REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
Hugo Sinzheimer Institute for Labour and Social Security Law

The HSI is an institute of the Hans-Böckler-Stiftung

Edition 3/2021
Reporting period: 1 July – 30 September 2021

Content

I. Editorial

In the seventh edition of the HSI Report, which covers the reporting period from July to September 2021, the overview of the proceedings before the CJEU and ECtHR offers the usual broad panorama of topics. The most eagerly awaited decision was very likely the one answering the question if employers may ban the wearing of 'Islamic headscarves' (hijabs) in the workplace. Quite a few observers thought they had identified a fundamental contradiction between the European and German fundamental rights systems on this issue. In its recent decision on the employer's ban on the wearing of visible signs of religious conviction (joined cases C-804/18 and C-341/19 – *WABE and MH Müller Handel*), the CJEU clarifies in principle that a company's neutrality policy can be a justification for this, but it must be applied consistently and without distinction (an in-depth discussion of the decision is offered by the comment of *Seeland*, HSI-Report 3/2021, p. 4, in German). Moreover, in the *EPSU* case (C-928/19 P), the CJEU had to deal in the last instance with the social dialogue and the legislative procedure under Article 155 TFEU, strengthening the position of the Commission and weakening the binding nature of the dialogue between the social partners. Here it is now up to the Union legislator to give the social partnership instrument a stronger binding effect. In addition, various aspects of temporary agency work relevant for German law are at issue in ongoing proceedings before the CJEU.

At the ECtHR, several cases revolve around freedom of expression in the employment relationship. Among other things, the ECtHR dealt with the question of how 'Likes', which are used on Facebook, for example, to show approval of content, are to be assessed against the background of freedom of expression within the employment relationship (*Melike v. Turkey*, No. 35786/19, see the comment of *Buschmann*, HSI-Report 3/2021, p. 12, in German). The cases of *Yartsev v. Russia*, No. 16683/17 and *Łabądź v. Poland*, No. 10949/15 deal with participation in trade union demonstrations, *Poienaru v. Romania*, No. 43744/17 and *Pill v. Germany*, No. 51451/19 with whistleblowing.

We wish you an informative and interesting read and happy holidays.

The editors

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

→ back to overview

II. Proceedings before the CJEU

Compiled and commented by

Prof. Dr. Daniel Hlava, Johannes Höller and Dr. Ernesto Klengel, Hugo Sinzheimer Institute of the Hans Böckler Foundation, Frankfurt/M.

1. Annual leave

Opinions

Opinion of Advocate General Hogan of 8 July 2021 – C-217/20 – *Staatssecretaris van Financiën*

Law: Article 7(1) Working Time Directive 2003/88/EC

Keywords: Protection of workers' health and safety – Right to annual leave – Reduced pay due to incapacity for work

Core statement: The amount of remuneration of workers during their paid annual leave which they take while they are (totally or partially) incapable of work may not be reduced to the amount of remuneration they would receive during such incapacity.

→ back to overview

2. Equal treatment

Decisions

Judgment of the Court of Justice (Grand Chamber) of 15 July 2021 – C-804/20, C-341/19 – *WABE, MH Müller Handel*

Law: Article 2(2) Article 8(1) Equal Treatment Framework Directive 2000/78/EC, Article 10 Charter of Fundamental Rights (freedom of religion), Article 9 ECHR (freedom of religion)

Keywords: Ban on headscarves – Discrimination on the grounds of religion – Internal ban on wearing visible or conspicuous large-scale political, philosophical or religious signs in the workplace – Customers' wish for the company to pursue a policy of neutrality

Core statement: 1. An internal company rule prohibiting employees from wearing any visible sign of political, philosophical or religious beliefs (hereinafter 'religious sign') at the workplace does not constitute direct discrimination against employees on grounds of religion, provided that the rule is applied generally and without distinction.

2. The indirect unequal treatment inherent in such a prohibition may be justified by the employer's intention to pursue a policy of political, ideological and religious neutrality towards its customers or users,

- provided that, firstly, this policy meets a genuine need of the employer which must be demonstrated by the employer, e.g., taking into account the legitimate expectations of the customers or users,
- secondly, the difference in treatment is appropriate to ensure the proper application of the principle of neutrality, which requires that the policy is followed consistently and systematically; and
- thirdly, the prohibition is limited to what is strictly necessary.

3. A prohibition on the wearing of visible religious signs in the workplace is justified in pursuit of a policy of neutrality only if that prohibition covers any visible expression of political, philosophical or religious beliefs.

4. A prohibition limited to the wearing of conspicuous large signs may constitute direct discrimination on grounds of religion or belief which, in any event, cannot be justified based on this provision.

5. A national provision protecting freedom of religion may be taken into account as a more favourable provision within the meaning of Article 8(1) of the Framework Directive when considering whether indirect discrimination on grounds of religion or belief is appropriate.

Note: See the comment by *Seeland*, HSI-report 3/2021, p. 4 (in German).

Judgment of the Court of Justice (Second Chamber) of 15 July 2021 – C-795/19 – *Tartu Vangla*

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

Keywords: Discrimination on grounds of disability – Hearing requirements for prison officers – Dismissal for failure to meet the minimum hearing threshold

Core statement: A national provision is contrary to EU law which makes it impossible to continue to employ prison officers whose hearing is below a specified minimum hearing threshold and which does not allow for an assessment of whether the officers are able to perform their duties, if necessary after reasonable accommodation has been made.

Note: The main proceedings concern the dismissal of a prison officer who worked for 15 years in a prison in Estonia. Estonian law provides for a minimum hearing requirement to work as a prison officer. The dismissal was due to an established hearing impairment below this threshold. The one-sided hearing impairment had existed since birth.

The CJEU found that the Estonian regulation caused unjustified discrimination on the grounds of disability under Article 2 of Directive 2000/78/EC. It was true that a minimum hearing capacity could be a permissible occupational requirement for work in the penal system. However, this requirement should not lead to an exclusion from the job without exception, but it should be assessed individually whether the person concerned can nevertheless fulfil his or her essential tasks. In doing so, it must be taken into account whether the employer has fulfilled his or her obligation to take reasonable accommodation (Article 5 of Directive 2000/78/EC, interpreted in the light of the UNCRPD). The Court cites as examples of such measures within the meaning of Article 5 of Directive 2000/78/EC the

use of a hearing aid which can also be worn under the helmet (especially since, in the case of a visual impairment, compensation by means of a visual aid would have been permissible), the exemption of the civil servant from tasks which require a certain hearing ability, or the transfer to another position.

Opinions

Opinion of Advocate General Szpunar of 30 September 2021 – C-389/20 – *TGSS*

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

Keywords: Equal treatment of men and women – Social security – Prohibition of discrimination – Domestic workers – Protection against unemployment

Core statement: A Spanish regulation that excludes domestic workers from unemployment benefits is indirectly discriminatory if it is established that it affects almost exclusively women.

Note: Domestic workers are subject to social security under Spanish law – with the exception of unemployment insurance. As domestic workers are predominantly female, this exception mainly affects women, which is statistically proven. The question referred to the Court therefore relates to whether the regulation constitutes indirect discrimination. The Advocate General concludes in the affirmative.

By way of justification, the Spanish Government argued that the domestic workers' sector is traditionally sensitive to non-wage costs. In addition, the risk of unemployment for domestic workers is low. On the other hand, the risk of illegal employment is high, especially since controls at the place of work, the home, are virtually impossible. The opinion is worth reading, also because the Advocate General draws a connection between these reasons and the model of the family with a male breadwinner. He criticised the assumption that unemployment insurance would lead people to temporarily forego gainful employment and draw the insurance benefit. This argument also applies to other, non-female dominated, areas of precarious employment. But that is where unemployment insurance comes in.

New pending cases

Request for a preliminary ruling from the Sąd Rejonowy dla m.st. Warszawy w Warszawie (Poland), of 16 March 2021, lodged on 7 July 2021 – C-356/21 – *TP*

Law: Article 3(1)(a) and (c), Article 17 Equal Treatment Framework Directive 2000/78/EC

Keywords: Discrimination on grounds of sexual orientation – Refusal to conclude a contract for self-employed services on grounds of the sexual orientation of the potential contracting party

Request for a preliminary ruling from the Curtea de Apel Oradea (Romania), lodged on 11 May 2021 – C-301/21 – *Curtea de Apel Alba Julia*

Law: Article 9(1) Equal Treatment Framework Directive 2000/78/EC, Article 47 Charter of Fundamental Rights

Keywords: Age discrimination – National rule providing that the three-year time-limit for claiming damages runs 'from the time when the damage occurred', irrespective of whether or not the claimants had knowledge of the occurrence of the damage (and of its extent).

Request for a preliminary ruling from the Consiglio di Stato (Italy), lodged on 12 May 2021 – C-304/21 – *Ministero dell'Interno*

Law: Equal Treatment Framework Directive 2000/78/EC, Article 3 TEU, Article 10 TFEU and Article 21 Charter of Fundamental Rights

Keywords: Compatibility under European law of an age limit of 30 years for participation in a selection procedure for posts as commissioner in the civil service career of the police

→ back to overview

3. General matters

Decisions

Judgment of the Court of Justice (Fourth Chamber) of 8 July 2021 – C-71/20 – *VAS Shipping*

Law: Article 49, 54, 79(5) TFEU

Keywords: National regulation providing that third-country nationals employed on a vessel flying the flag of a Member State must have a work permit in that Member State – Exemption for vessels which do not call at the ports of the Member State more than 25 times in a year – Regulation limiting the entry of third-country nationals seeking employment from third countries

Core statement: Third-country national crew members of a ship flying the flag of a Member State and owned by a company based in a second Member State may be required to have a work permit in the first Member State, except in cases where the ship in question has not called at its ports more than 25 times within a year.

Judgment of the Court of Justice (Sixth Chamber) of 8 July 2021 – C-166/20 – *Lietuvos Respublikos sveikatos apsaugos ministerija*

Law: Article 1 and Article 10(b) Professional Qualifications Directive 2005/36/EC, Article 45 and 49 TFEU

Keywords: Recognition of professional qualifications acquired in several Member States – Conditions for acquisition – Absence of evidence of formal qualifications.

Core statement: The Professional Qualifications Directive does not apply to a situation in which a person applies for recognition of his professional qualifications but has not acquired evidence of education and training qualifying him for that regulated profession in his Member State. The competent national authorities are obliged to match the person's acquired professional skills with the national professional requirements and, if there is a match, to recognise them. In the case of partial conformity, the Member States have discretion as to the way they obtain evidence of competence.

