last contract with the departing company

Core statement: (1) It may constitute appropriate and sufficient measures to prevent abuse if employment contracts limited in time for the completion of construction work ("fijo de obra" contracts) are concluded by the same company at different work sites in the same province only for usually three consecutive years and the workers receive compensation upon termination of the contract. However, the extension of the contracts cannot be justified solely on the basis of the fixed term (completion of the construction site), as this does not prevent the employer in question from meeting a permanent and lasting need for labour.

(2) A collective agreement provision according to which, in the course of a transfer of an undertaking, the entering undertaking only has to observe those rights and obligations of the transferred employees which result from the last contract concluded by these employees with the leaving undertaking is in conformity with Article 3(1)(1) of the Directive 2001/23/EC, provided that their situation is not worsened solely as a result of this transfer.

Note: In this case, too, the issue is whether regulations that restrict the use of fixed-term employment relationships sufficiently counteract abuse through this form of employment. The CJEU again applies as a standard of review that permanent employment needs may not be

covered by fixed-term employment relationships and subsequently develops concrete requirements that Member State law must comply with (paras. 59 et seq.).¹¹

The second set of issues in the decision concerns the transfer of an undertaking. The Court again emphasises that a succession to a contract can also constitute a transfer of an undertaking (para. 84) – an insight that has still not got around everywhere. The decisive factor is whether the transferring entity maintains its "identity". Furthermore, the Court reiterated that while the circumstances of the transfer can be regulated by collective agreements with the transferor, the application of these regulations must not lead to a deterioration of the situation of the employees.¹² This was to be examined here by the referring court.

Judgement of the Court (Seventh Chamber) of 3 June 2021 – C-326/19 – *Ministero dell'Istruzione, dell'Università e della Ricerca – MIUR and others (Chercheurs universitaires)*

Law: Section 5 Framework agreement on fixed-term work (implemented by Directive 1999/70/EC)

Keywords: fixed-term contracts in the public service – university researchers – misuse – preventive measures

Core statement: The fixed-term employment of a certain category of university researchers may be extended once for two years if the extension is made dependent on a "positive appraisal of the scientific activity". It is not necessary that objective and transparent criteria be established for this purpose, on the basis of which it can be verified whether the conclusion and extension of such contracts actually correspond to a real need and whether they are suitable for achieving the objective pursued and are necessary for this purpose.

Note: The proceedings concern a particular constellation of fixed-term contracts for academic staff at Italian universities. Specifically, it concerns the question of whether fixed-term contracts are being abused for one category of university researchers (type A – post-docs) – also in comparison to university researchers in another category (type B – with a completed habilitation). In both categories, a fixed-term of three years is initially envisaged. Type A employees are employed if corresponding "to carry out research, teaching, further education and student services activities" (para. 46). Their contract can be extended once for another two years after a positive evaluation. The contracts of type B employees, on the other hand, cannot be renewed, but after a positive evaluation they can obtain a permanent position as an associate professor. The two categories also differ in terms of their access possibilities (type B, for example, requires a habilitation). A type A contract allows access to a subsequent type B contract.

The CJEU clarifies that the contract constellation only falls within the scope of Section 5 of the Framework Agreement on fixed-term work (multiple fixed-term contracts) when it is extended by a further two years. The national legislature had a discretionary power here as to which measures it would take to protect against the abusive use of fixed-term employment contracts. In the present case, the maximum duration of fixed-term contracts was determined

¹¹ On this aspect in connection with the prohibition of abuse of rights under the Temporary Agency Work Directive 2008/104/EC *Klengel*, in: *HSI Report 3/2020*, pp. 4, 8 (German).

¹² CJEU of 26 March 2020 – C-344/18 – *ISS Facility Services*, para. 25, cf. *HSI Report 1/2020*, p. 19; the principle of safeguarding existing legal standards applies, according to which the application of the collective agreement in force at the transferor cannot change the working conditions actually applicable at the time of the transfer of the undertaking in a way that worsens them, cf. *Klengel*, *Kollektivverträge im EU-Betriebsübergangsrecht*, 2020, pp. 168 et seqq. and pp. 173 et seq. for the application case of individual and collective agreement maintenance of dynamic reference clauses.

by national law. In this respect, the university researchers of type A were also aware that their employment relationship could last a maximum of five years (3+2) (para. 64).

The universities' permanent need for university researchers did not mean that this need could not be covered by fixed-term contracts (para. 67). The position of type A researcher was "appears to be intended as the first step in a scientist's career, the researcher being destined, in any case, to move on to another position, namely a teaching position, first as an associate professor and then as a full professor" (para. 68). The possibility of extending the fixed-term contract by two years could make sense against the background of the special features of the higher education sector in order to assess the qualifications of the post holder, so that the higher education institution would not be obliged to conclude a permanent contract without a positive evaluation (cf. para. 69).

Judgement of the Court (Seventh Chamber) of 3 June 2021 – C-726/19 – *Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario*

Law: Section 5 Framework agreement on fixed-term work (implemented by Directive 1999/70/EC)

Keywords: public service – measures to prevent and punish abuse through successive fixed-term employment contracts – justifying 'objective reasons' – economic crisis

Core statement: It is not compatible with Section 5 No. 1 of the Framework Agreement on fixed-term work if, on the one hand, fixed-term contracts are permitted in the public sector prior to the conclusion of the recruitment procedure, without specifying a deadline for the conclusion of the procedure, and, on the other hand, fixed-term workers may not be treated in the same way as "permanent, non-permanent workers" and no compensation is granted to them. Such a national regulation does not contain any measure to prevent and possibly punish the abusive use of successive fixed-term contracts. Purely economic considerations in the context of the 2008 economic crisis do not justify the omission in national law of any measure to prevent and penalise the use of successive fixed-term contracts.

Note: The applicant concluded a fixed-term contract with the defendant in June 2002 until a position as a canteen assistant in the public service was filled. The selection procedure was organised in 2005, but none of the applicants took up the post. In 2009, a new competition was organised, but the post was only filled by the successful candidate in 2016, which is why the applicant was dismissed in October 2016.

In the reference, the CJEU clarifies that the Framework Agreement on fixed-term work requires concrete measures to prevent the abuse of successive fixed-term employment contracts. Referring to previous case-law, it examines in detail the requirements of Spanish law from the point of view of whether such fixed-term contracts can be used to unlawfully cover permanent and ongoing needs (paras. 59 et seq., on the obligations incumbent on the national court in this context see paras. 78 et seq.). It points out that the assessment of the facts is the responsibility of the court of the member state but defines the requirements of the prohibition of abuse in detail (para. 61). This is interesting insofar as in previous decisions there was an emphasis on the fact that the national court must also assess whether the law of the Member States meets the requirements of the prohibition of abuse under EU law, i.e., whether they effectively prevent the abuse of fixed-term employment relationships. In the present case, the CJEU concludes that this is not the case and that the provision is therefore not in conformity with Union law.

Judgement of the Court (Seventh Chamber) of 3 June 2021 – C-942/19 – Servicio Aragonés de Salud

Law: Section 4 Framework agreement on fixed-term work (implemented by Directive 1999/70/EC)

Keywords: civil service – employment of indefinite duration – application for leave to take up temporary employment – scope of the framework agreement – inadmissibility

Core statement: (1) The CJEU does not have jurisdiction to answer the questions posed by the referring court.

(2) The prohibition of discrimination in Section 4 in conjunction with Section 2 No. 1 of the Framework Agreement is not applicable if employees who are hired on the basis of a permanent contract are refused leave of absence by the public administration on the grounds that this leave is intended to take up a fixed-term employment relationship during the leave of absence.

Note: The plaintiff in the main proceedings was employed for an indefinite period by the public health service of the Spanish autonomous community of Aragon. When she was offered a temporary position as an interim professor at a university, she wanted to take leave from her employment with the health service for that period. Her employer refused, as Spanish law precludes leave of absence to provide services in the public sector if the new position is temporary, as in the present case. The CJEU was asked to clarify whether there was a violation of the prohibition of discrimination in Section 4 of the Framework Agreement on fixed-term work.

However, the Court declared that it did not have jurisdiction, as Union law was not relevant in this case. Although it emphasised that the scope of application of the Framework Agreement was to be defined broadly (para. 31), it was clear from the wording of Section 2 No. 1 and the objective pursued by the Framework Agreement and the prohibition of discrimination in Section 4 " that the principle of non-discrimination, for the purposes of the latter clause, applies only to all workers providing remunerated services in the context of a fixed-term employment relationship linking them with their employer." (para. 35). Since the plaintiff applied to take up fixed-term employment from an employment of indefinite duration, the Framework Agreement would not (yet) apply to her at that time (para. 36).

Even if the wording of Section 2 No. 1 of the Framework Agreement as well as its preamble indicate that only "workers in fixed-term employment relationships" are to be included in the scope of protection, arguments in favour of the admissibility of the reference for a preliminary ruling certainly also spoke in this case. For example, the question can be raised whether access to a fixed-term employment relationship is not also covered by the scope of application of the Framework Agreement. The – correct – principle that open-ended contracts should be the normal case and that the abuse of fixed-term contracts should be prevented does not stand in the way of this. In the present case, the plaintiff did not want to give up her permanent employment with the health service in order to be employed on a fixed-term contract with uncertain prospects from then on, but merely wanted to be granted leave from her permanent employment for the previously determined period. The CJEU did not deal with this question in the present case. In view of the otherwise sometimes very broad interpretation of the scope of application of Union law, a different decision on admissibility would have been quite conceivable here. In any case, it is surprising that the CJEU does not leave it to the referring court – as is otherwise quite common in its case law – to assess whether a question referred is relevant to the proceedings pending there. The interpretation of the scope of application of the framework agreement could/should then have been examined in the context of the merits.

Decision of the Court (Seventh Chamber) of 2 June 2021 – C-103/19 – *SUSH and CGT Sanidad de Madrid*

Law: Article 99 of the Rules of Procedure of the Court of Justice, Section 5 No. 1 Framework Agreement on fixed-term work (implemented by Directive 1999/70/EC)

Keywords: successive fixed-term employment contracts in the field of public health – concept of “objective reasons” – concept of “equivalent legal measures to prevent abuse”.

Core statement: It is for the national court to assess whether national measures providing for the conversion of the status of temporary staff (“personal estatutario eventual”), employed on a fixed-term basis, into interim staff (“personal estatutario interion”), with a possible conversion of their employment relationship into a permanent one at the end of the selection procedure for the definitive filling of the posts they occupy on a fixed-term basis, constitute an appropriate measure to prevent the abusive use of fixed-term contracts. If this is not the case, it is for the court to determine whether the applicable national legislation contains other effective measures to prevent and punish such abuses.

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4. General matters

New pending cases

Request for a preliminary ruling from the Korkein hallinto-oikeus (Finland) lodged on 27 April 2021 – C-270/21 – A

Law: Article 3 para. 1 letter a Professional Qualifications Directive 2005/36/EC

Keywords: professional qualification – kindergarten teacher – term “regulated profession”

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5. Independence of the judiciary

In the second quarter of 2021, a number of judgements and opinions were issued on the subject of “independence of the judiciary”. The main points of the individual proceedings are summarised below.

In all proceedings, the focus is on Article 19(1)(2) of the TEU, which obliges the Member States to guarantee effective legal protection.

Decisions

Judgement of the Court (Grand Chamber) of 20 April 2021 – C-896/19 – *Repubblika*

Summary: The complaint was directed against the Republic of Malta, which, with its current system of appointing judges, could be in breach of Article 19(1)(2) TEU. The focus is on the powers of the Prime Minister, who currently has discretionary powers in the appointment of judges, which raises doubts about judicial independence. However, the CJEU ruled that the

existence of an independent body that evaluates the judicial candidates and makes this evaluation available to the Prime Minister preserves the legality of the appointment of judges.

Opinions

Opinion of Advocate General Bobek, delivered on 20 May 2021 – joint cases C-748/19 to C-754/19 – *Prokuratura Rejonowa w Mińsku Mazowieckim*

Summary: The guarantee of the separation of powers between the executive and the judiciary in Poland no longer seems to be valid, as the possibility of political influence on the judiciary is too great. The possibility of political influence on the judiciary is too great when the judicial magistrate and the judicial authority are the same person and have the power to delegate judges to higher courts.

Opinion of Advocate General Tanchev, delivered on 6 May 2021 – C-791/19 – *Commission / Poland (Régime disciplinaire des juges)*

Summary: The case was brought by the European Commission under Article 258 TFEU against the Republic of Poland for national measures introducing new disciplinary measures for judges of the Polish Supreme and Ordinary Courts adopted by law in 2017.

The Commission relies on four grounds: disciplinary sanctioning of court decisions; lack of independence and impartiality of the Disciplinary Chamber; the discretion granted to the President of the Disciplinary Chamber; lack of review of disciplinary proceedings.

Opinion of Advocate General Tanchev, delivered on 15 April 2021 – C-508/19 – *Prokurator Generalny (Chambre disciplinaire de la Cour suprême – Nomination)*

Summary: The present case concerns a judge at the Polish Supreme Court against whom disciplinary proceedings were sought by the Disciplinary Chamber. She defended herself on the grounds that the appointment of the Chairman of the Disciplinary Board was not lawful. The GA leaves it to the referring court to examine whether the appointment procedure was carried out in obvious, intentional violations of the national appointment requirements. This includes an examination of the independence of the disciplinary board. In accordance with the principle of the primacy of European Union law, the referring court is obliged to disapply national rules of jurisdiction which attribute such a decision as that on the actions in the main proceedings to such a body (meaning the Disciplinary Board), so that those actions can be heard by a court which satisfies the abovementioned requirements of independence and impartiality.

Opinion of Advocate General Tanchev, delivered on 15 April 2021 – C-487/19 – *W. Ż. () und des affaires publiques de la Cour suprême – nomination)*

Summary: These proceedings concern the appointments of judges to the Chamber for Extraordinary Review and Public Affairs of the Polish Supreme Court. The referring court must examine the legality of their appointments and whether they were made in flagrant breach of the laws of the Member State, which would mean that the chambers established would not comply with the European requirements for a court established by law.