Judgment of the Court of Justice (Grand Chamber) of 2 September 2021 – C-928/19 P – *EPSU v Commission*

Law: Article 155(2) TFEU

Keywords: Appeal before the Court of Justice – Social dialogue – Information and consultation of officials and employees of the administrative authorities of the Member States – Social partner agreement – Refusal of the European Commission to submit a proposal for a directive

Core statement: The EU Commission is not obliged to propose a decision to the Council on a social partner agreement concluded at the joint request of the social partners pursuant to Article 155 (2) TFEU.

Note: Does the EU Commission have to forward a joint legislative proposal of the social partners to the Council in the course of the legislative procedure of Article 155 TFEU or can it decide for itself whether to do so? This is the legal issue at stake in the present proceedings, in which the Public Service Trade Union Federation (EPSU) challenged the decision of the European Court of First Instance[1] before the CJEU – and was unsuccessful.

After being invited to do so by the EU Commission, trade union and employer federations had negotiated and submitted to the EU Commission an agreement on a 'General framework for informing and consulting civil servants and employees of central government administrations [of the Member States]'. Article 155 (2) TFEU states that 'Agreements concluded at Union level shall be implemented (...) at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.' However, the Commission failed to submit the proposal to the Council, so this agreement cannot be put into effect.

EPSU filed a lawsuit. The fact that the Commission was at most empowered to carry out a legal review could already be deduced from the French and English language versions, but also from the systematic structure of the agreements and the position assigned to the social partners.

The Grand Chamber did not agree with this in the final instance.[2] In the reasons for the judgement, he pointed out, that an independent position of the Commission could be derived from Article 17 TEU. The obligation of the commission to refer would change the institutional balance of the EU (para. 63). The social partners would then have a stronger position than the Parliament, which would only have to be informed in matters of social policy (para. 74). The frequently stated democratic deficit in the EU[3] is thus used to set limits to the collective regulatory power in labour law.

The decision fails to recognise the formation processes of collective agreements (in EU terminology: social partner agreements).[4] The content of such agreements is typically to restrict the freedom of decision-making in the employment relationship, which is assigned to the employer's side by the legal system. Trade unions can usually only achieve the

[1] CEU of 24 October 2019 – T-310/18 – *EPSU and Goudriaan*, p. 22; with critical comments on the ruling *Lörcher*, AuR 2020, p. 476 et seqq., and on the present judgement of the CJEU *Lörcher*, AuR 2021, p. 428.

[2] Endorsing a political discretion already *Benecke*, EuZA 2021, p. 214, 218 et seqq.; *Franzen*, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 3rd ed. 2020, Article 155 AEUV Rn. 20; *Krebber*, in: Calliess/Ruffert, EUV/AEUV, 5th ed. 2016, Article 155 marginal 26.

[3] Cf. Federal Constitutional Court of 30 June 2009 – 2 BvE 2/08 u.a. – *Lissabon*, para. 276 et seqq.

[4] Cf. *Kocher*, in: Frankfurter Kommentar zum EUV/AEUV 2017, Article 155 AEUV, marginal 2 et seq.

conclusion of a collective agreement by activating the means of power they have achieved by mobilising and organising workers.[5] However, the typical means, the strike, is not available within the framework of the social dialogue at EU level. The possibility that a social partner agreement can be rejected by the EU Commission further devalues this instrument. For what reason should the federations engage in compromise-building if the EU Commission can destroy the efforts with a stroke of the pen? The decision of the Grand Chamber exemplifies the problems that the institutional framework of the European multi-level system poses for an effective collective representation of workers' interests.

Opinions

Opinion of Advocate General Szpunar of 15 July 2021 – C-261/20 – *Thelen Technopark Berlin GmbH*

Law: Article 15 Services Directive 2006/123/EC, Article 49 TFEU (freedom of establishment), Article 16 Charter of Fundamental Rights (freedom to conduct a business)

Keywords: Fees for architects and engineers – Minimum and maximum fees – Claim of illegality of Union law in a dispute between private individuals – Horizontal effect

Core statement: In a legal dispute between private individuals, a national court must disapply a regulation on minimum rates for service providers that is contrary to the directive. This obligation arises from Article 15(1), (2)(g) and (3) of the Services Directive 2006/123/EC as provisions concretising the freedom of establishment (Article 49 TFEU) and from Article 16 CFR.

Note: The German Fee Regulations for Architects and Engineers (HOAI) contained minimum and maximum rates for the services of these professions in the period at issue. In its judgment of 4 July 2019, the CJEU already found that these mandatory minimum and maximum rates were contrary to EU law.[6] The background to the proceedings now submitted by the BGH is the claim of an engineering firm for higher remuneration for services rendered. A lump sum fee had been agreed with the client. However, on the basis of the statutory minimum rates in the HOAI, the engineering firm ultimately claimed a significantly higher fee. Taking into account the previous findings of the CJEU, the Federal Supreme Court wants to know whether it must leave the disputed regulation of the HOAI, which is contrary to EU law, inapplicable in a legal dispute between private individuals, even in a horizontal relationship. It is therefore a question of the third-party effects of Union law.

The Advocate General comes to the conclusion that the referring court must also disapply the relevant provision of the HOAI in a horizontal relationship, as it infringes Article 15(1), (2)(g) and (3) of Directive 2006/123/EC. The aforementioned provisions concretise the freedom of establishment based on primary law. In addition, there is a violation of the freedom of contract referred to in Article 16 CFR.

[5] On the power-theoretical reconstruction of the collective agreement (in the context of the Transfer of Undertakings Directive) *Klengel*, Kollektivverträge im EU-Betriebsübergangsrecht, 2020, p. 56 et seqq.

[6] CJEU of 4 July 2019 – C-377/17 – *European Commission/Germany*.

Opinion of Advocate General Tanchev of 30 September 2021 – C-283/20 – *EULEX-KOSOVO*

Law: Joint action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO
Keywords: Common Foreign and Security Policy – Personnel of the EU's international missions – Determination of the employer of international staff
Core statement: The European Commission is to be considered as the employer of international staff in the service of Eulex Kosovo for the period before 12 June 2014.

New pending cases

Request for a preliminary ruling from the Curtea de Apel Cluj of 12 April 2021 – lodged on 26 June 2021 – C-392/21 – *Inspectoratul General pentru Imigrări*

Law: Article 9 Directive 90/270/EEC

Keywords: Term 'special corrective appliances' – Expenses covered by the employer in the form of a general salary supplement paid on a permanent basis under the designation 'aggravated working conditions allowance'.

→ back to overview

4. Part-time work

New pending cases

Request for a preliminary ruling from the Cour du travail de Mons (Belgium), lodged on 21 June 2021 – C-337/21 – *Zone de secours Hainaut – Centre*

Law: § 4 Framework agreement on part-time work (implemented by Directive 97/81/EC)

Keywords: National rule according to which, when calculating the remuneration of full-time professional firefighters for seniority in terms of remuneration, the services rendered in the capacity of part-time volunteer firefighters are counted according to the 'pro rata temporis' principle according to the amount of work, i.e., according to the duration of the services actually rendered and not according to the period during which these services were rendered

→ back to overview

5. Posting of workers

Decisions

Judgment of the Court of Justice (First Chamber) of 8 July 2021 – C-428/19 – *Rapidsped*

Law: Article 3(1), (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 road transport drivers – Posting – Compliance with the national minimum wage – Daily subsistence payment – Fuel economy allowance

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

2. In proceedings in the posting state, an infringement of minimum wage provisions of the host Member State may be invoked if the courts there have jurisdiction.

3. A daily payment which varies according to the duration of the posting may constitute a posting allowance and thus form part of the minimum wage, unless it is paid as reimbursement for costs actually incurred as a result of the posting, such as travel, accommodation and subsistence costs, or corresponds to an allowance which alters the relationship between the worker's performance and the consideration he/she receives.

4. Drivers may be paid an allowance for fuel savings depending on the distance travelled. However, such an allowance would be prohibited under Article 10(1) of Regulation (EC) No 561/2006 if, instead of being linked only to fuel savings, it rewarded such savings in relation to the distance travelled and/or the quantity of goods transported in such a way that the driver was induced to engage in behaviour which endangered road safety and/or led to infringements of Regulation (EC) No 561/2006.

Note: The background to the case is the question of which remuneration components can be offset against the national minimum wage in the context of a posting. In the case at hand, several lorry drivers work for a company based in Hungary. They often drive abroad, which means that the rules of the Posting of Workers Directive apply to them according to the case law of the CJEU[7]. The lorry drivers receive daily allowances from their employer for the work performed abroad, which increase with the duration of the posting. In addition, they are paid a fuel economy allowance, the amount of which is calculated according to the fuel consumption in relation to the distance travelled. For their cross-border work in France, they received a certificate from their employer – to be presented to the French authorities – stating that they received an hourly wage above the minimum wage of 9.76 euros applicable in France for the road transport sector. The drivers, on the other hand, claimed that their hourly wage was in fact significantly lower (3.24 euros), as daily allowances and fuel economy allowance were not to be considered as chargeable wage components.

The CJEU, which was seised of the case, first examined whether the daily allowance was a posting allowance[8] that could be offset against the minimum wage. It concluded that '(…) in particular the lump-sum and progressive nature of that allowance, seem to indicate that the purpose of that daily allowance is not so much to cover the costs incurred abroad by the workers, but rather (…) to provide compensation for the disadvantages entailed by the posting, as a result of the workers being removed from their usual environment.' (para. 50). Ultimately, however, this would have to be decided by the referring court on the basis of all relevant information.

With regard to the classification of the fuel-saving bonus, the CJEU refers to Article 10(1) of Regulation (EC) No 561/2006, according to which transport undertakings may not pay their drivers bonuses or wage supplements 'related to distances travelled and/or the amount of goods carried' if this would endanger road safety or encourage drivers to breach the protective provisions of Regulation (EC) No 561/2006. The CJEU emphasises that the provision does not generally prohibit the promotion of an economical driving style through

[7] CJEU of 1 December 2020 – C-815/18 – *Federatie Nederlandse Vakbeweging*.
[8] See CJEU of 12 February 2015 – C-396/13 – *Sähköalojen ammattiliitto*.

financial incentives, but only if the aforementioned conditions are met (para. 59 et seq.). Here, too, it is up to the referring court to assess the characteristics and effects of the allowance against the background of Article 10(1) of Regulation (EC) No 561/2006.