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6. Part-time work

New pending cases

Request for a preliminary ruling from the Bundesarbeitsgericht (Germany) lodged on 4 December 2020 – C-660/20 – Lufthansa CityLine

Law: Section 4 No. 1 Framework agreement on part-time work (implemented by Directive 97/81/EC)

Keywords: additional pay paid when a certain number of flight duty hours is exceeded – discrimination against part-time employees – pro rata temporis principle

Note: The German Federal Labour Court (Bundesarbeitsgericht, BAG) has to decide whether a collective agreement unlawfully discriminates against part-time workers. According to the regulation in question, pilots are to be paid additional remuneration if a certain number of flight duty hours per month is exceeded, whereby this number is not reduced for part-time employees. According to the Federal Labour Court, it is to be assumed that the purpose of the additional remuneration is to compensate for a particular workload.

Naturally, part-time workers find it much more difficult to achieve the same additional working time than full-time workers. The plaintiff therefore takes the view that the limit above which the additional remuneration component which is to be paid to him must be reduced in accordance with his working hours.

The Federal Labour Court referred the question of the compatibility of the regulation with the prohibition of discrimination in section 4 no. 1 of the Framework Agreement and the pro rata temporis principle in Section 4 No. 2 of the Framework Agreement to the CJEU.¹³ In particular, it is not clear from the previous decisions of the CJEU whether the assessment of unequal treatment should be based on whether the employees were paid unequally for the same number of hours worked or whether remuneration components should be considered individually.

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7. Posting of workers

Opinions

Opinion of Advocate General Bobek, delivered on 6 May 2021 – C-428/19 – Rapidsped

Law: Article 3(1) and (7) Posting of Workers Directive 96/71/EC, Article 10 Regulation (EC) No. 561/2006 (harmonisation of certain social legislation relating to road transport)

Keywords: international transport drivers – posting – compliance with the minimum rates of pay of the country of posting – daily allowance – fuel saving allowance

Core statement: (1) The Posting of Workers Directive 96/71/EC is applicable to the transnational provision of services in the road transport sector.

¹³ Decision of the German Federal Labour Court of 11 November 2020 – 10 AZR 185/20 (A).

(2) An infringement of minimum wage provisions may be invoked in the member states which post workers if the courts have jurisdiction over the proceedings, for example on the basis of the employer's place of business.

(3) Daily allowances paid without proof of costs shall not be paid as reimbursement of costs actually incurred as a result of the posting within the meaning of Article 3(7) of Directive 96/71/EC. If daily allowances are also paid as a posting allowance, they are part of the minimum wage.

(4) If an employer pays his posted workers a fuel saving allowance if a standard fuel consumption is not exceeded, this is compatible with Article 10 of Regulation (EC) No. 561/2006, provided that the allowance is not to be understood as being dependent on the distance travelled and/or the quantity of goods transported and is not likely to jeopardise road safety and/or encourage infringements of the Regulation.

Note: With the so-called mobility package¹⁴, a number of improvements in the working conditions of truck drivers and in law enforcement were adopted in 2020. It was also clarified in which constellations the regulations on posting apply. The corresponding regulations of the new Directive (EU) 2020/1057 must be transposed into national law by 2 February 2022. The present reference for a preliminary ruling also shows that legal uncertainties exist here.

The plaintiffs in the main proceedings were employed as drivers by a company based in Hungary. In the course of their work, they drove to France in a minibus in order to carry out their duties there, crossing borders on several occasions. Before each journey, their employer handed them a certificate of posting required by the French state, in which – notarised – the payment of an hourly wage of 10.40 euros was declared. The drivers claimed that according to their employment contract they received 544 euros per month, which corresponded to an hourly wage of 3.24 euros. In contrast, the French minimum wage was 9.76 euros. Their employer argued that the daily allowances and the fuel saving allowance reached the minimum wage.

The Grand Chamber of the CJEU had already held in the *Federatie Nederlandse Vakbewe* case that the Posting of Workers Directive applies to the transnational provision of services in the road transport sector.¹⁵ The Advocate General refers to this and also deals with further counter-arguments of the Hungarian and Polish governments.

As regards the question of whether the daily allowance can be offset against the minimum wage, the Advocate General answers in the affirmative in the present case. The daily allowance was paid on account of the posting, but not as reimbursement for specific costs incurred in the context of the posting. They were thus part of the salary (para. 57).

The applicants further argued that the fuel-saving allowance was not compatible with Article 10 of Regulation (EC) No 561/2006. " That provision prohibits any payment which encourages dangerous driving " (para. 61). According to the argumentation, the allowance rewards drivers whose fuel consumption per distance is lower than the "standard" consumption on this route. For the Advocate General, it is questionable whether the scope of application of Article 10 of Regulation (EC) No. 561/2006 is open here, since fuel consumption results from many different factors. In any case, there was no evidence in the present case that the allowance as such constituted an incentive for a dangerous driving style (para. 68).

¹⁴ Cf. [press release](#) of the EU-Parliament of 9 July 2020.

¹⁵ CJEU of 1 December 2020 – C-815/18 – *Federatie Nederlandse Vakbeweging*, cf. note in [HSI Report 4/2020](#), p. 12 et seq.

In the meantime, the judgment of the CJEU has been issued in the proceedings on 8 July 2021. The Court of Justice has adopted the Advocate General's legal opinion in this case. The ruling will be presented in the next issue of the HSI Report.

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8. Social Security

Decisions

Judgement of the Court (Fifth Chamber) of 10 June 2021 – C-94/20 – Land Oberösterreich (Aide au logement)

Law: Article 11 (1) (d), (4) Permanent Residence Directive 2003/109/EC, Anti-discrimination Directive 2000/43/EC, Article 21 Charta of Fundamental Rights

Keywords: granting of a housing allowance to third-country nationals who are long-term residents only on condition that they have a basic knowledge of the language of that Member State – concept of “core benefits” – equal treatment with regard to social security, social assistance and social protection

Core statement: (1) Insofar as housing assistance constitutes a “core benefit” within the meaning of Article 11(4) of Directive 2003/109/EC, it is not compatible with Union law if the granting of this benefit to third-country nationals who are long-term residents is made conditional on proof of basic language skills in the national language of the Member State.

(2) Such a provision is not covered by the anti-discrimination Directive 2000/43/EC.

(3) If the exception under Article 11(4) of Directive 2003/109/EC has been used and the housing benefit is not a “core benefit”, Article 21 of the Charta of Fundamental Rights does not apply to such a benefit. Even if it were a core benefit, Article 21 of the Charta would not prevent a national regulation such as the one mentioned above.

Judgement of the Court (Grand Chamber) of 3 June 2021 – C-784/19 – TEAM POWER EUROPE

Law: Article 12(1) Coordination Regulation (EC) No. 883/2004, Article 14 (2) Implementing Regulation (EC) No. 987/2009

Keywords: cross-border assignment of temporary agency workers – A1 certificate – determination of the Member State in which the employer habitually carries on business – no assignment of temporary agency workers in the State in which the employer is established

Core statement: A temporary employment agency is only “normally active” within the meaning of Article 12(1) of Regulation (EC) No. 883/2004 in the Member State in which it has its registered office if it provides a significant proportion of temporary agency workers to undertakings established and operating in that Member State.

Note: Cf. comment by Niksova, HSI-Report 2/2021, p. 4 et seqq. (in German).