Opinions

Opinion of Advocate General Bobek of 23 September 2021 – C-205/20 – *Bezirkshauptmannschaft Hartberg-Fürstenfeld*

Law: Article 20 Implementing Directive 2014/67/EU on the Posting of Workers Directive 96/71/EC

Keywords: Direct effect of the principle of proportionality – National law providing for the accumulation of administrative penalties for each infringement committed and for minimum penalties without setting upper limits for the overall penalty

Core statement: The requirement of proportionality of sanctions set out in Article 20 of the Enforcement Directive 2014/67/EU has direct effect. National courts and administrative authorities must take all appropriate measures to ensure this. If necessary, national provisions must remain inapplicable insofar as their application would lead to a result contrary to Union law. However, it may even be necessary for national rules to be supplemented by the criteria of the proportionality requirement laid down in the case-law of the Court of Justice.

Note: In a series of successive decisions, beginning with the *Maksimovic* ruling[9], the CJEU found that the Austrian system of sanctions for violations of administrative provisions under posting law was in part disproportionate. However, these deficiencies were not subsequently remedied by the national legislator. This led to uncertainties in the application of the law, which generated diverging lines of case law by the Austrian higher courts and resulted in widely varying decisions by the lower administrative courts. The referring court now requests the CJEU to state whether the requirement of proportionality of sanctions laid down in Article 20 of Directive 2014/67/EU is a directly applicable provision of the Directive and, if not, whether it is nevertheless possible and necessary for the interpretation of national law in conformity with Union law to leave national provisions unapplied or even to supplement them with criteria developed by the CJEU without a new provision of national law having been adopted.

After a comprehensive examination, the Advocate General concludes that the proportionality requirement of Article 20 of Directive 2014/67/EU is directly applicable. His main argument is that there are some provisions of EU law 'which – such as the requirement of proportionality of sanctions – already have direct effect in themselves and can thus, if necessary, be reviewed by the national courts' (para. 45) and that, although the Court of Justice has not yet explicitly dealt with the prohibition of disproportionate penalties under Article 49(3) CFR, it would be a surprising result if this provision were denied direct effect. The Advocate General concludes his Opinion with an urgent appeal to the Grand Chamber to follow his reasoning, as otherwise the system of direct effect of European norms and principles would be threatened (para. 48).

It should be noted that the incriminated regulation has now been amended by an amendment to the Austrian Wage and Social Dumping Prevention Act (Federal Law Gazette I

[9] CJEU of 12 September 2019 – C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723 – *Maksimovic*.

2021/174)[10] in the sense that the accumulation principle has been abolished as of 1 September 2021.

→ back to overview

6. Social security

Decisions

Judgment of the Court of Justice (Grand Chamber) of 15 July 2021 – C-709/20 – *The Department for Communities in Northern Ireland*

Law: Article 24 Free Movement Directive 2004/38/EC, Article 1, 7 and 24 Charter of Fundamental Rights, Article 18(1) TFEU

Keywords: Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU – Inactive nationals of a Member State residing in the territory of another Member State on the basis of national law – Conditions for obtaining a right of residence for more than three months – National provision under which citizens of the Union who have a right of temporary residence under national law are not entitled to social assistance

Core statement: A national regulation according to which non-employed EU foreigners without sufficient means of subsistence with a temporary right of residence are not entitled to social assistance, unlike nationals, is in conformity with Union law.

However, a refusal of social assistance must not expose the EU citizen concerned and his/her children to a concrete and present risk of violation of fundamental rights as guaranteed in Article 1, 7 and 24 CFR. Where Union citizens have no means of supporting themselves and their children and are on their own, the competent authorities must ensure that, if they are not granted social assistance, they can still live with their children in dignified circumstances. In carrying out this examination, the competent authorities may take into account all the assistance provided for by national law and actually available to the Union citizens and their children concerned.

Judgment of the Court of Justice (Grand Chamber) of 15 July 2021 – C-535/19 – *A*

Law: Article 3(1) lit. a and Article 11(3) lit. e Coordination Regulation (EC) No. 883/2004, Article 7(1) lit. b Free Movement Directive 2004/38/EC

Keywords: 'Economically inactive' Union citizens residing in another Member State for the purpose of family reunification – Refusal of access to the public sickness insurance scheme of the host Member State

Core statement: 'Economically inactive' Union citizens residing in another Member State may not be excluded from access to the public health insurance system of the host Member State. However, the access of such Union citizens to this system does not have to be free of

[10] https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_I_174/BGBLA_2021_I_174.html.

charge. A fee/contribution may be charged in order to prevent these Union citizens from making excessive use of the public finances of the host Member State.

Note: In the case at hand, an Italian man moved to Latvia to live with his wife and children. There he applied to the national health service to be included in the Latvian state health insurance scheme. This was rejected on the grounds that he was neither an employee nor self-employed and thus (as an 'economically inactive EU citizen') did not belong to the group of persons who had access to state-funded health care benefits.

The CJEU first found that state-funded health care benefits, which are granted without an individual means test, fall within the material scope of the Coordination Regulation as 'sickness benefits' and do not constitute 'social and medical assistance' excluded under Article 3(5) of Regulation (EC) No 883/2004 (para. 36). In this respect, the legal provisions of the Member State of residence apply (Article 11(3)(e) of Regulation (EC) No 883/2004), which may not deny Union citizens access to its public health insurance system (para. 50). Taking into account Article 7(1)(b) of the Free Movement Directive 2004/38/EC, the host Member State 'may, however, provide that access to this scheme is not free of charge in order to avoid the Union citizen concerned making an unreasonable demand on the public finances of that Member State' (para. 58). This could be achieved, for example, by the Union citizen taking out 'comprehensive private sickness insurance' or by levying contributions to the public sickness insurance scheme, the level of which must be proportionate (para. 59).[11]

Judgment of the Court of Justice (Grand Chamber) of 2 September 2021 – C-350/20 – *INPS*

Law: Article 12(1) lit. e and Article 3(1) Directive 2011/98/EU (combined residence/work permit for third-country nationals), Article 3 Coordination Regulation (EC) No. 883/2004, Article 34(1), (2) Charter of Fundamental Rights (access to social benefits)

Keywords: Rights of third-country workers with a combined residence/work permit – Exclusion from the granting of childbirth and maternity allowances provided for by national law – Right to equal treatment in social security

Core statement: Third-country nationals who are in possession of a combined permit pursuant to Article 3(1)(b) and (c) of Directive 2011/98/EU may not be excluded from the granting of childbirth and maternity allowances provided for by national law.

Note: Nationals of Italy or other Member States as well as third-country nationals, provided they are in possession of a long-term residence permit, can claim childbirth and maternity allowances as Italian social benefits. However, third-country nationals who are only legally residing in Italy with a combined work permit are excluded from these benefits. The Italian Constitutional Court was confronted with the question of whether this exclusion violates the prohibition of arbitrary discrimination and the requirements for the protection of mothers and children. Since these constitutional provisions must be interpreted in compliance with EU law, the Constitutional Court turned to the CJEU. The CJEU first established that the childbirth grant is a family benefit within the meaning of Article 3(1)(j) of Regulation (EC) No 883/2004 and that the coordination Regulation (EC) No 883/2004 applies to the maternity grant in accordance with Article 3(1)(b) thereof. For these benefits, third-country nationals are also entitled to equal treatment pursuant to Article 12(1)(e) of Directive 2011/98/EU.

[11] With regard of opinion of Advocate General Øe of 11 February 2021 – C-535/19 – A, para. 124.

Judgment of the Court of Justice (Eighth Chamber) of 30 September 2021 – C-285/20 – *Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*

Law: Article 65(2), (5) Coordination Regulation (EC) No. 883/2004

Keywords: Unemployment benefits – Transfer of residence to another Member State – Person who did not pursue any activity as an employed person in the competent Member State before becoming wholly unemployed – Person who does not work because of sickness and therefore receives sickness benefits from the competent Member State

Core statement: A situation in which a person, before becoming wholly unemployed, resided in a Member State other than the competent Member State and did not pursue an activity as an employed person but did not work because of sickness and therefore received sickness benefits paid by the competent Member State, falls within the scope of the Coordination Regulation, provided, however, that the receipt of such benefits is treated as the pursuit of an activity as an employed person under the national law of the competent Member State. In this respect, the reasons (e.g., family reasons) for which the person concerned has transferred his residence to a Member State other than the competent Member State are not to be taken into account for the application of this provision.

New pending cases

Request for a preliminary ruling from the hof van Cassatie (Belgium), lodged on 5 July 2021 – C-410/21 – *DRV Intertrans*

Law: Article 5 Regulation (EC) No 987/2009

Keywords: Binding nature of A1 certificates – Provisional revocation – Criminal proceedings – Irrefutable evidence that an undertaking is established in a particular Member State for the relevant provision of the applicable social security scheme

Request for a preliminary ruling from the Landessozialgericht Nordrhein-Westfalen, lodged on 4 May 2021 – C-283/21 – *Deutsche Rentenversicherung Bund*

Law: Article 44(2) Regulation (EC) No. 987/2009, § 56 German Social Code VI (SGB VI)

Keywords: Child rearing – Pension entitlement – Place of residence in another Member State – Sufficient connection to the German pension insurance system

Note: According to §§ 55, 56 the German Social Code (SGB) VI, periods of bringing up a child in the first three years of life are taken into account as contribution periods to increase the pension. However, this presupposes that the child was brought up within the territory of the Federal Republic of Germany (§ 56(1) s. 2, no. 2, SGB VI), which means that the bringing-up parent with the child has his or her habitual residence there or – in the same way – 'if the bringing-up parent has habitually resided abroad with his or her child and has compulsory contribution periods during the bringing-up or immediately before the birth of the child because of employment or self-employment carried out there' (§ 56(3) SGB VI), i.e. has acquired pension entitlements in the foreign system.

In the case at issue, a German pension insurance institution had refused to take into account child-raising periods because the child had been brought up in the Netherlands during the first three years of its life. At the time of the birth or immediately before it, no employment or self-employment subject to contributions had been pursued in Germany. There were only periods of pension insurance in the Netherlands. The person concerned is a German citizen

who lived temporarily in the Netherlands and raised her children there without ever having worked in the Netherlands.

The Regional Social Court of North Rhine-Westphalia, which heard the case, asked itself whether Article 44 of Regulation (EC) No. 987/2009, which contains a special provision for the equalisation of child-raising periods abroad, had to be interpreted broadly.[12] In this case, it would first be decisive whether child-raising periods were already taken into account in the Dutch pension insurance – which was obviously not to be assumed. If this was not the case, the question would arise as to whether, beyond the wording of Article 44 of Regulation (EC) No. 987/2009, crediting in the German pension insurance was also required if insured persons had exercised an unpaid employment free of insurance before the birth of their children and a self-employed activity in Germany free of insurance after the birth.[13] Ultimately, the question is whether this has created a sufficient link to the German pension insurance system.

Request for a preliminary ruling from the Court of Appeal (Ireland), lodged on 27 July – C-488/21 – *Chief Appeals Officer et al.*

Law: Free Movement Directive 2004/38/EC

Keywords: Restriction of social assistance benefit on the grounds that payment of the benefit would result in the family member concerned becoming an unreasonable burden on the social assistance benefits of the host Member State.

→ back to overview

7. Working time

Decisions

Judgment of the Court of Justice (Grand Chamber) of 15 July 2021 – C-742/19 – *Ministrstvo za obrambo*

Law: Article 1(3) Working Time Directive 2003/88/EC, Article 2(2) OSH Framework Directive 89/391/EEC

Keywords: Concept of working time – Applicability of the directive to military personnel of the armed forces of the Member States – Guarding of military installations

Core statement: 1. Guard duty by military personnel is excluded from the scope of the Working Time Directive,

- if it takes place in the context of basic training, a training operation or a military operation proper,
- if it constitutes a special activity which does not lend itself to a system of personnel rotation,

[12] Reference decision of the Regional Social Court of North Rhine-Westphalia of 23 April 2021 – L 18 R 1114/16.
[13] Regional Social Court of North Rhine-Westphalia of 23 April 2021 – L 18 R 1114/16, para. 55.

- when the activity is carried out in the context of exceptional situations, the seriousness and extent of which require the adoption of measures essential for the protection of the life, health and safety of the general public, or
- if the application of the Working Time Directive to such an activity, by reason of the fact that it requires the authorities concerned to introduce a system of rotation or planning of working time, could only be carried out to the detriment of the proper conduct of the military operations themselves.

2. A period of readiness during which a military staff member is required to remain within his/her barracks but is not actually on duty there may be remunerated differently from a period of readiness during which he/she is actually on duty.

Judgment of the Court of Justice (Tenth Chamber) of 9 September 2021 – C-107/19 – *Dopravní podnik hl. M. Prahy*

Law: Working Time Directive 2003/88/EC

Keywords: Company fire brigade – Concepts of working time and rest period – Break time during which a worker must be ready for action within two minutes – Precedence of Union law

Core statement: 1. Rest breaks during which a worker must be ready for work within two minutes are to be classified as working time if an overall assessment shows that the restrictions imposed very significantly limit his or her opportunities to spend free time.

2. It is contrary to the principle of the primacy of Union law for a national court to be bound by a higher court's interpretation of the law after its judgment has been set aside if that interpretation is incompatible with Union law.

Opinions

Opinion of Advocate General Pitruzzella of 2 September 2021 – C-262/20 – *Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'*

Law: Article 8, 12 (a) Working Time Directive 2003/88/EC, Article 20, 31 Charter of Fundamental Rights

Keywords: Limitation of the duration of night work – Equal treatment of workers in the public and private sector

Core statement: 1. The Working Time Directive only lays down the maximum duration of night work, but does not oblige Member States to set a shorter duration for night work than for day work.

2. the standard duration of night work of seven hours laid down in a member state for workers in the private sector does not have to apply indiscriminately to workers in the public sector. Member States have the discretion to set a different duration if it is objectively justified.

3. national law does not have to explicitly define the normal duration of night work.

New pending cases

Request for a preliminary ruling from Bundesarbeitsgericht of 22 April 2021 – lodged on 22 April 2021 – C-257/21, C-258/21 – *Coca-Cola European Partners Deutschland*

Law: Article 9 Directive 90/270/EEC

Keywords: Term 'special corrective appliances' – Expenses covered by the employer in the form of a general salary supplement paid on a permanent basis under the designation 'aggravated working conditions allowance'.

Note: The collective agreement applicable to the employment relationship between the parties stipulates a supplement for regular night work of 20% and for irregular night work of 50% of the regular hourly remuneration. Since the plaintiff performed night work in a shift model, she only received a supplement of 20%. She argued that the different levels of night work bonuses violated the general principle of equality under Article 3(1) of the Basic Law, as there was no objective reason for the different treatment.

With its request for a preliminary ruling, the German Federal Labour Court wants to know from the CJEU whether the collective agreement regulation in question is an implementation of Union law (more precisely: the Working Time Directive) within the meaning of Article 51 (1) sentence CFR and whether it is compatible with Article 20 CFR. The CJEU is also to decide whether the higher burden on workers due to the poorer ability to plan working time in the case of irregular night work can also be assumed as a justification for the unequal treatment.

Whether collective agreements may stipulate a higher surcharge for irregular night work as opposed to regular night work has been a recurring issue for the labour courts (the two preliminary rulings are two of almost 400 similar revision cases pending before the Tenth Senate of the Federal Labour Court[1]). In 2013, the Federal Labour Court still did not see a violation of the principle of equality in such a constellation[2], but changed its position in 2018 so that, according to the current state of occupational medicine, the more frequently night work is performed by employees, the more harmful it is and thus there is no objectively justifiable reason for this differentiation.[3] With the reference to the CJEU, the Federal Labour Court seeks to shed light on the Union law requirements that have not yet been addressed, because if it were to come to the conclusion that the regulation already violates national law (which was established in parallel proceedings[4]), strictly speaking, the order for reference would no longer be necessary.[5]

→ back to overview

[1] https://www.bundesarbeitsgericht.de/presse/aussetzung-wegen-eines-anhaengigen-vorabentscheidungsverfahrens/.
[2] Federal Labour Court of 11 December 2013 – 10 AZR 736/12 = NZA 2014, 669.
[3] Federal Labour Court of 21 March 2018 – 10 AZR 34/17 = NZA 2019, 622.
[4] Federal Labour Court of 9 December 2020 – 10 AZR 334/20 = NZA 2021, 1110; NJW-Spezial 2021, 372.
[5] *Krieger*, FD-Arbeitsrecht 2021, 434932.

8. Temporary agency work

Opinions

Opinion of Advocate General Tanchev of 15 July 2021 – C-948/19 – *Manpower Lit*

Law: Article 1(1), 3(1) lit. d Temporary Agency Work Directive 2008/104/EC, Regulation (EC) No. 1922/2006 on establishing a European Institute for Gender Equality (EIGE)

Keywords: Scope of the Temporary Agency Work Directive 2008/104/EC – Agencies of the European Union – User undertakings

Core statement: 1. Agencies of the European Union, such as the European Institute for Gender Equality (EIGE), are 'user undertakings' within the meaning of Article 1(2) of the Temporary Agency Work Directive 2008/104/EC, as defined in Article 3(1)(d) of Directive 2008/104.

2. The fields of activity and tasks of the EIGE are to be regarded as economic activities within the meaning of Article 1(2) of the Temporary Agency Work Directive 2008/104/EC.

3. It is in accordance with the administrative autonomy of EIGE and the Staff Regulations to apply the principle of equal treatment within the meaning of Article 5(1) of the Temporary Agency Work Directive 2008/104 to temporary agency workers employed by EIGE.

Opinion of Advocate General Tanchev of 9 September 2021 – C-232/20 – *Daimler*

Law: Article 1(1), Article 5(5) Temporary Agency Work Directive 2008/104/EC

Keywords: 'Temporary' temporary agency work – Reference date for taking into account periods of temporary employment – Maximum period of temporary employment – Fiction of an employment contract of indefinite duration with the hirer

Note: German temporary agency work law is currently under scrutiny by the CJEU in various respects and must be measured against the requirements of the Temporary Agency Work Directive. The 'Daimler case' deals with the question of the duration of temporary employment, i.e. how long temporary workers may be employed as such in a company without being offered employment with the hirer.

In the case at hand, the plaintiff, who had been employed as a metal worker in a car factory, had his assignments extended 18 times in a period of 56 months. The exceeding of the statutory maximum duration of temporary employment was made possible by a collective agreement, but also by the provision in section 19 (2) of German Law on temporary agency work (AÜG), according to which periods of temporary employment before the cut-off date of the reform, 1 April 2017, do not count.

The reference was made by the German Regional Labour Court (LAG) of Berlin-Brandenburg.[6] The legal points of reference are the definition of the scope of application of the Temporary Agency Work Directive, which according to Article 1(1) applies to workers who temporarily work under the supervision and management of a hirer, as well as the prohibition of abusive application and circumvention in Article 5(5) of the Directive.

[6] Instructive *Brors*, AuR 2021, p. 156.

Most recently, in October 2020, the CJEU had to deal with the admissibility of long assignments under EU law in the *KG* case.[7] The Advocate General refers to the decision in the *KG* case and uses the concept of 'temporary' assignment to determine the requirements of inadmissible abuse of rights. According to him, the understanding of 'temporary' should be about the use of a concrete temporary worker, not about the (temporary) occupation of a job with (also changing) temporary workers. The Advocate General wants to counter the use of changing temporary agency workers in a permanent workplace, which this understanding invites, by applying the prohibition of abuse of rights. This approach is feasible.

However, it cannot lead to the goal if the criteria for whether an abusive arrangement exists and what consequences it has are ultimately placed in the hands of the member states. But this is precisely what the Advocate General seems to be arguing for with reference to the *KG* judgment (para. 46). The Advocate General's approach is opposed to the effective effectiveness of Union law[8], a principle that is too often neglected in EU social policy and here in the area of precarious employment.

New pending cases

Request for a preliminary ruling from Bundesarbeitsgericht of 16 December 2020 – lodged on 18 May 2021 – C-311/21 – *TimePartner Personalmanagement*

Law: Article 5(3) Temporary Agency Work Directive 2008/104/EC

Keywords: Overall protection of temporary agency workers – Collective agreement on temporary agency work

Note: The preliminary ruling of the German Federal Labour Court is one of the results of a campaign calling on temporary agency workers to take legal action and supporting them in doing so. This case is about the 'overall protection' according to Article 5(3) of the Temporary Agency Work Directive.[9] According to this, 'social partners' can derogate from the principle of equal treatment of temporary agency workers (Article 5(1) of the Temporary Agency Work Directive), for example in collective agreements, but must respect the overall protection with regard to working and employment conditions. German legislation has made use of the possibility to derogate from the principle of equal treatment through collective agreements, for which, according to section 8(4) sentence 3 of the German Temporary Employment Act (Arbeitnehmerüberlassungsgesetz – AÜG), it is sufficient that the employer is bound by the collective agreement, it is not necessary that the employees are trade union members. In the present case, a temporary worker invokes equal pay, arguing that the relevant collective agreement does not guarantee overall protection.
The concept of overall protection is still unclear more than ten years after the Temporary Agency Work Directive came into force. The spectrum of opinions in the literature ranges from the far-reaching insignificance of the concept[10] to binding requirements for the legal interpretation of the power to deviate[11]. In its reference for a preliminary ruling, the Federal

[7] CJEU of 14 October 2020 – C-681/18 – *KG*, see also the comment on the decision of *Klengel*, HSI-Report 3/2020, p. 4, = AuR 2021, p. 180.