Judgement of the Court (Eighth Chamber) of 20 May 2021 – C-879/19 – Format

Law: Article 13(2)(a) and Article 14(2) Coordination Regulation (EEC) No. 1408/71 (replaced by Coordination Regulation (EC) 883/2004)

Keywords: person usually employed in two or more Member States – work carried out for a longer period in different foreign Member States – E 101 certificate

Core statement: Article 14(2) Coordination Regulation (EEC) No. 1408/71 does not apply to a person who works for one employer for a continuous period of more than twelve months in different Member States.

Note: The complaint was brought by a Polish employee who had worked for a Polish employer in France and the United Kingdom for a longer period of time. In February 2008, the competent Polish authority refused to issue E 101 certificates (today: A1 certificates), which serve to prove that the worker is also subject to Polish social security law during the stay abroad. Both the employee and the employer appealed against this decision, which was ultimately referred to the CJEU.

In principle, the legal provisions of the place of employment are applicable to an employment relationship, Article 13(2) of Regulation 1408/71. If a person is usually employed in several Member States, Article 14(2) of Regulation 1408/71 stipulates that the legal provisions of the place of residence apply if the person exercises his activity partly there or if he works for several employers in different Member States. If she does not reside in any of the Member States where she carries out her work, the social security legislation of the country where the employer has its registered office applies.

In its decision, the CJEU clarified that these provisions of Article 14(2) of Regulation 1408/71 only apply if the duration of the foreign employment in each of the states of employment does not exceed twelve months. Article 14 para. 1 of Regulation 1408/71 expressly regulates such a limit for postings. The derogation could not apply if the work in the other Member State was the norm – in that case the employees concerned should be covered by the social security system there.

Opinions

Opinion of Advocate General De La Tour, delivered on 24 June 2021 – C-709/20 – The Department for Communities in Northern Ireland

Law: Article 24 Free Movement Directive 2004/38/EC, Article 18 TFEU

Keywords: transitional period of the Brexit Treaty – prohibition of discrimination on grounds of nationality – exclusion of destitute EU citizens with a right of residence from receiving a living benefit

Core statement: It constitutes indirect discrimination on grounds of nationality if an unemployed national of another Member State who has a right of residence irrespective of means is not entitled to social assistance benefits solely because of the nature of her/his right of residence. The exclusion goes beyond what is necessary to maintain the balance of the social assistance system of the host Member State if it affects nationals of the other Member States more or in greater numbers than those of the host Member State.

Opinion of Advocate General Tanchev, delivered on 14 April 2021 – C-866/19 – Zakład Ubezpieczeń Społecznych I Oddział w Warszawie

Law: Coordination Regulation (EC) No 883/2004

Keywords: insured person who has completed contribution periods in a Member State other than the competent Member State – entitlement to an retirement pension – calculation of pension benefits

Core statement: A competent institution shall, when calculating pension benefits, take into account non-contributory periods up to a limit of one third of the sum of the contribution periods completed under national legislation and under the legislation of other Member States only for the purposes of determining the theoretical amount and not for determining the actual amount of the benefit.

Opinion of Advocate General Rantos, delivered on 22 April 2021 – C-636/19 – CAK

Law: Articles 7(1) and 3(b)(i) Patients' Rights Directive 2011/24/EU, Articles 1(c), 2 and 24 Coordination Regulation (EC) No. 884/2004, Article 56 TFEU (freedom to provide services)

Keywords: cross-border healthcare – concept of “insured person” – reimbursement of the costs of cross-border healthcare – right to benefits in kind on the part of the Member State of residence on behalf of the Member State obliged to pay the pension

Core statement: (1) Persons who receive a pension under the legislation of a Member State and who, under Article 24 of the Coordination Regulation, are entitled to the provision of benefits in kind by their State of residence on behalf of the first Member State, without having compulsory sickness insurance in that State, may, as 'insured persons' within the meaning of those provisions, claim reimbursement of the costs of cross-border healthcare received in a third Member State, relying on the Patient Rights Directive.

(2) A national rule is contrary to Union law which, in the absence of prior authorisation, automatically precludes the competent institution from reimbursing the costs of hospital care or complex non-hospital care received in another Member State, even if the conditions for reimbursement were otherwise met. This includes cases where the insured person was unable to apply for such authorisation or to await the decision of the competent institution on the request for authorisation for health reasons or because of the urgency of such treatment.

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III. Proceedings before the ECtHR

Compiled and commented by

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1. Freedom of association

Decisions

Judgment (5th Section) of 10 June 2021 – No. 45487/17 – Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway

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

Keywords: legality of industrial action – impact of trade union collective action on internal market freedoms – principle of proportionality

Core statement: Given the sensitive nature of the social and political issues involved in striking a proper balance between the respective interests of workers and employers and given the high degree of divergence between national systems in this area, states have a wide margin of discretion as to how to ensure trade union freedom and the protection of the professional interests of trade union members.

Note: The complaint concerns the Norwegian Supreme Court's decision to declare illegal a trade union's decision to call on organised workers to boycott a shipping company. Several trade unions concluded framework agreements with the Norwegian employers' associations of logistics and freight companies on a fixed wage system for dock workers in Norway's major ports, including the port of Drammen. Among other things, the framework agreement established an administrative office for dockworkers in Drammen, where almost all employed dockworkers are employed. The Norwegian subsidiary of a Danish shipping company (Holship Norge AS), which was not bound by the collective agreements concluded by the complainants, employed four persons in the port who carried out loading and unloading activities for their employer. After Holship Norge AS refused to enter into collective agreements with the complainants, the complainants threatened in writing to organise a boycott of the loading and unloading activities by the dockworkers with regard to the Holship Norge AS vessels. In advance of this boycott announcement, the complainants applied for a court declaration, which is possible under Swedish law, that the announced boycott was not unlawful. The Drammen Municipal Court held that the boycott announced was lawful. It held that the action to reaffirm the demand for the conclusion of a collective agreement was a permissible industrial action that did not violate important public interests. The decision was upheld by the Court of Appeal. The Supreme Court, after obtaining an opinion from the Court of Justice of the European Free Trade Association (EFTA Court), ruled that the announced boycott was unlawful because, although the announced measure protected workers' interests, it could not be seen as a compelling reason to restrict the freedom of establishment.

The complainants consider the finding that the boycott announced was unlawful to be a violation of their right to freedom of association under Article 11 ECHR.

According to the case law of the Court, freedom of association is a specific form of freedom of association within the meaning of Article 11 ECHR. The provision does not guarantee

trade unions and their members special treatment by the state.¹ The ECHR protects the freedom to safeguard the occupational interests of trade union members through trade union action, which states must both permit and enable to be carried out and developed.² It follows that freedom of association is not to be interpreted more narrowly under national law than under international law.³ The boycott measure announced by the complainants therefore falls within the scope of Article 11 ECHR. Moreover, it is also recognised by the CJEU that the right to collective action constitutes an EU fundamental right.⁴ In this way, the CJEU intervenes in concrete disputes between the social partners and draws boundaries for industrial disputes via the diversions of fundamental freedoms. However, it is left open whether there is a state duty to protect that is equivalent to the respective fundamental freedom.⁵ With regard to the necessity of the restriction of freedom of association under Article 11 (2) ECHR, the ECtHR considers the balancing exercise undertaken by the Supreme Court to be correct, according to which the collective measure, in order to achieve its objective, may interfere with internal market freedoms. Even if the extent of the economic consequences of a collective measure cannot in itself be a decisive factor in the analysis of proportionality,⁶ the freedom of establishment under EU law had to be weighed against the right to freedom of association in the decision. The states had a wide margin of discretion here, which was exceeded in this case by the Norwegian Supreme Court. Accordingly, no violation of Article 11 ECHR was found.