[8] In detail *Klengel*, HSI-Report 3/2020, p. 4, 8.

[9] https://www.labournet.de/politik/alltag/leiharbeit/arbed_leiharbeit/die-anstalt-prof-wolfgang-daeubler-und-labournet-germany-gesucht-leiharbeiterinnen-fuer-eine-klage-vor-dem-eugh-fuer-gleichen-lohn-und-gleiche-bedingungen-auch-in-deutschland/.

[10] In this sense *Forst*, in: Schlachter/Heinig, Europäisches Arbeits- und Sozialrecht, 2nd ed. 2021, § 16 para. 74; *Sansone* in: Preis/Sagan, Europäisches Arbeitsrecht, 2nd ed. 2019, para. 12.77.

[11] Cf. for the different approaches *Blanke*, DB 2010, p. 1528, 1532; *Zimmer*, NZA 2013, p. 289, 290 et seq. For normatively applicable collective agreements, a collective bargaining autonomy of assessment will have to be recognised, whereas for collective agreements applicable by virtue of a reference clause, legal requirements for the scope of the power to deviate may be necessary, c.f. *Hamann/Klengel*, EuZA 2017, p. 485, 500 et seqq. with further references, in-depth on the

Labour Court (Bundesarbeitsgericht – BAG) also asks about the definition of the term. It sought clarification as to whether the overall protection refers abstractly to the position of employees covered by collective agreements or requires a comparison between employees bound by collective agreements and those not bound by them, and whether and to what extent further requirements are to be made beyond the so-called 'guarantee of correctness' of collective agreements or a scope for assessment by the parties to collective agreements that can only be reviewed to a limited extent.

Request for a preliminary ruling from Bundesarbeitsgericht of 14 July 2021 – C-427/21 – *ALB FILS KLINIKEN*

Law: Article 1(1), (2) Temporary Agency Work Directive 2002/104/EC, section 1 para 3 no. 2b AÜG, § 4(3) Collective Agreement for public service employees (TVöD)

Keywords: Temporary agency work – Scope of the Temporary Agency Work Directive – Exception to the scope of application in the case of staff secondment in the public sector

Note: Section 4 (3) of the Collective Agreement for the Public Service (TVöD) contains a simple provision: If tasks are transferred from a legal entity subject to the TVöD to a third party, employees must perform their work at the new employer upon request (personnel secondment).

According to the wording, the protective provisions of the German Temporary Employment Act (Arbeitnehmerüberlassungsgesetz – AÜG) are applicable to such a constellation. Since this did not seem politically opportune and workers are assumed to have an interest in continuing their employment relationship in the public sector, a tailor-made provision was included in section 1, paragraph 3, no. 2b of the AÜG, which almost completely excludes the provision of personnel from the scope of application of the law.[12]
However, according to Article 1 (2), the Temporary Agency Work Directive also explicitly applies to public undertakings and does not contain any special right for public employers who jeopardise the feasibility of the employment relationships that they have concluded through privatisation and restructuring.[13] Whether the exception in the AÜG is in conformity with the Temporary Agency Work Directive[14] has therefore now been referred by the German Federal Labour Court to the CJEU for a decision.[15]

→ back to overview

classification of the legal effect of collective agreements as collective or contractual *Klengel*, Kollektivverträge im EU-Betriebsübergangsrecht, 2020, p. 56 et seq.

[12] C.f. the official explanatory memorandum to the law of 2017, Bundestag printed paper 18/9232, p. 22.

[13] Instructive on the interpretation *Forst*, in: Schlachter/Heinig (fn. 21), § 16 marginal 54.

[14] *Deinert*, RdA 2017, p. 65, 82; Hamann/Klengel, EuZA 2017, p. 485, 491 et seq, *Sansone*, in: Preis/Sagan (footnote 21), marginal no. 12.38; *J. Ulber*, RdA 2018, pp. 50, 56, consider the blanket regulation to be contrary to Union law, in each case with further references; for conformity for example *Forst*, in Schlachter/Heinig (fn. 21), § 16 marginal 88, who considers permanent leasing to be permissible under EU law.

[15] The reference decision is discussed by *Hamann*, jurisPraxisreport Arbeitsrecht 37/2021, Anm. 5.

III. Proceedings before the ECtHR

Compiled and commented by

Karsten Jessolat, German Trade Union Legal Service, Centre for Appeal and European Law

1. Freedom of association

New pending cases (notified to the respective government)

No. 511954 – *Kaya v. Turkey* (2nd Section), submitted on 9 September 2019 – delivered on 9 July 2021

Law: Article 6 ECHR (right to a fair trial); Article 11 ECHR (freedom of assembly and association)

Keywords: Disciplinary measure – Participation in a trade union demonstration – Different treatment of comparable plaintiffs

Note: The complainant is a teacher and a member of the local branch of *Eğitim ve Bilim Emekçiler Sendikası*, the Education and Science Workers' Union. The union organised a demonstration in December 2015 to protest against curfews and their impact on the education system. As a result of her participation in the demonstration, the complainant was subject to disciplinary action and her monthly salary was reduced. Appeals against this decision were unsuccessful before the national courts. In the similar cases, the disciplinary measures imposed on other public servants participating in the demonstration were overturned by court decisions. The complaint alleges that the disciplinary measure violates Article 11 ECHR, as it interferes with the right to engage in trade union activity. The complaint also alleges discrimination under Article 14 ECHR in conjunction with Article 6 ECHR, as courts have made contrary decisions in similar cases.

→ back to overview

2. Freedom of expression

Decisions

Judgment (4th Section) of 31 August 2021 – No. 16683/17 – *Yartsev v. Russia*

Law: Article 10 ECHR (freedom of expression) in conjunction with Article 11 (freedom of assembly and association)

Keywords: Participation in a trade union manifestation – Shouts of protest against the police state – Detention and conviction for an administrative offence

Core statement: Shouting slogans that do not correspond to the stated aims of a lawful public event is not protected by the right to freedom of expression only if this conduct violates domestic law.

Note: In April 2016, the Deputy Mayor of Moscow authorised a trade union rally to take place on 1 May. The aim of the event was to show solidarity and stand up for workers' rights on Labour Day. On Facebook, all 'leftist, anarchist, feminist and LGBT groups' were called to participate in the event. The complainant took part in the demonstration and, according to court findings, chanted the slogans 'Stop abuse by the cops' and 'Down with the police state'. This led to the arrest of the complainant and a fine of RUB 10,000 (about €140). In justification, the courts pointed out that the slogans chanted by the complainant did not correspond to the objectives of the demonstration as approved by the authorities.

Recalling its case-law[16], the Court examines Article 10 ECHR in the light of the general principles established in the context of Article 11 ECHR. In doing so, it assumes, on the basis of the findings of the domestic courts, that the complainant actually shouted the alleged slogans. Therefore, there was a connection between the measures taken against him and the exercise of the right to freedom of expression and assembly.[17] The conviction of the complainant for an administrative offence in connection with the shouting of these slogans must therefore be regarded as an interference with the exercise of the right to freedom of expression.[18] Regarding the question of whether the interference is prescribed by law, Article 10 ECHR requires that the measure must have a legal basis in national law. According to national law, participants in a demonstration may use banners or other means of expression that are not prohibited by law.[19] However, the national courts did not give reasons why the slogans chanted were prohibited by law. Therefore, the conviction of the complainant had no basis in national law, so that Article 10 ECHR in conjunction with Article 11 ECHR was violated. The Court therefore ordered the respondent state to pay compensation of €7,500 under Article 44(2) ECHR.

(In)admissibility decisions

Judgment (1st section) of 31 August 2021 – No. 10949/15 – *Łabądź v. Poland*

Law: Article 10 ECHR (freedom of expression); Article 11 ECHR (freedom of assembly and association)

Keywords: Trade union demonstration – Damage to the employer's reputation – Freedom of expression vs. inviolability of the home

Core statement: The state, in order to fulfil its positive obligation to protect a person's rights under Article 8 ECHR, must to some extent restrict the rights of other persons to be granted under Article 10 ECHR and Article 11 ECHR.

Note: The complainant is the president of a trade union represented in a state-owned coal mine. In connection with the privatisation of the company, the union decided to hold several demonstrations. In May 2009, demonstrations took place in front of the house of a board member of the company. Among other things, flyers were distributed, some of which

[16] ECtHR of 24 July 2012 – No. 40721/08 – *Fáber / Hungary.*
[17] ECtHR of 15 November 2018 – No. 29580/12 – *Navalny / Russia*; ECtHR of 3 October 2013 – No. 21613/07 – *Kasparov / Russia.*
[18] ECtHR of 16 July 2019 – No. 65808/10 – *Zülküf Murat Kahraman / Turkey*; ECtHR of 6 October 2015 – No. 15450/03 – *Müdür Duman / Turkey*; ECtHR of 19 September 2013 – No. 23160/09 – *Stojanović / Croatia.*
[19] ECtHR of 16 June 2015 – No. 64569/09 – *Delfi AS / Estonia.*

contained insulting and untrue allegations about the person of the board member. Following the demonstrations, criminal proceedings were initially instituted against the complainant, but were discontinued due to lack of sufficient suspicion. In a subsequent civil case he was ordered to publish a statement apologising for the damage to his reputation and the untrue allegations, as well as to pay 5,000 Zl. (about € 1,250) to a charity. Appeals against this decision were largely unsuccessful. An appeal to the Supreme Court was dismissed as manifestly unfounded.

In his complaint, the complainant alleges a violation of both Article 10 ECHR and Article 11 ECHR. He considers that he made a legitimate criticism of his employer and that the judgments of the domestic courts confer on him collective responsibility for the demonstration in question.

The Court first refers to the principles it has established on the rights to freedom of expression[20] and assembly[21]. These principles must be applied to the present dispute, it being significant that the issues of freedom of expression and freedom of peaceful assembly are closely linked in the present case. In contrast, however, the right to protection of reputation as well as the right to inviolability of the home, which is protected by Article 8 ECHR, must also be taken into account.[22] Even if this provision is primarily aimed at protecting individuals from arbitrary interference by the public authorities, it also imposes a positive obligation on the state to adopt measures that are suitable for ensuring respect for private life also within relations between individuals.[23] To fulfil these obligations under Article 8 ECHR, the state may, to a certain extent, restrict the rights it is obliged to grant to other persons under Article 10 and 11 ECHR. When considering whether these restrictions are necessary in a democratic society, the conflicting ECHR rights must be weighed against each other, taking into account that the respective rights deserve equal respect and that the margin of appreciation should be the same in both cases.[24] According to the findings of the domestic courts, the complainant's actions were undisputed. The sanctions imposed on him are not to be considered excessive. The Court therefore concludes, considering all the circumstances, that the national courts have given valid and sufficient reasons for their decisions. The interference with the complainant's rights under Articles 10 and 11 ECHR, based on Article 8 ECHR, was therefore not disproportionate to the legitimate aim pursued. The complaint was therefore manifestly unfounded and had to be declared inadmissible pursuant to Article 35 (3a) and (4) ECHR.

New pending cases (notified to the respective government)

No. 43744/17 – *Poienaru v. Rumania* (2nd section), submitted on 9 June 2017 – delivered on 16 September 2021

Law: Article 10 ECHR (freedom of expression)

Keywords: Dismissal – Whistleblowing

---

[20] ECtHR of 24 April 2007 – No. 7333/06 – *Lombardo / Malta*; ECtHR of 24 February 2009 – No. 23806/03 – *Długołęcki / Poland*; ECtHR of 22 June 2010 – No. 41029/06 – *Kurłowicz /* Poland; ECtHR of 23 April 2015 – No. 29369/10 – *Morice / France*; ECtHR of 29 July 2018 – No. 64659/11, 24133/13 – *Makraduli / The former Yugoslav Republic of Macedonia.*

[21] ECtHR of 15 October 2015 – No. 37553/05 – *Kudrevičius / Lithuania*; ECtHR of 15 May 2015 – No. 19554/05 – *Taranenko / Russia*; ECtHR of 26 April 1991 – No. 11800/85 – *Ezelin / France*; ECtHR of 15 November 2007 – No. 26986/03 – *Galstyan / Armenia*; ECtHR of 23 October 2008 – No. 10877/04 – *Sergey Kuznetsov / Russia.*

[22] ECtHR of 7 February 2012 – No. 39954/08 – *Axel Springer AG / Germany.*

[23] ECtHR of 7 February 2012 – No. 40660/08, 60641/08 – *von Hannover / Germany (2)*; ECtHR of 29 March 2016 – No. 56925/08 – *Bédat / Switzerland.*

[24] ECtHR of 7 February 2012 – No. 39954/08 – *Axel Springer AG / Germany*; ECtHR of 7 February 2012 – No. 40660/08, 60641/08 – *von Hannover / Germany (2).*

Note: The complainant was employed in the public service and disclosed information on the management of European funds by the authorities to third parties. An action against the dismissal on these grounds was unsuccessful before the national courts. The complainant claims that the dismissal violated his right to freedom of expression under Article 10 ECHR. In particular, the Court will consider whether any interference with the complainant's freedom of expression is necessary in a democratic society.[25]

No. 51451/19 – *Pill v. Germany* (1st section) submitted on 30 September 2019 – delivered on 31 August 2021

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

Keywords: Termination of employment – Whistleblowing – Judicial dissolution of the employment relationship

Note: The complainant was employed as a veterinarian at the veterinary office in Göppingen and was responsible for monitoring hygiene and animal welfare standards in a slaughterhouse. She had reported several times in the past to the slaughterhouse management, her superiors and the competent authorities that the standards were not being observed and that slaughterhouse employees were being treated in a harassing manner. As she felt that her complaints were not being followed up, she filed a supervisory complaint with the responsible regional council. As a result, the complainant was transferred to another slaughterhouse and later dismissed. The Local Labour Court granted her dismissal complaint filed against this. The Regional Labour Court also found that the dismissal was invalid but dissolved the employment relationship pursuant to section 9 of the Protection against Dismissal Act (KSchG) and ordered the employer to pay severance pay. The complaint alleges a violation of the right to freedom of expression under Article 10 ECHR.

No. 8035/20 – *Özbarsis Demirer* v. *Turkey* (2nd section) submitted on 22 January 2020 – delivered on 5 July 2021

Law: Article 10 ECHR (freedom of expression)

Keywords: Transfer of a headmaster – Postings on Facebook – Disrespectful remarks against the President of the Republic

Note: The subject of the proceedings is the transfer of the complainant, who is employed as a head teacher, to a position as a teacher at another primary school. He was accused of spreading disparaging remarks against the President of the Republic on his Facebook account. According to the national authorities, these actions justified the transfer, as the office of headmaster also requires the respect and trust of the state authorities outside of the service. The complainant invokes his freedom of expression under Article 10 ECHR with regard to his statements. The European Court of Human Rights will examine the question of whether the national courts have carried out a sufficient balancing of interests with regard to the interference with freedom of expression.[26]

→ back to overview

[25] ECtHR of 12 February 2008 – No. 14277/04 – *Guja / Moldova.*

[26] ECtHR of 6 July 2010 – No. 43453/04 u. 31098/05 – *Gözel und Özer / Turkey*; ECtHR of 19 June 2018 – No. 20233/06 – *Kula / Turkey*; ECtHR of 19 March 2019 – No. 57031/10 – *Mart / Turkey.*

3. Non-discrimination

Decisions

Judgment (3rd section) of 6 July 2021 – No. 66180/09 – *Gruba et al v. Russia*

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

Keywords: Discrimination on grounds of sex – No parental leave for male police officers – Principle of proportionality

Core statement: Gender stereotypes that define men as the main breadwinners and women as child carers cannot be used as a sufficient justification for treating men and women differently in terms of parental leave entitlement.

Note: The complainants are four police officers who work in the Ministry of the Interior's departments in various Russian cities. In 2008, 2009 and 2010, the complainants' wives each gave birth to a child. They applied for parental leave for the period after the birth of the child, which was refused on the grounds that it could only be granted if the child was without maternal care. This condition was not met in the case of the complainants. An action brought against the denial of parental leave was unsuccessful in all instances before the national courts. According to the national regulations, male staff are only entitled to parental leave if children grow up without maternal care. This condition is only met in the event of the death of the mother, withdrawal of parental care, prolonged illness or other situations in which the children are without maternal care.

The Court first recalls its case-law[27] according to which Article 14 ECHR in conjunction with Article 8 ECHR applies to parental leave and state parental leave schemes must be compatible with Article 14 ECHR. With regard to parental leave and parental benefits, men are in a comparable situation to women. Unlike maternity leave, which is intended to allow the woman to recover from the birth and breastfeed the child, parental leave and parental allowance are intended to take care of the child in the period thereafter. With regard to the care of the child during parental leave, men and women are treated equally. In this context, the Court reiterates that gender stereotypes, according to which men are responsible for earning an income in the family and women are responsible for childcare, cannot justify different treatment of men and women. Nor can such discrimination be justified by the need to maintain the police service. In doing so, the Court also invokes Article 1 of ILO Convention No. 111 concerning discrimination in respect of employment and occupation. According to this, a difference in treatment in relation to a particular activity on the basis of its inherent requirements does not constitute discrimination. There is therefore no reasonable relationship between the legitimate aim of having to maintain the police service and the alleged disadvantage, so that in the present case there is discrimination on grounds of sex. The Court therefore found a violation of Article 14 ECHR in conjunction with Article 8 ECHR and awarded the complainants compensation of between €1,000 and €7,500 each.

Russia was the first country in the world to introduce maternity protection after the October Revolution in 1917, and today fathers can also claim parental leave. However, the facts of the case were assessed according to a special regulation for the Russian Ministry of the Interior, which treats mothers and fathers unequally. For the EU Member States, on the other

[27] ECtHR of 22 March 2012 – No. 30078/06 – *Markin /* Russia with further references.

hand, Directive 2019/1158/EU of 19 June 2019 regulates the granting of parental leave equally for both parents, irrespective of gender.[28]

New pending cases (notified to the respective government)

No. 61802/13 – *Revenko v. Ukraine* (5th section), submitted on 27 September 2013 – delivered on 27 July 2021

Law: Article 14 ECHR (prohibition of discrimination) in conjunction with Article 1 Article 1 Additional Protocol No. 1 (protection of property)

Keywords: Entitlement to an old-age pension – Residence abroad – Discrimination

Note: The complainant is a Ukrainian citizen and has been a permanent resident of Israel since 1991. He was born in 1937 and applied to the State Pension Fund of Ukraine for an old-age pension in 2012. Before moving to Israel, he had worked in Ukraine for 35 years. After his application was rejected on the grounds of his residence abroad, the Administrative Court annulled the relevant decision and granted the complainant the requested old-age pension. It pointed out that according to the Ukrainian Constitution, citizens of Ukraine may not be discriminated against, in particular because of their place of residence. The Court of Appeal overturned this decision on the grounds that, according to national legislation, persons with permanent residence abroad cannot claim an old-age pension from the State Pension Fund. The complainant alleges discrimination under Article 14 ECHR in conjunction with Article 1 Additional Protocol No. 1.

→ back to overview

4. Procedural law

Decisions

Judgment (2nd section) of 6 July 2021 – No. 70306/10 – *Tiğrak v. Turkey*

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

Keywords: Privatisation of a bank – Retirement – Amount of a severance payment – Recognition of periods of prior service – Annulment of a final judgment

Core statement: A deviation from the principle of legal certainty, which requires that a final court decision may not be called into question, is only justified if there are substantial and compelling circumstances for this and a fair balance is struck between the interests of the individual and the safeguarding of the state legal order.

Note: The complainant was employed by Türkiye Cumhuriyeti Ziraat Bankası and its legal predecessor, Türkiye Emlak Bankası, from 1982 to 2005. At the latter, the application of civil service law provisions was agreed in her employment contract until 2002. In 2005, she retired and received a severance payment to which she was entitled according to statutory provisions. When calculating the severance payment, the length of service she had completed under civil service law was only taken into account subject to the application of

[28] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1158&rid=16.

special upper limits. The complainant brought an action for payment of further severance pay to be calculated on the basis of her entire period of employment, disregarding the upper limits. The Labour Court awarded her the claimed further severance pay. This decision was confirmed by the Court of Cassation on 26 December 2008. After this decision became final, Türkiye Cumhuriyeti Ziraat Bankası applied for the annulment of the decision of the Court of Cassation within the framework of a rectification procedure permitted under national provisions. The reason given was that in the cassation proceedings the upper limit provided for by law for calculating the severance payment had not been taken into account. The Court of Cassation then annulled its original decision on the grounds that the application of a statutory provision had not been observed. Thus, the claim for payment of the further severance pay was dismissed.