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2. Freedom of expression

Decisions

Judgment (2nd Section) of 15 June 2021 – No. 35786/19 – *Melike v. Turkey*

Law: Article 10 ECHR (freedom of expression)

Keywords: termination of employment – "Likes" on Facebook content – disturbance of industrial peace – proportionality of the measure

Core statement: The actual and effective exercise of freedom of expression depends not only on the duty of the state to refrain from interference but may require positive safeguards in the relations between individuals, so that the state has a positive obligation to protect the right to freedom of expression against infringement by private individuals.

Note: The complainant was employed by the Ministry of National Education as a cleaner in schools. Her employment was governed by the provisions applicable to public sector workers. Her employer terminated the employment relationship because she had affirmed with the "Like" button on various Facebook pages where critical posts on various issues were published. The content of the Facebook pages in question had consisted of political criticism of repressive practices by the authorities, calls and encouragement for demonstrations, expressions of outrage at the assassination of the president of a bar association,

¹ ECtHR of 9 July 2013 – No. 2330/09 – *Sindicatul "Păstorul cel Bun" v. Romania*.

² ECtHR of 12 December 2008 – No. 34503/97 – *Demir und Baykara v. Turkey*.

³ ECtHR of 8 April 2014 – No. 31045/10 – *National Union of Rail, Maritime and Transport Workers v. United Kingdom*.

⁴ CJEU of 11 December 2007 – C-438/05 – *Viking Line ABP*; CJEU of 18 December 2007 – C-341/05 – *Laval un Partneri Ltd.*

⁵ On the criticism of the restrictive jurisprudence of the CJEU: *Ulber/Wiegandt*, Die Bindung von Arbeitnehmervereinigungen an die europäischen Grundfreiheiten, HSI-Schriftenreihe Band 24.

⁶ ECtHR of 20 November 2018 – No. 44873/09 – *Ognevenko v. Russia*.

denunciations of the alleged abuse of pupils in institutions controlled by the authorities, and a sharp reaction to a statement by a well-known religious figure that was perceived as sexist. The use of "likes" on social media to show interest in and approval of content is a common and popular form of exercising freedom of expression.

The Adana Labour Court dismissed the complainant's action for protection against dismissal on the grounds that the content to which approval was given was not covered by freedom of expression and was likely to disturb industrial peace in the schools. The appeals filed against this were unsuccessful. The Constitutional Court dismissed the complaint as inadmissible, considering it to be manifestly unfounded. Further proceedings by the complainant for payment of a settlement are currently pending in the appellate court.

The complainant alleges a violation of Article 10 ECHR by the termination of her employment on the basis of her opinions expressed on social networks.

The Court first pointed out that the complainant was subject to the rules of general labour law and therefore not to a duty of loyalty and restraint, as is the case with civil servants.⁷ The protection of Article 10 ECHR extends to the professional sphere in general and does not only concern relations between employers and employees regulated under public law. Rather, employment relationships governed by private law are also affected by the scope of application of this provision.⁸ In addition to the state's duty to refrain from interfering with freedom of expression, the state has a positive obligation to protect the right to freedom of expression against infringements by private individuals.⁹ Against this background, it was necessary to examine whether there was a state obligation to ensure the complainant's freedom of expression by having her dismissal overturned by a court decision. The state court should have examined whether sanctions imposed by the complainant's employer were proportionate to the legitimate aim pursued. In the Court's view, the national courts failed to consider the impact of the complainant's conduct and to determine the significance and public reach of the online postings. It would therefore have been necessary to explain what the consequences of the postings were and whether they actually posed a threat to industrial peace. In addition, the complainant was not the author of the objectionable content in the social networks, but her action was limited to pressing the "Like" button. In doing so, she merely expressed sympathy for the public content.

In conclusion, the Court therefore found a violation of Article 10 ECHR and awarded the complainant an amount of €2,000 as compensation for the non-material damage.

Similarly, German labour courts also assess the impact of Facebook posts on the employment relationship.¹⁰ In principle, such publications in which employees comment on their employers are also covered by the right to freedom of expression. However, deliberately false statements of fact do not enjoy this protection unless they are purely value judgements. The courts may not attach a meaning to an ambiguous statement that it does not objectively have.

⁷ ECtHR of 21 July 2011 – No. 28274/08 – *Heinisch v. Germany*; ECtHR of 9 January 2018 – No. 13003/04 – *Catalan v. Romania*.

⁸ ECtHR of 5 November 2019 – No. 11608/15 – *Herbai v. Hungary*; ECtHR of 26 February 2009 – No. 29492/05 – *Kudeshkina v. Russia*; ECtHR of 29 February 2000 – No. 39293/98 – *Fuentes Bobo v. Spain*.

⁹ ECtHR of 12 September 2011 – Nos. 28955 and others – *Palomo Sánchez and others v. Spain*.

¹⁰ Federal Labour Court of 31 July 2014 – 2 AZR 505/13; State Labour Court of Rheinland-Pfalz of 2 September 2020 – 7 Sa 333/19.

Judgment (2nd Section) of 18 May 2021 – No. 48909/14 – Sedat Doğan v. Turkey

Law: Article 6 ECHR (right to a fair trial); Article 10 ECHR (freedom of expression)

Keywords: disciplinary measure against sports club officials – unsportsmanlike statements in public – balancing of interests – independence of an arbitration commission

Core statement: The assessment of whether interference with the right to freedom of expression is necessary in a democratic society is primarily judged by the national authorities' justification for the challenged sanction, whereby they have to weigh up the right to freedom of expression against legal interests that may be infringed by its exercise.

Note: The Turkish Football Federation (TFF) initiated two disciplinary proceedings against the complainant, who was a director of a football club at the relevant time. He was accused of making critical and degrading comments about the TFF on a television programme and on his Twitter account. He had stated, among other things, that those (meaning the TFF) who punish a man for speaking out against racism are themselves guilty of the crime of racism. The TFF Disciplinary Committee imposed a disciplinary sanction on the complainant, relieving him of his official duties for 45 days. He was also ordered to pay a fine of €11,750. The authority took the view that the complainant's remarks had exceeded the limits of criticism and had offended the dignity of the chairperson and other officials of the TFF. The statements were also not covered by freedom of opinion. An appeal by the complainant against this decision was rejected by the competent arbitration commission.

The complainant first alleges a violation of Article 10 ECHR by the sanctions imposed on him. He also alleges a violation of Article 6 ECHR, as the Arbitration Commission was not an independent and impartial tribunal.