The ECHR held that the Court of Cassation had based its reasons for annulling a final decision on a factual error. It is true that the court was empowered under national provisions to rectify factual errors in a judicial decision. This refers exclusively to obvious factual errors, in particular with regard to final decisions. In the present case, however, the dispute between the parties was whether a statutory provision applied to the facts. However, an incorrect application of the law does not constitute a reason to depart from the principle of legal certainty.[29] This can only apply if an error of law leads to a denial of justice and disregards that different views on an issue are justifiable.[30] Since, in the appellant's case, the rectification of the original decision of the Court of Cassation is not based on a manifest error of fact but on an alleged misapplication of a statutory provision, the annulment of the final decision infringes the principle of legal certainty, which is a fundamental aspect of the rule of law.[31] The Court also points out that the review of a final and binding judicial decision cannot be regarded as an appeal in disguise, which would invalidate the principle of legal certainty. The correction of final decisions can only serve to remedy their fundamental defects or a miscarriage of justice[32], not for the sake of legal purism.[33] The Court therefore found a violation of Article 6 ECHR and awarded the applicant compensation of €2,500.

Judgment (4th section) of 31 August 2021 – No. 27994/19 – *Mugishta v. Bosnia and Herzegovina*

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

Keywords: Refugee with a disability – Refusal of an invalidity allowance and care allowance – No benefits for foreigners – Right to be heard – Excessive length of proceedings

Core statement: Even if it is up to the national authorities to interpret domestic legislation, there may be a violation of Article 6 ECHR if their findings are arbitrary or manifestly unreasonable and lead to a denial of justice.

Note: The complainant was granted refugee status in 2004. She is illiterate and has been diagnosed with a severe mental disability. In 2011, she was found by the competent authorities to be 90 % incapacitated and in need of assistance with activities of daily living. In 2011, without invoking any specific legal provisions, she applied for a disability allowance and a care allowance. Both were refused by the authorities on the grounds that she was a

[29] ECtHR of 23 January 2001 – No. 28342/95 – *Brumărescu / Romania.*
[30] ECtHR of 9 June 2015 – No. 25132/13 – *COMPCAR, s.r.o / Slowakei.*
[31] ECtHR of 23 January 2001 – No. 28342/95 – *Brumărescu / Romania*; ECtHR of 9 June 2015 – No. 25132/13 – *COMPCAR, s.r.o / Slovakia.*
[32] ECtHR of 24 July 2003 – No. 52854/99 – *Ryabykh / Russia.*
[33] ECtHR of 23 July 2009 – No. 8269/02 – *Sutyazhnik / Russia.*

foreigner, citing social legislation. A judicial review confirmed the authorities' decision. In its ruling in 2016, the Sarajevo Cantonal Court explicitly pointed out that the complainant had applied for disability assistance, which, according to the legal provisions, can only be granted to nationals of Bosnia and Herzegovina. Refugees with disabilities can claim permanent allowance and care allowance in Bosnia and Herzegovina under other social law provisions. A constitutional appeal against the decision of the Cantonal Court, which was decided in 2018, was unsuccessful.

The Court again states that it is not its task to rule on the interpretation of domestic legislation instead of the national courts. Notwithstanding this, there may be a violation of Article 6 ECHR if the findings of the national court are arbitrary or manifestly unreasonable and result in a denial of justice.[34] Even though the complainant in the present case had expressly applied for a disability allowance and a care allowance, which can only be granted to nationals of Bosnia and Herzegovina, the competent administrative authorities completely disregarded the examination of other legal provisions providing for similar benefits for refugees. Thus, both the authorities and the courts neglected their statutory duty to refer to the relevant legal situation. The Court therefore concludes that the applicant was not granted a fair hearing.
With regard to the length of the administrative and judicial procedure, the Court finds that the period of more than five years was excessive and that the complainant's case was not dealt with within a reasonable time. The complexity of the case, the conduct of the complainant and the competent authorities, and the subject-matter of the dispute had to be taken into account.[35] A special duty of care in this regard is incumbent on state institutions when it comes to social benefits that account for a large part of the income of the person concerned[36], which was the case here. The Court therefore found a violation of Article 6 ECHR both because of the arbitrariness of the administrative decision and because of the excessive length of the proceedings and ordered the defendant state to pay compensation of €4,700.

Judgment (3rd section) of 13 July 2021 – No. 74989/11 – *Ali Riza v. Switzerland*

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

Keywords: Access to a court – Applicability of Article 6 ECHR to claims arising from a private legal relationship

Core statement: The right of access to a court does not necessarily imply the right to go to a court that is integrated into the normal judicial structures of a country; thus, an institution that is competent to adjudicate a limited number of specific disputes may meet the requirements of Article 6 ECHR, provided that it offers the appropriate guarantees.

Note: The complainant is a British citizen and also has Turkish citizenship due to his Turkish origin. He is a professional football player. From 2006 to 2008, he was an employee of a professional football club in the Turkish league, which is a member of the Turkish Football Federation (FFT), which in turn is a member of FIFA. The complainant terminated the employment relationship with the Turkish club without notice on the grounds that the club had breached its contractual obligations. For this reason, the club imposed a fine on the complainant. The complainant initially brought an action against this before a FIFA Dispute Resolution Chamber, which declared that it had no jurisdiction and recommended that the case be submitted to the FFT. The FFT ordered the complainant to pay a fine for unlawful termination of the contract. The FFT's decision was binding and could not be reviewed by the

[34] ECtHR of 11 July 2017 – No. 19867/12 – *Moreira Ferreira/ Portugal (2)*; ECtHR of 14 January 2020 – No. 29422/17 – *Lazarević* / Bosnia and Herzegovina.
[35] ECtHR of 27 June 2000 – No. 30979/96 – *Frydlender / France.*
[36] ECtHR of 8 April 2003 – No. 46096/99 – *Mocie / France.*

ordinary courts. Following a complaint to the ECtHR, the Court[37] ruled that the composition of the FFT Arbitration Committee did not meet the conditions of independence and impartiality. It pointed out that according to Article 46 ECHR, measures must be taken to ensure the structural independence of the Arbitral Tribunal. In the meantime, the complainant had appealed the award to the International Court of Arbitration for Sport (CAS). The CAS considered itself to lack jurisdiction and dismissed the appeal without a hearing. The complainant appealed to the Swiss Federal Supreme Court, which confirmed the decisions of the FFT and the CAS.
In his appeal, the appellant complains in particular that his right of access to an independent tribunal under Article 6 ECHR has been violated.

The Court points out that access to a tribunal is not absolute and is subject to implicitly accepted limitations that may result from state regulatory measures and are subject to a margin of appreciation.[38] However, these limitations must not restrict the essence of the right of access to a court.[39] A court within the meaning of Article 6 ECHR does not necessarily have to be a court of a traditional kind, integrated into the normal judicial structures of a country. The only decisive factor is the guarantee of the rights arising from Article 6 ECHR. The establishment of arbitral tribunals for the resolution of property disputes between persons can therefore be permissible if it offers the guarantees mentioned in Article 6 ECHR.[40] The TFF fulfils these conditions, as the complainant could not sue before the ordinary courts in Turkey and was therefore forced to submit the dispute to the TFF arbitration panels. In view of its limited power of review in relation to CAS as an international court, the Court concludes that its decision is neither arbitrary nor manifestly unreasonable. Therefore, the restriction of the right of access to a court was not disproportionate and unreasonable in view of the objective pursued, namely the proper administration of justice and the effectiveness of domestic judicial decisions. The substance of the right under Article 6 ECHR was therefore not affected. Similarly, the Court finds that there was also no violation of Article 6 ECHR because there was no public hearing before the CAS. Nor was the principle of parity of arms violated in the proceedings before the Swiss Federal Supreme Court. The Court therefore did not find a violation of Article 6 ECHR.
In a concurring opinion, Judges *Pavli, Dedov* and *Ravarani* point out that, against the background of the importance of the CAS in the resolution of disputes arising from sports contracts with an international element, the Court should not weaken this arbitration system through superior jurisdiction.

In a partially dissenting and concurring opinion, Judge *Lemmens* held that the appellant was subject to Swiss jurisdiction within the meaning of Article 1 ECHR, even though the subject matter of the dispute had only an extremely weak connection with the respondent state.

[37] ECtHR of 28 January 2020 – No. 30226/10 – *Ali Riza / Turkey.*
[38] ECtHR of 23 June 2016 – No. 20261/12 – *Baka / Hungary*; ECtHR of 21 June 2016 – No. 5809/08 – *Al-Dulimi and Montana Management Inc. / Switzerland;* ECtHR of 12 November 2012 – No. 43903/09 – *Yabansu / Turkey;* ECtHR of 11 March 2014 – No. 52067/10, 41072/11 – *Howald Moor / Switzerland.*
[39] ECtHR of 23 June 2016 – No. 20261/12 – *Baka / Hungary*; ECtHR of 21 June 2016 – No. 5809/08 – *Al-Dulimi and Montana Management Inc. / Switzerland;* ECtHR of 12 November 2012 – No. 43903/09 – *Yabansu / Turkey;* ECtHR of 11 March 2014 – No. 52067/10, 41072/11 – *Howald Moor / Switzerland.*
[40] ECtHR of 28 October 2010 – No. 1643/06 – *Suda / Czech* Republic.

(In)admissibility decisions

Judgment (2nd section) of 7 September 2021 – No. 30330/19 – *Seker v. Turkey*

Law: Article 6 ECHR (right to fair trial)

Keywords: Dismissal protection proceedings – Amicable settlement in mediation proceedings – Failure to communicate essential facts of the proceedings

Core statement: Failure to inform about a fact essential for the examination of a complaint can lead to the loss of the right of appeal.

Note: The complainant had brought an action before the Labour Court against a termination of her employment contract, complaining about the lack of a reason and thus the invalidity of the termination of the employment relationship. In the lawsuit, the employer argued that the termination had been issued on suspicion of involvement in the attempted coup of 15 July 2016. The action for protection against dismissal was unsuccessful in all instances. A constitutional complaint was rejected as obviously unfounded. In the course of the complaint proceedings before the ECtHR, the respondent government submitted that the complainant had reached an agreement with the employer on the payment of a severance payment in a mediation procedure that was permissible under national provisions before the complaint was filed. These facts were not contested by the complainant in the proceedings before the Court.