The Court starts from the premise that the sanction imposed on the complainant constitutes an interference with the exercise of his right to freedom of expression. The necessity of an interference with Article 10 ECHR is primarily determined by the national authorities' justification for the contested sanctions.¹¹ However, according to the findings of the Disciplinary Committee and the Arbitration Commission, it was not possible to strike an appropriate balance between the complainant's right to freedom of expression on the one hand and the right of the persons concerned to respect for their private life on the other. The authorities merely quoted in general terms certain parts of the statements in dispute describing the allegations made against the complainant, without making a detailed assessment of the facts. As regards the violation of Article 6 ECHR, the Court refers to its jurisprudence¹² on the structural deficiencies of the Arbitral Tribunal resulting from the wide powers conferred on the TFF's Administrative Council on the organisation and functioning of the Tribunal.

It therefore found both a violation of Article 6 ECHR and a violation of Article 10 ECHR and ordered the government to pay compensation of €7,800.

¹¹ ECtHR of 29 March 2016 – No. 56925/08 – *Bédat v. Switzerland*; ECtHR of 19 June 2018 – No. 20233/06 – *Kula v. Turkey*; ECtHR of 6 July 2010 – Nos. 43453/04 and 31098/05 – *Gözel and Özer v. Turkey*.

¹² ECtHR of 28 January 2020 – No. 30226/10 – *Ali Rıza and others v. Turkey*.

Judgment (2nd Section) of 18 May 2021 – No. 48924/16 – Naki and Amed Sportif Faaliyetler Kulübü Derneği vs. Turkey

Cf. No. 48909/14 – *Sedat Doğan v. Türkiye*

Note: The complaint concerns the trial of a professional football player who was subject to sporting sanctions and fines for speaking out in favour of freedom and hope on social media and dedicating the victory at the match to those who had lost their lives or suffered injuries during the persecution that has been ongoing in Turkey for over fifty days.

Judgment (2nd Section) of 18 May 2021 – No. 54540/16 – İbrahim Tokmak vs. Turkey

Cf. No. 48909/14 – *Sedat Doğan v. Türkiye*

Note: The complainant, who was a football referee at the relevant time, was relieved of his functions for three months in the context of disciplinary proceedings. He had commented on his Facebook account on a publication about the death of a journalist that had occurred in circumstances that had been discussed in the press and on social networks.

Judgment (3rd Section) of 11 May 2021 – No. 21884/18 – Halet v. Luxembourg

Law: Article 10 ECHR (freedom of expression)

Keywords: publication of confidential documents of the employer – public interest – balancing of interests by domestic courts

Core statement: In determining whether interference with the right to freedom of expression is proportionate, the nature and severity of any penalty imposed on whistleblowers by domestic courts must be taken into account.

Note: Cf. comment by *Gerdemann*, HSI–Report 2/2021, p. 14 et seqq (German).

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3. Non-Discrimination

New pending cases (notified to the respective government)

Application No. 46352/19 – Voloshchuk v. Ukraine (5th Section) – lodged on 30 August 2019 – communicated on 27 May 2021

Law: Article 8 ECHR (protection of private and family life); Article 14 ECHR (prohibition of discrimination); Article 1 Additional Protocol No. 12 (general prohibition of discrimination); Article 1 Additional Protocol No. 1 (protection of property)

Keywords: discrimination due to health impairments – termination of the employment relationship

Note: The complainant, who holds a university diploma in software engineering, has suffered from slight mobility impairments of his left upper arm since birth. He applied for a special agent position advertised by the Ukrainian Cyber Police. He was recruited and given the post of inspector, as the advertised post had not yet been created. The remuneration in this post was lower than that of the special agent. Before taking up the job, the complainant had to undergo three months of training, which included tactics training with combat exercises. Due

to his health impairments, he did not pass the test and was dismissed three months after being recruited. The complainant brought an action against this, claiming not only reinstatement but also payment of his remuneration as a special agent. In particular, he argued that the position of special agent for which he had applied did not require any particular physical aptitude. The national courts have rejected the claim in all instances, pointing out that all applicants for police posts have to pass a physical fitness test.

The complaint alleges a violation of the principle of non-discrimination and, in addition, an interference with the protection of property due to the payment of the lower remuneration.

The Court will have to examine in particular whether the complainant was treated unequally and whether this pursued a legitimate aim and was proportionate.

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4. Procedural law

Decisions

Judgment (1st Section) of 22 April 2021 – No. 27903/15 – *Zustović v. Croatia*

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

Keywords: winning court decision on the granting of an invalidity pension – no reimbursement of the costs of the proceedings – violation of Article 6 ECHR

Core statement: The ability of a litigant to effectively present his or her case in court is central to a fair trial in terms of equality of arms, so the imposition of a substantial sum of money at the conclusion of proceedings may constitute a restriction on access to a court.

Note: The case concerns the review of a disability pension by national authorities and courts. In 2012, on the advice of her doctor, the complainant applied to the Central Office of the Croatian Pension Fund (Central Pension Fund) for a disability pension. This was refused on the basis of a company doctor's report. She brought an action against this decision before the Rijeka Administrative Court. The court ordered that a medical report be obtained from an independent expert. The complainant was asked to pay an advance to cover the costs of obtaining this expert opinion. She paid the requested amounts, whereupon an independent medical expert stated in his report that the complainant was completely and permanently incapacitated. The Administrative Court then annulled the decision of the Central Pension Fund and ordered it to decide on the granting of a disability pension on the basis of the medical expert's report. The Central Pension Fund then granted the complainant a monthly disability pension as of the date of application. In its decision, the Administrative Court simultaneously dismissed the complainant's application for reimbursement of the costs incurred for the expert's report. The complainant filed a constitutional complaint against this part of the decision, complaining that her right of access to a court had been denied by the refusal to pay the costs. The Constitutional Court held that the complaint was inadmissible because the decision on costs did not concern the merits of the case and was therefore not open to constitutional review.

The appellant argues that she was violated in her right to a fair trial, as she was denied a final instance decision on the costs of the judicial proceedings and thus access to a court.

The Court first assumes the admissibility of the appeal, since if there are several potentially effective remedies, only one needs to be used in order to meet the requirements of Article

35(1) ECHR.¹³ Therefore, it does not matter whether the constitutional complaint can be regarded as an effective legal remedy. With regard to the application for the assumption of costs, the complainant had presented the same arguments in the proceedings before the Administrative Court as she had presented to the Constitutional Court. She thus gave the domestic courts sufficient opportunity to remedy the alleged violation of her right of access to a court.

Moreover, the Court considers the right of access to a court to be paramount to the right to a fair trial in a democratic society. It highlights the centrality of the equality of arms enjoyed by litigants in judicial proceedings and emphasises its central importance to the concept of a fair trial.¹⁴ It follows that the unjustified obligation of a litigant to pay substantial court costs after the conclusion of the proceedings may constitute a restriction of the right of access to a court guaranteed by Article 6(1) ECHR.¹⁵ This also applies to the subsequent refusal to reimburse those costs which were paid as an advance by a party to the proceedings who was later successful before the court. This also constitutes an interference with the right to property within the meaning of Article 1 of Additional Protocol No. 1.¹⁶ Measured against these principles, the court's decision to order the complainant to pay the costs of the expert opinion obtained in the proceedings violates Article 6 ECHR. It contradicts the established principle that the state must bear the risk of an error by its own authorities itself and may not pass it on to the persons concerned in order to protect its financial interests.

The Court therefore found a violation of Article 6 ECHR and ordered the government to pay pecuniary damages of €3,500 and to compensate the non-material damage in the amount of €3,000.

With regard to the legal situation under German law, it should be noted that in the context of social court proceedings, an expert opinion obtained upon application under section 109 SGG can be made dependent on the applicant bearing the costs thereof. However, when deciding on the final obligation to bear the costs, it must be taken into account whether the expert opinion obtained contributed significantly to the clarification of the facts of the case.¹⁷

Judgment (4th Section) of 13 April 2021 – No. 44546/13 – *Istrate v. Romania*

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

Keywords: disciplinary proceedings for an official offence – discontinuation of the related criminal proceedings – presumption of innocence

Core statement: In addition to ensuring the rights guaranteed by Article 6(2) ECHR, the presumption of innocence has the further purpose of preventing persons who have been acquitted or released from proceedings from being treated by officials or authorities as if they were actually guilty of the offence with which they are charged.

Note: The complainant was an official of the Ministry of the Interior and performed duties of a police officer of the border police of the Naidăș Office. Criminal proceedings were initiated against him for driving a vehicle under the influence of alcohol. Before the charges were brought, the case was dropped as it could not be proven that he had actually committed the offence. Disciplinary proceedings were opened against the complainant for the same offence

¹³ ECtHR of 21 December 2004 – No. 6586/01 – *Moreira Barbosa v. Portugal*; ECtHR of 31 October 2006 – No. 41183/02 – *Jeličić v. Bosnia and Herzegovina*; ECtHR of 28 April 2009 No. 39311/05 – *Karakó v. Hungary*, ECtHR of 29 April 1999 – No. 25642/94 – *Aquilina v. Malta*.

¹⁴ ECtHR of 15 February 2005 No. 68416/01 – *Steel and Morris v. United Kingdom*.

¹⁵ ECtHR of 12 July 2007 – No. 68490/01 – *Stankov v. Bulgaria*; ECtHR of 18 July 2013 – No. 28963/10 – *Klauz v. Croatia*.

¹⁶ ECtHR of 23 October 2018 – No. 12055/17 – *Musa Tarhan v. Turkey*; ECtHR of 18 February 2020 – Nos. 74579/17 and 14620/18 – *Černius und Rinkevičius v. Lithuania*.

¹⁷ MKLS/Keller SGG § 109 para. 16a; State Social Court of Bavaria of 21 November 2018 – L 20 KR 486/18 B.

while criminal proceedings were still pending. The disciplinary committee found that the complainant had in fact committed the drunken driving offence. On appeal against this decision, the Administrative Court annulled the disciplinary measure and ordered the employer to reinstate the complainant. The employer's appeal against this decision was upheld and the official was finally dismissed from the service.

The complainant argues that his dismissal, which was ordered on disciplinary grounds while criminal proceedings were pending on the same facts, violated the principle of the presumption of innocence and therefore constituted a violation of Article 6 ECHR.

According to Article 6(2) ECHR, everyone is presumed innocent until proven guilty according to law. This presumption of innocence is violated if a judicial decision or an official statement reflects the conviction that the person concerned is guilty, even though his or her guilt has not previously been legally established.¹⁸ An official or judicial reason with which the person is considered guilty is sufficient.¹⁹ In this context, considerable importance is to be attached to the choice of words used by public officials in the statements they make before a person's guilt has been established.²⁰ In addition to ensuring the rights guaranteed by Article 6 ECHR, the purpose of the presumption of innocence is to ensure that persons who have been acquitted or against whom proceedings have been discontinued are treated by the state authorities as if they were in fact not guilty of the offence with which they are charged.²¹ The presumption of innocence requires that, once criminal proceedings have been closed, all subsequent proceedings of any kind, including disciplinary proceedings or proceedings concerning the dismissal of public officials, must take into account the fact that the person concerned has not been convicted.²²

In the present case, the Court first notes that there is a link between the criminal proceedings and the disciplinary proceedings, both of which were initiated against the complainant. It must be taken into account that the subject-matter of the disciplinary proceedings was the allegation of a culpable breach of official duty. In this respect, the facts of the case differed from the criminal proceedings, which investigated whether the complainant had been guilty of a criminal offence. In this respect, the criminal investigation was broader. Therefore, the disciplinary authorities were not obliged to suspend the disciplinary proceedings pending the outcome of the criminal proceedings. The facts under investigation concerned different breaches of duty.

Therefore, the Court concludes that the authorities involved in the disciplinary and criminal proceedings did not violate the presumption of innocence and thus there was no violation of Article 6 ECHR.

Judgment (1. Section) of 7 May 2021 – No. 4907/18 – *Xero Flor w Polsce sp. z o.o. v. Poland*

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

Keywords: irregularities in the election of constitutional judges – applicability of Article 6 ECHR – inadmissible influence of the legislative and executive branches of government

¹⁸ ECtHR of 10 February 1995 – No. 15175/89 – *Allenet de Ribemont v. France*; ECtHR of 19 September 2006 – No. 23037/04 – *Matijašević v. Serbia*; ECtHR of 12 July 2013 – No. 25424/09 – *Allen v. United Kingdom*.

¹⁹ ECtHR of 25 March 1983 – No. 8660/79 – *Minelli v. Switzerland*; ECtHR of 19 September 2006 – No. 23037/04 – *Matijašević v. Serbia*.

²⁰ ECtHR of 10 October 2000 – No. 42095/98 – *Daktaras v. Lithuania*; ECtHR of 28 November 2002 – No. 45313/99 – *Marziano v. Italy*.

²¹ ECtHR of 28 June 2018 – No. 1828/06 – *G.I.E.M. S.R.L. and others v. Italy*.

²² ECtHR of 14 January 2010 – No. 29889/04 – *Vanjak v. Croatia*; ECtHR of 15 July 2010 – No. 9143/08 – *Šikić v. Croatia*.

Core statement: The right to a court established on a "legal basis" reflects the very principle of the rule of law and as such plays an important role in maintaining the separation of powers and the independence and legitimacy of the judiciary as required in a democratic society. A fundamental aspect of the rule of law is the principle of legal certainty, which requires, among other things, that a final judicial decision may not be called into question.

Note: The case concerns the question whether serious irregularities in the election of a constitutional judge can constitute a violation of the right of access to a court based on law. The complainant is a company that had unsuccessfully asserted claims for damages against the state in court. The complainant filed a constitutional complaint against the decision of the court of last instance. The appeal was dismissed with the participation of Judge M. M. The lower house of the Polish Parliament had decided to appoint five new constitutional judges. They were not sworn in during the parliament's term of office. After the end of the parliament's term of office, five new judges, including M. M., were appointed as constitutional judges instead. The Constitutional Court found that the appointment of these judges was unconstitutional and declared it invalid. As a result, the parliament passed a law during the current legislative period, according to which the judges in question were to take office. After the unconstitutionality of this law was established, new laws were passed by the parliament containing similar provisions, which subsequently legitimised the appointment. These laws were deemed constitutional by the Constitutional Court.