The Court notes that the failure of a complainant to submit facts essential to the resolution of the dispute may, in principle, lead to the complaint being declared inadmissible for abuse of the right of appeal under Article 35(3) ECHR.[41] Incomplete and therefore misleading information may also constitute an abuse of the right of individual complaint, especially if it goes to the heart of the case and the complainant does not sufficiently explain why he or she did not disclose the relevant information.[42] However, the intention of the person concerned to mislead the court must always be proven with reasonable certainty.[43] The Court considers that the agreement reached by the complainant with her employer in the mediation procedure is relevant information for the assessment of the admissibility of the complaint. This applies in particular because the agreement settled the dispute about the dismissal, which was the starting point for the complaint before the ECtHR. It must also be taken into account that it is undisputed that the complainant did not conclude the settlement agreement under duress and therefore voluntarily waived further rights.[44] The Court therefore declared the complaint inadmissible due to the failure to provide essential procedural information.

New pending cases (notified to the respective government)

No. 8057/19 – *Seyitvan v. Turkey* (2nd section) submitted on 29 January 2019 – delivered on 18 August 2021

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

Keywords: dismissal of an employee of public service – Alleged connection to a terrorist organisation – Damage to reputation through dismissal

---

41 ECtHR of 30 September 2014 – No. 67810/10 – *Gross / Switzerland.*

42 ECtHR of 19 June 2006 – No. 23130/04 – *Hüttner /* Germany; ECtHR of 2 December 2008 – No. 21447/03 – *Predescu / Romania*; ECtHR of 2 October 2012 – No. 21913/05 – *Kowal / Poland.*

43 ECtHR of 3 December 2019 – No. 57242/13 – *Belošević / Croatia.*

44 ECtHR of 19 May 2005 – No. 52332/99 – *Calì / Ita*ly.

Note: The case concerns the termination of the employment of the seven complainants on the grounds of alleged links to a terrorist organisation and the simplified possibility of dismissal under national law. Following the coup attempt of 15 July 2016, legal provisions were enacted facilitating the dismissal of employees suspected of involvement in the coup. The complainants allege a lack of effective judicial review of the dismissal within the meaning of Article 6 ECHR and a violation of Article 8 ECHR, as the dismissals had an adverse effect on their private life. The Court notes that the complaints raise issues similar to those decided in *Pişkin v. Turkey*[45].

No. 61590/19 – *Onat et al. v. Turkey* (2nd section) submitted on 15 November 2019 – delivered on 3 August 2021

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

Keywords: Dismissal of an employee of public service – alleged connection to a terrorist organisation – Presumption of innocence

Note: The complaints concern the termination of the employment of the 15 complainants because of their alleged links to a terrorist organisation. According to national law, which was enacted as a result of the attempted coup of 15 July 2016, dismissals on this ground can be issued under a simplified dismissal procedure. In the actions for protection against dismissal brought against the dismissals, the complainants invoked the fact that the criminal proceedings brought against them on the basis of the aforementioned accusation did not lead to a conviction but were discontinued or ended in acquittals. The complaint alleges, in addition to the lack of effective judicial review[46], in particular that the labour courts and the innocence of the complainants established by the criminal courts were disregarded.

No. 32916/20 – *Bogdan v. Romania* (4th section), submitted on 13 July 2020 – delivered on 1 September 2021

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

Keywords: Disciplinary proceedings – Suspension – Lack of legal remedy

Note: The complainant was employed as a judge and was dismissed from the judiciary by way of disciplinary proceedings in April 2018. While the disciplinary proceedings were still pending, she was suspended from service in May 2018. An appeal against the suspension was dismissed as inadmissible in June 2019 on the grounds that such an appeal was not available under domestic law. The complainant argues that the inability to challenge the suspension denies her access to a court within the meaning of Article 6 ECHR. In addition, she claims that this violates Article 8 ECHR, as the immediate termination of her employment has a serious impact on her private life, as she no longer has any remuneration and is no longer covered by social security. A disciplinary measure imposed in February 2017, which also resulted in the exclusion of the complainant from the judiciary, was already pending before the ECtHR, which led to a finding of a violation of Article 6 ECHR.[47]

→ back to overview

[45] ECtHR of 15 December 2020 – No. 33399/18 – *Pişkin / Turkey* (cf. HSI – Report 4/2020 V.).
[46] ECtHR of 15 December 2020 – No. 33399/18 – *Pişkin / Turkey* (cf. HSI – Report 4/2020 V.).
[47] ECtHR of 20 October 2020 – No. 36889/18 – *Bogdan / Romania* (cf. HSI – Report 4/2020 V.).

5. Privacy

Decisions

Judgment (5th section) of 8 July 2021 – No. 28519/10 – *Panova v. Ukraine*

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

Keywords: Eviction of a company flat – Sale of the residential complex

Core statement: Since the loss of the home is the most extreme form of interference with the right to respect for the home under Article 8 ECHR, national courts must take particular account of the excessive individual burden that an eviction imposes on the persons concerned when considering the proportionality of an interference with this right.

Note: The complainants were employed by a Soviet state enterprise based in Russia. In 1980, the company built a holiday complex in the Kiev region to accommodate the employees' children during the holidays. From 1987 onwards, the complainants and their families lived permanently in the complex. The apartments were given to them as company housing. In 1992, the buildings were sold to a private company. As the possibility to live permanently in the holiday accommodation was not legally settled between the original owner of the building and the complainants, the new owner initiated eviction proceedings against the complainants in 2006. An eviction order issued by the District Court was upheld by the Supreme Court in 2010.

The Court starts from the premise that the existence of an interference with the complainants' right to respect for their home is not in dispute. In this context, it states that even if the eviction order in the present case was issued in favour of a private-law company, it is a state measure that constitutes an interference with Article 8 ECHR.[48] In view of its established case-law, the Court points out that the loss of the home is the most extreme form of interference with the right to respect for the home.[49] State interference with this right constitutes a violation of Article 8 ECHR if it does not pursue a legitimate aim that is in accordance with the law and necessary in a democratic society.[50] Therefore, an eviction must always be subject to the proportionality of the measure in question.[51] In the present case, the eviction order had its basis in domestic law and pursued a legitimate aim, namely the protection of the property interests of a private landlord. Nevertheless, the measure was disproportionate, as the state courts did not take into account the excessive individual burden that the eviction of the complainants would impose on them in the existential interference with their right to respect for their home.

The assessment contained in the decision corresponds to the German legal situation. According to this, the enforcement of an eviction order must take into account the value judgements of the Basic Law and the fundamental rights guaranteed to the debtor in the enforcement proceedings. In particular, if the enforcement interferes with the interests of the debtor that serve the preservation of life and health, the principle of proportionality and the debtor's fundamental right under Article 2 (2) sentence 1 of the German Constitution (GG)

[48] ECtHR of 18 July 2013 – No. 7177/10 – *Brežec / Croatia*; ECtHR of 12 July 2016 – No. 43777/13 – *Vrzić / Croatia.*
[49] ECtHR of 13 May 2008 – No. 19009/04 – *McCann / United Kingdom.*
[50] ECtHR of 2 December 2010 – No. 30856/03 – *Kryvitska u. Kryvitskyy / Ukraine.*
[51] ECtHR of 2 December 2010 – No. 30856/03 – *Kryvitska u. Kryvitskyy / Ukraine*; ECtHR of 17 October 2013 – No. 27013/07 – *Winterstein / France.*

may be violated.[52] Against this background, the Court found a violation of Article 8 ECHR and awarded the complainants compensation of €4,500 each.

→ back to overview

6. Social security

Decisions

Judgment (5th section) of 8 July 2021 – No. 42903/14 – *Sili v. Ukraine*

Law: Article 3 ECHR (prohibition of torture); Article 1 Additional Protocol No. 1 (Protection of property)

Keywords: Invalidity pension for a prisoner – Presentation of the requirements in judicial proceedings

Core statement: There is no interference with the rights under Article 1 of Additional Protocol No. 1 if social benefits are denied on the grounds that the conditions laid down by law for their granting are not met.

Note: The complainant has been serving a life sentence in Romny prison since 2009, which was interrupted by several stays in other detention facilities due to criminal investigations. In his complaint, he alleges, on the one hand, a violation of Article 3 ECHR due to inhumane conditions of detention. He also alleges a violation of Article 1 of Additional Protocol No. 1, as he was denied a disability pension. The complainant had lost the sight in his right eye as a result of an injury in 1987 and was granted a temporary certificate stating that he had the lightest degree of disability according to national regulations. An extension of this certificate, as well as a disability pension, was not requested as long as the complainant was not in prison. After his imprisonment, he was certified at his request that his disability due to the eye injury was permanent. An application for a disability pension, which under national law is available to prisoners as well as other citizens, was denied on the grounds that he had not submitted a proper application that complied with the law. In particular, he had not shown that he had discussed the preparation of the pension and the procurement of the necessary documents for it in the context of a meeting with a representative of the pension fund, which is to be organised by the prison administration. A judicial review, in particular with regard to the conditions for granting the invalidity pension, was unsuccessful.

With regard to the conditions of detention, the Court found a violation of Article 3 ECHR. As regards the violation of Article 1 Additional Protocol No. 1, the complaint was rejected as manifestly unfounded within the meaning of Article 35(3a)(4) ECHR. The Court first points out that states are free to establish a social security system and to determine the conditions for it.[53] If, under national law, the statutory conditions laid down for the granting of a certain form of benefit or pension are not fulfilled by the person concerned, there is no interference with the rights under Article 1 of Additional Protocol No. 1.[54] In the present case, under the law of Ukraine, the social security system applies to prisoners in the same way as to the

[52] BVerfG of 16 August 2001 – 1 BvR 1002/01.
[53] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy / Hungary.*
[54] ECtHR of 10 April 2012 – No. 26252/08 – *Richardson / UK.*

general population with regard to the granting of disability pensions. According to this, the health conditions for the requested benefit must first be presented. In addition, proof of pensionable periods of service must be provided. The complainant has neither shown that he fulfils the above-mentioned requirements, nor has he substantiated the allegation that he did not receive the necessary support during his imprisonment.

→ back to overview

Contact and Copyright
Hugo Sinzheimer Institute for Labour and Social Security Law (HSI)
of the Hans-Böckler-Stiftung
Wilhelm-Leuschner-Straße 79
60329 Frankfurt / Main, Germany
Phone +49 69 6693-2953
hsi@boeckler.de
www.hugo-sinzheimer-institut.de
You can also find us on Twitter: https://twitter.com/ArbeitsrechtHSI

The Hans-Böckler-Stiftung is a foundation under private law.
The Person entitled to represent the foundation is Dr. Claudia Bogedan (Director)
Imprint