The Court first assumes that Article 6 ECHR is applicable to the proceedings before the Constitutional Court, as the proceedings had also had to decide on the merits of the claims for damages.²³ The question of whether the irregularities in the appointment procedure of constitutional judges restrict the complainant's right of access to a court based on law must be examined on the basis of three criteria:²⁴

- (1) Whether there is a manifest breach of national law,
- (2) whether this violation fundamentally affects the procedure for appointing judges; and
- (3) whether the possible violation has been effectively reviewed by national courts.

In the present case, the Court finds that the appointment procedure manifestly violated national law. Both the legislature and the executive exercised undue influence on the appointment of judges. The violations were so serious that they affected the legitimacy of the appointment procedure. Finally, Polish law did not provide for a procedure by which the appellant could have challenged the defects in the appointment procedure. The Court therefore unanimously found a violation of Article 6 ECHR. After the CJEU²⁵ has repeatedly found that the amendments to the Polish laws on the National Judicial Council, which led to the loss of judicial control over the appointment of judges, violate EU law, the ECtHR now also had to deal with the question of the independence of the Polish judiciary. As in Luxembourg, the judicial reform in Poland is now also being critically assessed in Strasbourg with regard to the principle of the rule of law.

²³ ECtHR of 22 June 2000 – Nos. 32492/96 and others – *Coëme and others v. Belgium*; ECtHR of 20 September 2011 – Nos. 3989/07 und 38353/07 – *Ullens de Schooten und Rezabek v. Belgium*; ECtHR of 25 August 2015 – No. 3569/12 – *Renard and others v. France*.

²⁴ ECtHR of 1 December 2020 – No. 26374/18 – *Guðmundur Andri Ástráðsson v. Iceland*.

²⁵ CJEU (Grand Chamber) of 8 April 2020 – C-791/19 R – *Commission v. Poland*, cf. HSI-Report 2/2020, S. 17 f.; CJEU (Grand Chamber) of 2 March 2021 – C-824/18 – *A.B. and others*.

(In)admissibility decisions

Decision (1st Section) of 18 May 2021 – No. 41071/16 – *Odoran v. Croatia*

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

Keywords: late action for unfair dismissal – uniform domestic court practice – predictability of case-law

Core statement: The fact that a judicial decision was rendered before the harmonisation of a domestic case-law is not in itself sufficient to violate the principle of legal certainty and predictability of law.

Note: The case concerns the dismissal protection proceedings of the complainant. The complainant had been employed by the Croatian National Theatre in Zagreb for an indefinite period of time since 2007. On 17 December 2009, the employer terminated the complainant's employment. On 4 January 2010, she filed an application for reinstatement with the employer, which is permissible under Croatian law. On 3 February 2010, the complainant then filed a complaint against the termination with the Zagreb Municipal Civil Court. The court granted the application and ordered the reinstatement of the complainant. It assumed that the complaint had been filed within the time limit and found in particular that the complainant's employer had not complied with her request for reinstatement within 15 days and that the complaint had been filed within a further 15 days. On appeal by the employer, the Zagreb District Court set aside the first instance judgment. It held that the time limit for bringing the action began to run when the employer received the application for reinstatement. However, this application had only been served on 31 December 2009, so that the time limit had expired on 30 January 2010, taking into account the employer's deadline for refusal, and the action should have been filed on 1 February 2010 due to an intervening Saturday. The plaintiff had missed this deadline. The Supreme Court dismissed the appeal. It considered the calculation of the time limit by the district court to be correct and referred to decisions of the Supreme Court from 2009 and 2015. This decision contradicted another decision of the Supreme Court from 2013, which interpreted the regulation on the calculation of the time limit as meaning that the sending of the application for reinstatement by the employee was decisive for the beginning of the time limit.

The complainant alleges a violation of Article 6 ECHR in that she was denied access to a court by the dismissal of the action for unfair dismissal due to the failure to meet the deadline.

The Court points out that, with regard to a violation of Article 6 ECHR because of the violation of the right of access to a court, it must be examined in particular whether, with regard to the calculation of the time-limit, the relevant legal provisions and the case law of the national courts were taken into account and whether, taking into account the particular circumstances of the individual case, the time-limit was foreseeable and the principle of proportionality was observed.²⁶ A coherent domestic judicial practice and its consistent application generally fulfils the criterion of foreseeability.²⁷ In the event of changes in national case law, it depends on whether the divergences are serious and of longer duration. They are to be tolerated if they can be taken into account by the national legal system, although the process of standardising and ensuring the consistency of case law may take some time.²⁸ In the appellant's case, the decision of the Supreme Court was issued in 2015, i.e. at a time when the divergences in case law still existed. The fact that the decision was issued

²⁶ ECtHR of 19 July 2011 – No. 16824/08 – *Majski v. Croatia (no. 2)*; ECtHR of 11 July 2002 – No. 36534/97 – *Osu v. Italy*; ECtHR of 23 October 1996 – No. 21920/93 – *Levages Prestations Services v. France*.

²⁷ ECtHR of 5 April 2018 – No. 40160/12 – *Zubac v. Croatia*.

²⁸ ECtHR of 20 October 2011 – No. 13279/05 – *Nejdet Şahin and Perihan Şahin v. Turkey*; ECtHR of 26 November 2016 – No. 76943/11 – *Lupeni Greek Catholic Parish and others v. Romania*; ECtHR of 10 May 2012 – Nos. 34796/09 and others – *Albu and others v. Romania*.

before the harmonisation of case law does not in itself contradict the principle of legal certainty and predictability of the law. The domestic legal order could remedy such uncertainty by its own means. Due to the obvious lack of merit of the appeal, it was dismissed as inadmissible.

New pending cases (notified to the respective government)

Application No. 61397/17 – Kiliçoğlu v. Turkey (2nd Section) – lodged on 3 July 2017 – delivered on 15 April 2021

Law: Article 6 ECHR (right to a fair trial); Article 1 Additional Protocol No. 1 (protection of property)

Keywords: transfer due to privatisation of state-owned enterprises – reduction of remuneration

Note: The complainant is a civil servant who was transferred to another post in a public authority as a result of the privatisation of a state-owned bank. He has unsuccessfully challenged before the national courts the recalculation of his salary and the adjustment of certain allowances as a result of the privatisation. He argues that the Supreme Administrative Court's decision in his case is incompatible with its established case law. In particular, the court disregarded his submission on the inconsistency of the case-law.

In his complaint, he alleges both a violation of Article 6 ECHR and a violation of Article 1 Additional Protocol No. 1.

It is questionable here whether there is a divergence relevant to the decision with regard to the decisions of the domestic courts²⁹ and whether the Supreme Administrative Court has adequately taken into account the complainant's submission in this respect.³⁰

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²⁹ ECtHR of 18 July 2013 – No. 297884 *Stoilkovskav v. the former Yugoslav Republic of Macedonia*; ECtHR of 9 February 2016 – No. 582/05 – *Hayati Çelebi and others v. Turkey*; ECtHR of 26 November 2016 – No. 76943/11 – *Lupeni Greek Catholic Parish and others v. Romania*.

³⁰ ECtHR of 2 December 2014 – No. 61960/08 – *Emel Boyraz v. Turkey*; ECtHR of 19 June 2018 – No. 30733/08 – *Hülya Ebru Demirel v. Turkey*.

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